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# LAW TIMES REPORTS

OF

## Cases Decided

IN

THE HOUSE OF LORDS, THE PRIVY COUNCIL,

THE COURT OF APPEAL,

THE CHANCERY DIVISION, THE QUEEN'S BENCH DIVISION, THE  
PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

THE QUEEN'S BENCH DIVISION IN BANKRUPTCY,

AND THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

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VOLUME LI.

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PRIVY COUNCIL, by C. E. MALDEN, Esq., Barrister-at-Law.

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## ADMINISTRATION.

Judgment—Registration—Priority.—By sect. 3 of 4 & 5 Will. & M. c. 20, no judgment not duly docketed shall "affect any lands as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates." Sect. 3 of 23 & 24 Vict. c. 38, after reciting the above section, and that by several later Acts judgments not registered shall not affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, and that the later Acts "do not expressly enact that judgments not docketed as thereby required shall not have preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates," in consequence whereof such heirs, &c., had lost the protection which they enjoyed under the first recited Act, it was enacted that no judgment not docketed under the Acts in force so as to bind "lands, &c., as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates." Held, by Chitty, J. and the Court of Appeal, that the effect of the section is not only to protect heirs, executors, or administrators from an action by a judgment creditor for a *devastavit*, in case they should pay simple contracts in priority to the judgment debt, but also to regulate the order of administration, and therefore that an unregistered judgment debt has no priority over a simple contract debt. Held, also, by Chitty, J. and the Court of Appeal, that the heir-at-law or devisee of real estate sold by the court under 3 & 4 Will. 4, c. 104, has no right of retainer, out of the proceeds of sale, or any rents in his hands, for a debt due to him on simple contract. (*Re Illidge; Davidson v. Illidge.*) ... 523

Voluntary settlement—Creditors—Costs.—A testator made a voluntary settlement, which was admitted to be void against creditors. The trustee of the settlement paid 580*l.* 9*s.* 11*d.* into court. An administration action was necessary to find out the amount of debts. The claims of the creditors were found to amount to 504*l.* 3*s.* 1*d.* The chief clerk ordered the clear balance 76*l.* 6*s.* 10*d.* to be paid to the trustee, leaving the creditors only a dividend. The summons was adjourned by the defendant, the executor, into court. Held, that the order of the chief clerk was right, and the defendant must pay the costs of the adjourned summons personally. (*Re Turner; Turner v. Turner.*) ... 497

Will not appointing executors—Suppression of will—Revocation of grant—Sale of leaseholds before revocation—Title of vendor—Married woman—Equity to a settlement—Settlement of entire fund.—A testatrix, who died in 1874, bequeathed to her daughter B. certain leasehold property held for the residue of a long term of years, she paying the debts of the testatrix. The will did not appoint any executors. B. was a married woman, but in 1876 her husband deserted her, leaving with her his three children. From

the time he left her he contributed nothing towards the support of her or of his children, except by allowing her to receive the rents of the leasehold property, which were of small amount. In 1879 B., upon an affidavit stating that she was a widow, and that her mother had died intestate, obtained a grant of administration. She then mortgaged the leasehold property partly to pay a debt of the testatrix; and afterwards she agreed to sell it to P., who paid a portion of the purchase money in discharge of the mortgage, and the rest to B. by instalments, for her maintenance, except a small amount. P. purchased without any knowledge of the will, or that B. had a husband living. Proceedings were subsequently taken by B.'s husband to recall the grant of administration, and in 1883 the letters of administration were revoked, and new letters, with the will annexed, were granted to B. The questions were, whether the sale of the leasehold property could be supported, and whether B.'s husband had any right to recover, against his wife or P., the purchase, any part of the purchase money. Held, that a grant of administration, obtained by suppressing a will which contained no appointment of executors, could not be treated as utterly and *ab initio* void, and that the sale by B. under the first administration was a valid transaction. Held, also, that B. was entitled under her equity to a settlement, to have the whole proceeds of the leasehold property secured to herself, and, as the greater part of such proceeds had been expended in maintaining herself and children, the action must be dismissed with costs. (*Boxall v. Boxall.*)... ..page 771

## ADMIRALTY.

Action *in rem*—Lord Campbell's Act (9 & 10 Vict. c. 93)—Amendment of writ—Practice—Order XVI., r. 11.—Plaintiffs commenced an action *in rem* under Lord Campbell's Act on the 4th Jan. 1884 in respect of loss of life by collision at sea on the 10th Jan. 1883. After the 10th Jan. 1884, it having been decided in the interim by the Court of Appeal that the Admiralty Court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrongdoing ship personally. Application refused upon the ground that, under the provisions of Order XVI., r. 11, proceedings against the parties proposed to be added would only be deemed to have commenced from the date of the service upon them of the writ of summons, and hence the action would not have been commenced against them within the time provided by Lord Campbell's Act, and the court being of opinion that it had no power to add parties as defendants *in personam* in an action *in rem*, thought it ought not to make the order merely because the objection as to time was an objection which ought strictly to be taken at a later stage. (*The Bovesfield.*) ... .. 123

Action of restraint—Part owners—Bond for safe return.—Where minority owners have instituted an action of restraint, claiming security for the safe return of the ship to a named port within the jurisdiction, and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted it will be dismissed with costs. (*The Regalia.*) ... .. 904

## SUBJECTS OF CASES.

- Bottomry bond—Authority of master—Owners of cargo—Necessity—Registrar and merchants.**—The authority of a master to raise money on bottomry is limited as against the owners of cargo to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced by a person who is not the ship's agent, and has no interest in the repairs effected on the ship, and honestly believes from inquiries made that the money is necessary, he cannot recover as against the cargo owner anything in respect of items other than those which are in fact necessary. *Fry, L.J., dubitante.* The registrar and merchants have a discretionary power to refuse the items claimed under a bottomry bond, should they deem them unnecessary or exorbitant, and the court will not interfere with this discretion unless it be shown that the registrar and merchants have exercised it on an erroneous principle. (*The Pontida.*) ... page 268, 840
- Collision—Carriage of goods—Late delivery—Loss of market—Damages for delay in contract and in tort—Measure of damages.**—Where by reason of a collision between two steamships, occasioned by the negligence of one, goods carried by the other are delayed in transit, damages for loss of market are not recoverable as being too remote by reason of the uncertainty of the duration of a sea voyage. (*The Notting Hill.*) ... 68
- **Compulsory pilotage—Passing through the limits of a pilotage district—Exemption—Merchant Shipping Act Amendment Act 1862.**—Where a steamship puts into a port within a pilotage district for the purpose of coaling whilst bound on a voyage between two places outside such district, although she is only passing through such district, she is not exempt from compulsory pilotage under the provisions of sect. 41 of the Merchant Shipping Act 1862, as that section provides that the exemptions shall not extend to ships loading and discharging therein, and such loading and discharging is not confined to cargo but extends to coaling. (*The Winston.*) ... 183
- **Dense fog—Steamships—Steam whistle.**—Where those on a steamship in a dense fog hear the whistle or foghorn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing them, it is their duty, under art. 18 of the Regulations for Preventing Collisions at Sea, to at once stop and reverse her engines, so as to bring their vessel to a standstill in the water. (*The John McIntyre.*) ... 185
- **Lights—Steam trawler—Look-out—Regulations for Preventing Collisions at Sea 1863, art. 9—Regulations for Preventing Collisions at Sea 1880, art. 10.**—A steam trawler with her nets down and attached thereto is "stationary" within the meaning of art. 9 of the Regulations for Preventing Collisions at Sea 1863, although she has way on her through the water, provided such way is not more than is necessary to keep her under command, and in such circumstances she is bound only to carry the white light required by that article; but, if she exceeds that speed, she is bound by art. 3 of the Regulations for Preventing Collisions at Sea to carry the lights of a steamship under way. A steam trawler, whilst fishing, was only carrying a white light when she ought to have been carrying the lights for a steamship under way. A steamship having a bad look-out, but with an officer on deck and in charge, was approaching the trawler, but did not see her until within a distance of from a quarter to half a mile, and then did not alter her course until too late to avoid a collision. Held, that, as the officer in charge might have acted sooner if he had seen a side light, and that, as it was not proved that the absence of the side lights could not by any possibility have contributed to the collision, the steam trawler was to blame for a breach of the regulations. The judgment of the court below having been confirmed, but for reasons other than those given by the judge below, and the Court of Appeal differing from those reasons, ordered each party to pay his own costs. (*The Dunelm.*) ... 214
- Collision—Lord Campbell's Act (9 & 10 Vict. c. 93)—Action in rem—Foreign ship—Jurisdiction—Admiralty Court Act (24 Vict. c. 10), s. 7—Limitation of liability—Appeal—Practice.**—The Admiralty Division of the High Court of Justice has no jurisdiction to entertain an action in rem under Lord Campbell's Act, and hence the personal representatives of a deceased person killed by the negligence of those on board a foreign ship, in a collision between that ship and a British ship on waters within Her Majesty's dominions cannot sustain an action in rem against the owners of the foreign ship to recover damages for the loss of the deceased; but, *semble* (per Brett, M.R.), that, if in action for limitation of liability some of the claimants are the persons mentioned in Lord Campbell's Act, the Admiralty Division may entertain the claim. Although, in consequence of the Court of Appeal being equally divided in opinion, the decision of the court below stands, yet the Court of Appeal is not bound thereby on a subsequent occasion, though, *semble* (per Brett, M.R.), it is otherwise in the case of the House of Lords. (*The Vera Cruz.*) ... page 24, 104
- **Moderate speed—Dense fog—Bristol Channel—Salvage—Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 16.**—Moderate speed for a sailing ship, within the meaning of art. 13 of the Regulations for Preventing Collisions 1880 in a dense fog in the Bristol Channel, is the slowest speed that she can go so as to be under command, and, if she carries more sail than is necessary for this purpose, she will be guilty of a breach of the article. Moderate speed, within the meaning of art. 13 of the Regulations, varies according to the density of the fog; the thicker the fog, the slower ought to be the speed. Per Butt, J.: Where two ships having been in collision, one of them renders assistance to the other by towing her, being bound by sect. 16 of the Merchant Shipping Act 1873 to stand by and render assistance, *quære*, whether she is entitled to salvage remuneration, even though she is not to blame for the collision. (*The Beta; The Peter Graham.*) ... 154
- **"Narrow channel"—Falmouth Harbour—Regulations for Preventing Collisions at Sea 1880, art. 21.**—Art. 21 of the Regulations for Preventing Collisions at Sea 1880, providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship," applies to a steamship entering and passing up Falmouth Harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations. (*The Clydach.*) ... 668
- **Regulations for Preventing Collisions, art. 11—Infringement—Lights—Fishing smack—Overtaking ship.**—The bright white light carried by a trawling fishing smack when attached to her nets in pursuance of the provisions of art. 9 of the Regulations for Preventing Collisions 1863, although visible astern, is not a white light shown from the stern to an overtaking ship within the meaning of art. 11 of the Regulations for Preventing Collisions 1880. Where it the duty of a vessel to carry or show lights, and those lights are not carried where they are visible, or are not shown, the court will not be extremely nice in finding another vessel to blame because those on board her fail to see the first-mentioned vessel within a few yards of the distance when such vessel ought first to have been seen. (*The Pacific.*) ... 127
- **Regulations for Preventing Collisions at Sea 1880, arts. 13 and 18—Moderate speed—Dense fog—Steamship—Sailing ship.**—Where those in charge of a steamship in a dense fog hear a whistle and then others following it and getting nearer, even though the whistles get broader on their bow, it is their duty on hearing the first whistle to reduce their speed, and as the vessels get nearer to bring their ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse their engines. Art. 13 of the Regulations for Prevent-



- ing Collisions at Sea requiring "moderate speed" in a fog, requires the speed to become more moderate as the two vessels get closer together. (*The Dordogne*.)... ..page 651
- Collision—Salvage—Commission on bail—Liability of wrong-doer—Practice.—In a damage action the plaintiffs are not entitled to recover as part of their damages a sum paid by them as commission on bail given in an action brought against their ship by salvors whose services were necessitated by the collision. The vessels A. and B. came into collision, in consequence of which salvage services were rendered to the B. by the C. The salvors instituted an action against the B, in which the owners of the B. tendered, but the salvors recovered more than was tendered them. The A. was condemned in the damage action brought by the B., and on reference to the registrar and merchants to ascertain the amount of the A.'s liability, the registrar allowed the costs incurred by the owners of the B. in defending the salvage suit, but struck out the commission on the bail given by the owners of the B. for the release of their vessel in the salvage action. On objection to the registrar's report: Held, that, as commission on bail is not recoverable as defendants' costs in a salvage action, such item could not be recovered from the owners of the A. *Quære*, whether the owners of the B. were entitled to the costs incurred by them in the salvage action. (*The British Commerce*.)... .. 604
- Co-ownership—Sale of ship—Admiralty Court Act 1861.—The High Court of Justice (Admiralty Division) will not, in a co-ownership action, order the sale of a ship on the application of either minority or majority owners, unless the applicants prove strong necessity for so doing. (*The Marion*)... .. 906
- Sale of ship—Register—Guernsey—Admiralty Court Act 1861.—The Admiralty Division has no jurisdiction over an action *in rem*, instituted under sect. 8 of the Admiralty Court Act 1861, claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales. (*The Robinsons and The Satellite*.)... .. 905
- Co-ownership action—Order for an account—District registrar—Report—Order III., r. 8—Order XV., r. 1—Order XVI., r. 11.—Where an action is instituted in an Admiralty district registry by part owners of a ship against the managing owner thereof for an account, and the writ claims an account under Order III., r. 8, and an order for the filing of the accounts is made under Order XV., r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Order XVI., r. 11, otherwise the plaintiff will be entitled to judgment thereon. Where a district registrar has made an order in an action in the Admiralty Division for an account between the part owners of a ship that the accounts be filed, and that they be proceeded with, it is too late to take objection to his making such order after he has reported, there having been no appeal against such order. The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object. (*Gowan v. Sproth*.)... .. 266
- Damage to cargo—Stranding—Duty of master to repair—Negligence in not repairing—Caulking decks.—If a vessel after she has started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned, and to do that which a prudent master would do under the circumstances, whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or go on without repairing; but if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge, it is his duty to repair before proceeding. (*The Kona*.)... ..page 28
- Limitation of liability—Collision—Defect in machinery—"Improper navigation"—Merchant Shipping Act Amendment Act 1862.—Where a ship is held liable for a collision caused by a defect in her machinery, and such defect is due, not to her master or crew, but to the negligence or default of other persons employed by the shipowner to repair the machinery on shore before the commencement of the voyage, and for the purposes of the voyage, the collision is occasioned by "improper navigation" within the meaning of sect. 54, sub-sect. 4, of the Merchant Shipping Act Amendment Act 1862, so as to entitle the owners to limit their liability under the provisions of that Act. (*The Workworth*.)... .. 559
- Navigation—Sailing rules—Crossing steamships—"Keeping her course"—Assessors.—Where two ships under steam are on crossing courses at right angles, it is the duty of the vessel which has the other on the starboard hand to keep out of the way, under art. 16 of the Regulations for Preventing Collisions at Sea. A., one of two ships under steam, on whom this duty devolved, instead of keeping out of the way pursued her course. The B., the other steamship, had meanwhile slackened speed, but did not stop and reverse till within 300 yards of the A., when a collision was inevitable. Held, that, the regulations were applicable at the time when the risk of collision could be avoided, and that the B. was to blame as well as the A., for not having, under art. 18, stopped and reversed earlier. "Keeping her course" in art. 22 does not mean keeping the same speed but keep the same direction. Functions of assessors observed on. (*The Beryl*.)... .. 554
- Practice—Appeal—Cross-appeal—R. S. C., Order LVIII., r. 6.—Where an appellant withdraws his appeal after the respondent has given notice of motion by way of cross-appeal under Order LVIII., r. 6, should the respondent determine to continue with his cross-appeal, his cross-notice will be treated as a substantive notice of appeal, in which case the original appellant may give a cross-notice of appeal that he intends to bring forward the subject-matter of his original appeal. (*The Beswing*.)... .. 883
- Collision—Costs—Printed evidence for use of counsel in court—R. S. C., Order XLVI., r. 7, and Appendix N.—Counsel.—In consequence of the negligent navigation of the M. the steamship P. M. came into collision with the M. and with the D. In a damage action, instituted by the owners of the P. M. against the M., the plaintiffs were successful. In a damage action, instituted by the owners of the D. against the M. to recover damages arising out of the collision between the D. and the P. M., the plaintiffs were successful. In this latter action by agreement between the parties the evidence in the first action, which had been printed in the form of a record for the purposes of appeal, was admitted, and was supplied to the plaintiffs by the owners of the P. M., the defendants refusing to provide them with it. The registrar, on taxation, allowed the plaintiffs, the owners of the D., the amount paid by them to the owners of the P. M. for the printed evidence, and 3d. per folio for this printed evidence provided for the use of counsel in court in accordance with the terms of Appendix N. of the Rules of the Supreme Court 1883. On objection to the registrar's taxation the Court refused to disallow the 3d. per folio. In a collision action where the trial lasted four days, and the damage done exceeded 2000*l.*, the Court refused to interfere with the registrar's discretion in allowing the costs of three counsel. (*The Mammoth*.)... .. 459
- Counsel's fee—Witnesses—Registrar.—In an action for damage by collision, where the damage to one vessel amounted to 20,000*l.*, and to the other vessel to 2000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively, seventy-five guineas, fifty guineas, and thirty guineas, and the registrar, on taxation, reduced these fees to sixty

## SUBJECTS OF CASES.

- guineas, forty guineas, and twenty-seven guineas; the Court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. (*The City of Lucknow*.) ... page 907
- Practice—Damage to salving ship—Demurrage—Evidence—Separate award for injuries sustained—Registrar and merchants.—In a salvage action evidence of the specific injuries sustained by the salving ship and the cost of repairs thereof, and of demurrage during repairs, was tendered in the Court of Admiralty, and rejected. Held, that the judge is bound to receive such evidence, and to include the loss shown in his award, except in cases where such evidence is immaterial by reason of the property saved being too small in value to satisfy such loss, or by reason of the services being so trifling as to render it unjust that the loss sustained by the salvors should be borne by the owners of the salvaged property, or where from other circumstances it is obvious that the court cannot give an amount sufficient to cover the loss; but, per Brett, M.R., that the admission of such evidence is entirely in the discretion of the judge, subject to his award being reviewed by the Court of Appeal in the event of its being shown that the rejection of the evidence improperly affected the amount of the award. (*The City of Chester*.) ... 485
- Evidence—Engineer's log—Merchant Shipping Act 1854 (17 & 18 Vict. 104), s. 285.—In a damage action the log kept by the engineer is admissible as evidence against his owners. (*The Earl of Dumfries*.) ... 906
- Salvage—Tender—Costs.—Where in a salvage action defendants with their statement of defence tender and pay into court a sum of money in satisfaction of the plaintiffs' claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiffs' costs up to the date of the delivery of the statement of defence, unless the circumstances of the case render it just and expedient to order otherwise. In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiffs' costs up to the date of tender. (*The William Symington*.) ... 461

## ANIMALS.

- Negligence—Trespass—Injury caused by dog—Liability of owner of dog—Liability of person in charge of dog.—The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant T. There was a small wall, only three feet high, between these gardens. This wall belonged to the defendant T. The plaintiff was engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant T. had been taken out by the other defendant S., and as the defendant S. was returning, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. As the dogs were running about in playfulness, one of them, a large Newfoundland dog, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries through which he was confined to bed for three weeks, and he was unable to work for some time after. The defendant T. had offered the plaintiff a couple of sovereigns as compensation, which was refused. In an action for these injuries against the defendant T. as the owner of the dog, and against the defendant S. as having the dogs in charge: Held, that, inasmuch as the dogs were not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants either as for a trespass or as for any breach of duty. (*Sanders v. Teape and Swan*.) ... 264

## ANNUITY.

- Charged upon land—"Rent"—Trust to pay the same—Arrears—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), ss. 1, 10—3 & 4 Will. 4, c. 27,

s. 1.—By a deed, dated in 1833, certain real estate was conveyed to trustees upon trust to pay an annuity to A., his heirs and assigns for ever. A claim for this annuity was first made in June 1884. The right to receive the annuity accrued more than twenty years before such claim, but nothing had ever been paid in respect thereof. The question was, as to the effect of the Real Property Limitation Act 1874 upon the payments which had become due. Held, that no payment of the annuity which became due before the claim was made could be recovered, because, as to any such sum, the remedy was only the same as if there were no trust, in which case it would be irrecoverable. (*Hughes v. Coles*.) ... page 236

## APPROPRIATION OF PAYMENTS.

- Course of business—Remittances to cover acceptances—Liquidation—Specific appropriation.—The general course of business between N., a banker, and T. his correspondent, was for N. to accept accommodation bills for T., and for T. to send cash or bills, which N. discounted to meet the acceptances as they became due. T. sent N. a bill for 450l. to meet an acceptance which became due on the 21st July. N. discounted it and carried the proceeds to a general account, and on the 20th filed a liquidation petition. T. took up the bill and sought to recover the 450l. Held, that the bill, if still in specie, would have been recoverable by T., but having been converted and carried to a general account, there had been no specific appropriation and T. could not recover. (*Re Neck; Ex parte Broad*.) ... 368

## ARBITRATION.

- Award—Payment of sum awarded into court—Appeal to jury—Verdict—Compensation—Interest on difference between two sums—The Artisans and Labourers' Dwellings Improvement Act 1875.—A corporation had decided on taking some property, of which the plaintiff was tenant for life, for the purposes of an improvement scheme. An arbitrator had awarded the plaintiff 2400l. for the property. The plaintiff declined to accept the award, but the corporation took possession, and paid into court 2400l. on the 26th March 1881. Later on the plaintiff, acting under the Artisans and Labourers' Dwellings Act 1875, appealed to a jury from the arbitrator's decision, and was awarded 3200l., and on the 15th Jan. 1884 the corporation paid the additional sum of 800l. into court. The plaintiff now claimed to be entitled to an additional sum of 4 per cent. interest on the 800l. from the 26th March 1881 up to the 15th Jan. 1884. Held, that where, under the provisions of this Act, a sum of money has been paid into court under the award of an arbitrator, and on appeal a verdict is given by a jury for a larger sum, the difference also being subsequently paid into court, interest at the rate of 4 per cent. per annum from the date of the first payment into court to the date of the second payment in, is payable on the difference between the two sums; also that a local authority is entitled to enter into possession after payment to the party entitled or after payment into court of the sum awarded by the arbitrator. (*Shaw v. The Corporation of Birmingham*.) ... 684

## BANKER.

- Bank notes—Unlawful issue—Bank Charter Act.—Where a banking firm within the exception in sect. 11 of the Bank Charter Act as to issuing notes had transferred their business to a company, except the right to issue notes, but the benefit of the issue was to be given to the company: the Court held, on an information by the Attorney-General, that the firm which had issued notes for the company having ceased to carry on the business of banking within sect. 12, had lost their right to issue notes, and that the company and the firm were liable to the penalties under the Stamp Act for "issuing" notes. (*Attorney-General v. Birkbeck*.) ... 199

**BANKRUPTCY.**

**Act of bankruptcy—Assignment of all debtor's property—Promise of assignee to pay debts—Defeating creditors.**—S. a trader assigned substantially all his property to C. in consideration of a past debt owing from him to C., and a verbal promise by C. to pay the present and future debts of the business which was thenceforth to be carried on by S. in his own name, but as manager for C. None of S.'s creditors knew of the assignment: Held, that the assignment was an act of bankruptcy, and fraudulent and void under this sub-section, as against S.'s trustee in bankruptcy; C.'s promise to pay not being one which S.'s creditors could enforce, and that C. was only entitled to prove for certain sums paid by him in pursuance of the agreement. *Per Fry, L.J.*, the assignment was void under 13 Eliz. c. 5. (*Re Sinclair; Ex parte Chaplin.*) ... page 345

**—Notice of suspension.**—Although notice by a debtor to his creditors that he has suspended or is about to suspend payment, need not be in writing to constitute an act of bankruptcy within sub-sect. 1 (h) of sect. 4 of the Bankruptcy Act 1883, such notice, to be an act of bankruptcy, must be formally and deliberately given; mere casual talk is not sufficient. An offer made by the debtor to a creditor to pay him a dividend of 20 per cent. is not a sufficient notice within the section. (*Ex parte Ostler; Re Friedlaender.*) ... 309

**Appeal from registrar at chambers.**—All appeals from decisions of the High Court of Justice in bankruptcy matters, whether given in court or in chambers, lie to Her Majesty's Court of Appeal, and not to a divisional court of the High Court. (*Ex parte Ostler; Re Friedlaender.*) ... 309

**Bankrupt in receipt of income—Order for payment to trustee—Professional earnings.**—An order cannot be made under 32 & 33 Vict. c. 71, s. 90, or under 46 & 47 Vict. c. 52, s. 53 (2) for payment to the trustee of income, not in the nature of salary, which a bankrupt is earning by the exercise of personal skill and knowledge in carrying on his profession or business. (*Re Hatton; Ex parte Benwell.*) ... 677

**Bankrupt's wife tenant for life—Custody of title deeds—Trustee in bankruptcy.**—Under the will of her father, the wife of a bankrupt was tenant for life of some land, though not for her separate use. The trustee in bankruptcy of the husband applied to the court to order the title deeds of the property, which were in the custody of the registrar by order of the County Court judge, to be delivered up to him in order that he might sell the life interest, and hand over the deeds to the purchaser. It appeared that the wife was about to apply to the Divorce Court for a divorce. Held, that the trustee had no absolute right to the deeds, and the court having a discretion in the matter, under the circumstances ordered the deeds to remain in court. (*Ex parte Rogers; Re Pyatt.*) ... 177

**Building society—Mortgage—Principal, premium, and interest payable by instalments—Claim to prove for premiums after date of bankruptcy.**—By certain indentures of mortgage the debtor, in consideration of advances made by a building society, covenanted to repay the amounts with a premium in each case, and interest, by a certain number of monthly instalments extending over a term of twelve years. Each mortgage contained a provision that every monthly payment should, when made, be applied, first, in or towards satisfaction of so much interest as should be due at the time of such repayment; secondly, in or towards payment of the premium; and lastly, towards payment of the principal. In case of three months' default the whole of the instalments immediately became payable. The debtor having made default and filed a petition for liquidation: Held, that the premiums were not in the nature of interest, and might all be proved for in the liquidation. (*Ex parte Bath; Re Phillips.*) ... 520

**Business carried on by official receiver—Expenses paid by him—Repayment by trustee.**—Where the business of a debtor is carried on by official

receiver, who makes payments out of his own pocket for the purpose, and a composition is then sanctioned, the right order for the County Court judge to make is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that the trustee shall reimburse the official receiver out of the first moneys which come to his hand from the realisation of the assets. (*Re Taylor; Ex parte The Board of Trade.*) ... page 711

**Contempt of court—Committal—Powers of County Court judge—32 & 33 Vict. c. 71, ss. 96, 66—46 & 47 Vict. c. 52, ss. 27, 100.**—By the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 96 (which is substantially re-enacted by the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 27, the court had power under certain circumstances to summon persons to attend and give evidence or produce documents, and in case of refusal to cause such persons to be apprehended and brought up for examination. By sect. 66 (which is substantially re-enacted by sect. 100 of the Act of 1883) judges of local courts of bankruptcy had, for the purposes of the Act, in addition to their ordinary powers as County Court judges, all the powers and jurisdiction of judges of the High Court of Chancery, and their orders might be enforced accordingly. A County Court judge sitting in bankruptcy summoned a person to attend under sect. 96; this summons was disobeyed, and the judge thereupon made an order for the committal of the person so summoned. Held, that the remedy for disobedience to the summons was not confined to that prescribed by sect. 96, but the judge had power under sect. 66 to make the order for committal. (*Reg. v. The Judge of the County Court at Croydon.*) ... 102

**Costs—Taxation as between solicitor and client.**—Rule 98 of the Bankruptcy Rules 1883 gives power to the court in awarding costs to direct that the costs of any matter or application be taxed and paid as between solicitor and client. Held, that, where an order dealing with costs has been made, the court has no power to grant a subsequent application for an order that such costs be taxed and paid as between solicitor and client. (*Re Angell; Ex parte Shoolbred.*) ... 678

**Disclaimer of lease—Rights of second sub-lessee—Vesting order—Sect. 55, sub-sect. 6, of the Bankruptcy Act 1869—P. and P., being mortgagees of certain premises, deposited the deeds with their bankers by way of security for an advance. They then acquired a sublease of the premises from the leaseholder, and then let the premises to a third person for a term of years with an option of purchase. Upon the bankruptcy of P. and P. the trustee asked for an order vesting the property in him. Held, that the right order to make was one giving leave to disclaim subject to the second lessee's right to prove against the estate for any injury accruing to him through the disclaimer, and putting the mortgagees to their election whether or not they would within fourteen days take a vesting order to themselves, and, if they adopted the latter alternative, excluding them from all interest in and security upon the property. (*Re Parker and Parker; Ex parte Turquand.*) ... 667**

**—Bankruptcy of assignee of lease—Disclaimer by trustee—Liability of original lessee—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 23.**—The assignee of a lease became bankrupt, and his trustee, by leave of the court, disclaimed all interest in the lease under sect. 23 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), which provides that in such a case the lease shall "be deemed to have been surrendered" on the date of the disclaimer. Held, that this fiction of a surrender must be held to be only as between the lessor and the bankrupt and his trustee, and that the original lessee was, notwithstanding, liable to the lessor upon his covenant to pay rent. (*Hill v. East and West India Dock Company.*) ... 163

**—Leave of court—Conditions—Bankruptcy Act 1869—Bankruptcy Rules 1871.**—A partnership was dissolved, one of the partners purchasing the inte-

rest of the other for 12,000*l.*, which was to be paid in forty equal half-yearly instalments. The retiring partner covenanted that he would stand possessed of his share and interest in a lease of land and minerals granted to the two partners as joint tenants, in trust for the continuing partner. The continuing partner also covenanted to pay the 12,000*l.* in the manner agreed upon, and assigned to the retiring partner the buildings, machinery, and fixtures on the demised premises by way of mortgage to secure the payment of the 12,000*l.*, and covenanted that the leasehold premises should stand charged therewith. Soon afterwards the continuing partner filed a liquidation petition, and a trustee of his property was appointed. The trustee retained possession of the leasehold property for some time with a view to the benefit of the debtor's estate. The rent due under the lease was paid to the landlord by the retired partner. Held, that the trustee should be allowed to disclaim the debtor's interest in the lease only on condition of his paying to the retired partner the rent of the premises from the date of the trustee's appointment until the day when his beneficial occupation ceased. (*Ex parte Good*; *Re Salkeld*.) ... ..page 876

Domicil of debtor—Onus of proof—Officer in the British army.—In order to come within sub-sect. 1 (d) of sect. 6 of the Bankruptcy Act 1883 the debtor must be domiciled in England as distinguished from Scotland or Ireland. As a rule the onus is on the petitioning creditor to show that the debtor is domiciled in England, though he may produce such an amount of *prima facie* evidence of an English domicil as to throw the burden of disproving the domicil on the debtor. The fact that the debtor has an English name and is an officer in the British army, does not raise a presumption that he has an English domicil as distinguished from Scotch or Irish, as a Scotchman or Irishman entering the British army does not lose his domicil of origin. (*Ex parte Cunningham*; *Re Mitchell*.) ... .. 447

Evidence—Allegation against interest by bankrupt in statement of affairs—Judgment—Inquiry as to consideration.—An admission of a debt in the statement of affairs of a bankrupt made after bankruptcy proceedings have commenced, is not, after his death, evidence of the death as against other creditors. The Court of Bankruptcy has jurisdiction to inquire into the consideration for a debt, although judgment in respect of it has been recovered against a bankrupt. (*Ex parte Revell*; *Re Tollemache*, No. 1.) ... .. 376

Fraud on bankrupt law—Ship-building—Contract—Power for buyer to use contractor's materials in event of contractor's bankruptcy.—A contract for the building of a ship, which was to be paid for by instalments, provided that if at any time the builders should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without having it ready for delivery, or in the event of the bankruptcy or insolvency of the builders, it should be lawful for the buyers to enter and take possession of the ship and of all materials prepared or provided, or in the course of preparation for the ship, and to cause the ship to be completed by any persons whom they might see fit to employ, and to use such materials belonging to the builders as should be on their premises, and which should either have been intended to be or be considered fit and applicable for the purpose. Held, that this clause was void against the trustee in bankruptcy of the builders, as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and also as depriving the trustee of his right to elect to complete the ship or not, and transferring that right to the buyers. Held also, that the buyer having, on the filing of a liquidation petition by the builders, acted on the clause, could not justify the use of the builders' goods for the completion of the ship on the ground of a subsequent cesser of work on the ship. (*Ex parte Barter*; *Ex parte Black*; *Re Walker*.) ... .. 811

Judgment obtained after act of bankruptcy committed—Delay in proving on judgment—Onus of proof as to notice—Bankruptcy Act 1849.—T. was adjudicated a bankrupt in 1843. A judgment was entered against him a few days after he had completed the act of bankruptcy on which he was adjudicated, by lying in prison for twenty-one days. There being no available assets at the time, the bankruptcy proceedings were dropped for over twenty years, at the expiration of which time, some assets having become available for distribution among the creditors, a proof was brought in for the amount of the judgment debt. Held, that the onus of proving that when the judgment was obtained the creditor had no notice of the act of bankruptcy lay on the claimants, and that, on their failure to sustain the burden, the proof must be disallowed. (*Ex parte Revell*; *Re Tollemache*, No. 2.) ...page 379

Jurisdiction—Questions between third parties.—A bankrupt having purchased certain sheepskins for B., who had paid to him a part of the price, deposited the delivery warrants for the said goods at his bankers by way of pledge to secure advances. On an application on the part of B. that the warrants might be delivered to him: Held, that the question was not such a one as is referred to in sect. 102 of the Bankruptcy Act 1883, and was not a question arising in the bankruptcy within the meaning of sect. 102, and that its decision was not necessary for the purpose of doing complete justice or making a complete distribution of the property; but where the trustee has a higher and better title than anyone else, there the court has and ought to exercise a jurisdiction. (*Re Lowenthal*; *Ex parte Beesty*.) ... .. 431

Lease—Forfeiture on bankruptcy—Receiving order under Bankruptcy Act 1883—Fixtures.—In a lease there was contained a clause of forfeiture on bankruptcy of the lessees, who filed a petition for liquidation under the Bankruptcy Act 1883. Held, that there had been a forfeiture, and that a petition under sect. 149 of the Bankruptcy Act 1883 was equivalent to a bankruptcy under the Bankruptcy Act 1869. In the same lease there was a clause that the articles mentioned in the schedule thereto should be the property of the lessees, and be removable by them; and also a clause that the said articles should be removed before the cesser or determination of the term. Held, that the said articles were the property of the lessees irrespective of the time of removal. (*Re Walker*; *Ex parte Gould*, Official Receiver. The Lynn Dock Company's Lease.) ... .. 368

Notice—Receiving order—Conditional payment of the debt—Promissory note—Bankruptcy Act 1883.—A debtor, being served with a bankruptcy notice, within seven days gave the creditor a promissory note, payable two months after date, for the amount of the debt, which the creditor accepted. Held, that the note being accepted was a conditional payment of the debt, and that during the currency of the note the creditor could not avail himself of the bankruptcy notice to obtain a receiving order against the debtor. (*Ex parte Matthew*; *Re Matthew*.) ... .. 179

Partnership firm—Share in name of one partner—"Goods"—Reputed ownership.—B., one of the partners in a firm of stockbrokers, purchased railway shares with moneys of the firm, and registered the shares in his own name. Calls were made upon him, and paid out of the moneys of the firm, and dividends credited to the firm. B. subsequently deposited the certificates of the shares with a bank as security for advances made to the firm. Upon the bankruptcy of the firm, the bank claimed a charge upon the shares so deposited. Held, that the shares were "goods at the commencement of the bankruptcy in the possession, order, or disposition" of the firm, "in their trade or business," within the meaning of the Bankruptcy Act 1883, s. 44, sub-sect. (iii.), and belonged to the trustee in bankruptcy of the firm. (*The Colonial Bank v. Whinney*.) ... .. 354

Pending petition—Receipt of money from debtor by petitioning creditor's solicitor—Repayment to

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- trustee.—While the hearing of a bankruptcy petition was pending, the solicitor of the petitioning creditor, as his agent and with notice of the act of bankruptcy on which the petition was founded, received from the debtor various sums as consideration for several adjournments of the hearing of the petition. He paid over or accounted for these sums to his client. An adjudication having afterwards been made on the petition: Held, that the title of the trustee relating back to the act of bankruptcy, of which the solicitor had notice he must repay the money to the trustee, and was not discharged by the payment to his own principal. (*Ex parte Edwards; Re Chapman.*) page 581
- Petition—Presented in wrong court—*Bond fide* mistake.—By a *bond fide* mistake a bankruptcy notice was issued against a debtor from a court within the jurisdiction of which he did not reside; at the hearing of the petition the debtor raised an objection to the jurisdiction, and the petition was dismissed by the registrar. Sect. 95, sub-sect. 3, of the Bankruptcy Act 1883 provides that "nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong court." Sect. 97 provides that "any proceeding in bankruptcy may at any time and at any stage thereof, and either with or without application by any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have commenced." Held, on appeal, that the registrar had jurisdiction to make a receiving order, and that the order dismissing the petition was wrong. Held, further, that the Divisional Court had power to make a receiving order, the registrar having failed to do so. (*Re Brightmore; Ex parte May.*) 710
- Signature by attorney—Bankruptcy Rules 1883, r. 125; Form 10.—A bankruptcy petition may be signed on behalf of the petitioning creditor by a person holding a power of attorney from him, if the terms of the power are wide enough. Where a power of attorney authorised B. to commence and carry on, at law or in equity, all actions, suits, or other proceedings touching anything in which A. or his personal estate might be concerned: Held, that the words included a power to sign a bankruptcy petition on behalf of A. (*Ex parte Wallace; Re Wallace.*) 551
- Rent—Distress—Money due to gas company for gas.—A corporation which supplied gas, had a power under their special Act "to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrears." Held, that, after the filing of a liquidation petition by a customer, the corporation was entitled, as against the trustee in the liquidation, to levy a distress in respect of a sum due by the debtor for gas supplied before the filing of the petition. Held, also, that by virtue of that clause they were entitled to the rights given to landlords by sect. 34 of the Bankruptcy Act 1869, and were not "other persons" to whom rent was due by the debtor, within the meaning of that section. Though the charge for gas supplied has been called "rent" in some Acts of Parliament, it is really the price of the gas sold, and therefore a gas company does not come within the words "other persons to whom any rent is due" in sect. 34 of the Bankruptcy Act 1869, which refer to a person who is in a position analogous to that of a landlord, and is entitled to distrain for rent strictly so called. (*Ex parte Harrison; Re Peake.*) 878
- Scheme of arrangement—Debtors' discharge—Committee of inspection.—Certain debtors having presented a bankruptcy petition, a scheme of arrangement under the provisions of sect. 18 of the Bankruptcy Act 1883 was duly assented to by the creditors, which provided for the appointment (*inter alia*) of a trustee and a committee of inspection, and also that "the debtors shall be discharged when the committee of inspection shall so resolve." Held, that, the date of the discharge being left to the discretion of the committee of inspection, the scheme was not reasonable and ought not to be approved of by the court, though the debtors concurred in asking for its approval. (*Ex parte Clark; Re Clark.*) page 584
- Secured creditor—Amendment of proof—Appeal—Twenty-one days—Rights of second mortgagee—Trustee appearing without notice—Costs.—Upon a technical objection to the effect that an appeal against the decision of a County Court judge had not been brought within twenty-one days prescribed by Order LVIII., r. 15, the Court elected, in doubt whether the posting of the notice of appeal on the twenty-first day was sufficient, to exercise the power of extending the time given by rule 112 of the Bankruptcy Rules 1883, and hear the appeal. Upon a contention that the provisions of schedule 2 of the Bankruptcy Act 1883, concerning the amendment of proof by a secured creditor, could not have been intended to apply in cases where the amendment of the proof would affect the interests of a second mortgagee, and where some person other than the first secured creditor and the trustees are interested: Held, that this contention could not be upheld. Held, further, the trustee having appeared without being served with notice of appeal, that the trustee could not be allowed his costs. (*Arden v. Deacon.*) 713
- Sheriff's costs of execution—Poundage—"Fructuous process."—A writ of *fiat facias* being issued against the debtors on the 16th Jan., the sheriff levied execution on the 17th, and remained in possession until the 21st. The debtors filed their petition on the 20th of the same month, and the sheriff delivered possession of their goods to the official receiver. Held, that the sheriff was not entitled to poundage, as there had been no sale or realisation of the property. (*Re W. and J. Ludford.*) 241
- Stay of proceedings—Fraudulent trustee—Writ of attachment—Trustee filing petition—Protection.—M., against whom a writ of attachment had been issued for non-compliance with an order in a Chancery action to pay over money received by him in a fiduciary capacity, filed a bankruptcy petition, and moved under this section to stay further proceedings in the action: Held, that if sect. 9 of the Bankruptcy Act 1883 prohibited the attachment, which *seem* it did not, it would be an answer at the hearing of the motion for attachment, and that no ground had been shown for the interference of the judge in bankruptcy. (*Re Mackintosh; Ex parte Mackintosh.*) 20
- Workmen's wages—Deduction for doctor's fund—Bankruptcy Act 1869—Truck Act (1 & 2 Will. 4, c. 37).—Employers and their workmen arranged, but not by any agreement in writing signed by the latter, that certain deductions should be made from the wages towards a "doctor's fund" established to pay a doctor who attended and supplied with medicines such of the workmen and their families as were sick. The wages were paid monthly, and the sums deducted were from time to time handed by the employers to the doctor. There was no evidence that the doctor had accepted the liability of the employers. Held, in the liquidation of the debtors, that the fund, so far as it had not been paid to the doctor, must be repaid in full to the workmen, as it was wages not validly paid (within the Truck Act), and to preferential payment of which the workmen were entitled under sect. 32 of the Bankruptcy Act 1869. (*Ex parte Cooper; Re Morris.*) 374
- BASTARDY.
- Summons—Irregularity—Objection not taken—Affiliation order—Jurisdiction.—Where the respondent to a bastardy summons had appeared and opposed the summons on the merits without objecting to an irregularity in the issue of the summons, which went to the jurisdiction, and an affiliation order had been lawfully made by the justices, the Court refused to quash the order as a nullity on the ground of such irregularity. (*Reg. v. Fletcher.*) 334

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## BETTING.

Gaming—Agent employed to bet in his own name—Implied authority to pay bet—Irrevocability of authority—8 & 9 Vict. c. 109, s. 18.—Where a person authorises another to bet for him in the agent's own name, an implied request to pay if the bet be lost is involved in that authority; and the moment the bet is made, and the obligation to pay it if lost incurred, the authority to pay becomes irrevocable in law, and it is immaterial that such obligation is not enforceable by process of law, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent. (*Read v. Anderson.*) ... .. page 55

## BETTING HOUSES ACT 1833.

Gaming—"Person having the care or management of"—Bicycle match.—The appellant, who was the manager of certain grounds belonging to a company, and which were used for trotting matches, bicycle races, and other sports, was convicted under sect. 3 (b) of 16 & 17 Vict. c. 119, for unlawfully having the care and management of a certain place opened and kept for the purpose of persons betting upon certain events. On the day named in the conviction a championship bicycle match took place at which there were twenty thousand persons present more than on any previous occasion, and a number of persons known to the police as betting men were in one part of the grounds offering to make bets upon the races. Held, that the conviction was wrong. (*Reg. v. Cooke.*) ... .. 21

## BILLS OF EXCHANGE.

Counterfoils—Appropriation of shipments to meet bills—Agent of two firms—Notice.—Johnston, Pater, and Co., merchants of Pernambuco, ordered goods of their agents Samuel Johnston and Co., of Liverpool, the principal partner in both firms being the same individual. The Liverpool firm sent the order to their agent at New York, who bought the goods, and sent them and the bills of lading to Pernambuco. In order to pay for the goods, the agent drew bills of exchange on the Liverpool firm, and sent the bills with counterfoils attached to Liverpool. Each counterfoil was headed as follows: "Advice of draft. To Messrs. Samuel Johnston and Co., Liverpool," and after stating the number, date, and amount of the draft, and the shipments against which it was drawn, concluded as follows: "Please protect the draft as advised above and oblige drawer." Samuel Johnston and Co. accepted the bills, and detached the counterfoils. The agent sold the bills to bankers in New York shortly before the Liverpool firm stopped payment. The agent gave notice, by telegram, of the failure, to the Pernambuco firm. The Pernambuco firm received the proceeds of the sale of the goods, and applied them in payment of the balance due to them from the Liverpool firm. Held, on action by the bankers against the Pernambuco firm for payment of the bills, or an account, that there was no appropriation of the shipments, nor of the proceeds of the sale thereof, to meet the bills of exchange. (*Phelps, Stokes, and Co. v. Comber.*) ... .. 11

## BILL OF SALE.

Agreement to pay on demand—Power to seize and sell on default—Bills of Sale Act (1878) Amendment Act 1882.—By a bill of sale the grantor agreed to pay the loan and interest upon demand made in writing, and the grantee was empowered to seize and sell the goods if the grantor made default in payment on such demand. Held, that the bill of sale was void: by Brett, M.R. and Fry, L.J., because payment on demand is not payment at the time in the bill of sale provided, which is the only payment for default of which the goods may be seized by 45 & 46 Vict. c. 43, s. 7; by the whole Court, because there was not a stipulated time of payment within the meaning of the form in the schedule to the Act, and therefore the bill of sale was avoided by sect. 9; by Brett, M.R. and Fry, L.J. (*Bowen, L.J. doubting*), because the

power of sale appeared to arise immediately upon default, whereas by sect. 13 five clear days must elapse before it can be exercised, and therefore the bill of sale was not made in accordance with the form in the schedule. (*Hetherington v. Grooms.*) ... .. page 412

Assignment of after-acquired property.—A bill of sale, duly registered, purported to assign to plaintiff the stock-in-trade then on the grantor's premises, and that which should during the continuance of the security be brought on the premises. Goods brought on the premises after the execution of the bill of sale were pledged by the grantor with defendant, a pawnbroker, who received them in the course of business without knowledge of the bill of sale. In an action to recover the goods or their value: Held, that the bill of sale did not pass the legal property in the goods to plaintiff, but only gave him an equitable interest in them, and therefore he was not entitled to recover. (*Joseph v. Lyons.*) ... .. 740

"In consideration of any sum under 30l."—Bills of Sale Act (1878) Amendment Act 1882.—By the 12th section of the Bills of Sale Act (1878) Amendment Act 1882 it is provided that every bill of sale made or given in consideration of any sum under 30l. shall be void. D. applied to U. for a loan of 15l., offering as security a bill of sale on his furniture. U. replied that, by reason of a new law, he could not lend less than 30l., but that, if D. had sufficient furniture, he would lend him 30l. if he would agree to pay 15l. on demand and 15l. by instalments. D. agreed to the terms and gave U. a bill of sale in accordance therewith, and the sum of 30l., the consideration expressed to be paid by U. to D. on the execution thereof, was so paid in gold without any deduction. Immediately afterwards U., at the request of D., demanded payment of the 15l. due on demand, which D. paid and received a receipt for it. D. having made default in the payment of the instalments, U. seized under the bill of sale. Held, on special case stated by agreement in an action by D. against U. for damages for trespass, that the bill of sale was not void by reason of the 12th section of the Bills of Sale Act (1878) Amendment Act 1882. (*Davies v. Usher.*) ... .. 297

## BREAD.

Sale of—Baker not provided with scales and weights—Delivery of bread from a cart at a customer's house in pursuance of a previous order.—By 6 & 7 Will. 4, c. 37, s. 7, "Every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales, with proper weights . . . and in case any such baker or seller of bread . . . shall at any time carry out or deliver any bread without being provided with such beam and scales, with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds." Held, that this section applies to cases where bread is delivered in pursuance of a previous order, and not merely to cases where the baker sends out bread for sale in a cart. (*Ridgway, app. v. Ward, resp.*) ... .. 704

## BUILDING SOCIETY.

Advanced member—Reasonable rule—Fines—Compound interest—6 & 7 Will. 4, c. 32, ss. 1, 2.—By the rules of a benefit building society the members could borrow from the society the amount of their shares, to be repaid by monthly instalments comprising principal and simple interest at 5 per cent., and to be secured by a mortgage to the society. A fine was imposed on mortgagors "neglecting to make their monthly payments of principal, interest, fines, and other payments. . . . at the rate of 5 per cent. per month on the total amount in arrear." Held, that the meaning of the rule was, that fines, if unpaid, were to be added to the previous months' fines remaining unpaid, as well as

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to the instalments of principal and interest in arrear, and that the monthly fine was to be calculated upon the total amount of the principal, interest, past fines, and other payments added together; and that neither the rule nor the amount of the fine imposed was unreasonable. (*Re The Middlesbrough, &c., Building Society.*) ... page 743

Disputes between society and member—Reference to arbitration—Jurisdiction of High Court—Covenants in mortgage deed.—The Building Societies Act 1874 provides by sect. 16, sub-sect. 9, that the rules of every society established under the Act shall set forth whether disputes between the society and any of its members shall be referred to the County Court, or to the registrar, or to arbitration; and by sect. 34 for the determination of disputes by arbitration, where the rules so direct. Held, that these provisions included questions arising under covenants in a mortgage deed executed by the member to the society, and that the High Court had no jurisdiction. (*Municipal Permanent Investment Building Society v. Kent.*) ... 6

Loan—Interest on premiums—Redemption—Mortgage—Statutory receipt—Building Societies Act 1874.—A building society, in accordance with its rules, on making an advance to a borrowing member, charged a premium on the sum advanced in proportion to the amount and the intended duration of the loan. The advance was to be paid off by monthly instalments. Held, that the society might properly add the whole of the annual premiums to the amount actually advanced and charge interest on the total amount; and in the event of the loan being paid off before the date to which the premium was calculated, the borrower was not entitled to a rebate in respect of the premiums paid for the longer period. Where a building society gives a statutory receipt under sect. 42 of the Building Societies Act 1874 for money due on a mortgage by a borrowing member, no claim can afterwards be maintained by the society for any further payment, even on the ground that a further sum was due on the mortgagor's shares, or that the money paid was calculated on a wrong principle. (*Harvey v. Municipal Permanent Investment Building Society.*) ... 408

Validity of rule—Borrowing powers—Priority of creditors—Deposit of deeds—Preference shares.—A duly certified rule of a building society authorised the directors to borrow money "from time to time as occasion may require," without any limitation of the amount to be so borrowed, and further provided that "any borrowed money shall be a first charge on the funds and property of the society." The society went into liquidation. Held, that the rule was valid and not *ultra vires*, but that creditors who had made advances under the rule, and had had title deeds deposited with them by way of security, must deliver up the deeds to the official liquidator, and rank *pari passu* with other creditors for a dividend. A rule giving the directors power to issue deposit or paid up shares at a fixed rate of interest, with a right to the holders to withdraw the money in preference to the ordinary unadvanced members is valid, and in the winding-up the holders will be entitled to be paid in preference to the other shareholders. (*Murray v. Scott; Brimelow v. Murray; Agnew v. Murray.*) 463

## BURIAL BOARD.

District having a separate burial ground—13 & 19 Vict. c. 123, s. 12—19 & 19 Vict. c. 123, s. 12, the vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board, and such other powers as are vested in the vestry of a parish separately maintaining its own poor. Held, that this section applies to a district having a separate burial ground, but not separately maintaining its own poor, which is part of a district already

having a legally constituted burial board. (*Reg. v. The Overseers of the Parish of Tonbridge.*) page 179

## BYE-LAW.

Validity of—Playing concertina through streets of city—Conviction for—Reasonable cause—Disqualifying interest of justices—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 90.—Sect. 90 of the Municipal Corporations Act 1835 gives powers to boroughs to make bye-laws for the good rule and government of the borough, and for the prevention of all such nuisances as are not already punishable in a summary way. Under these powers the city of Truro made the following bye-law: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder resident in any street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause," &c. Edwin Gay was summoned before the justices of Truro on the 13th Oct. 1883, and convicted by them of an offence against the above bye-law, and fined 2*l.* 2*s.* and costs. It was proved that Gay was a captain in the Salvation Army, and that on the morning of Sunday, the 7th Oct., he was in Victoria-square, Truro, playing a concertina, and surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines, and triangles; that they had been frequently cautioned and required to desist, as many complaints had been made of their proceedings. On a rule for a *certiorari* to remove the conviction into this court: Held, that the bye-law was not unreasonable, and that the conviction thereunder ought to stand; also that there was reasonable cause for calling on the prosecutor to desist from playing. Held, also, that the mere fact of the justices having attended a meeting, convened by the superintendent, at which a summons was applied for, but refused, did not render them interested parties so as to disqualify them from afterwards dealing with the case, even if at that meeting they had discussed the facts of the case. (*Reg. on the prosecution of Gay v. Powell and others, Justices of Truro.*) ... 92

## COMPANY.

Director—Misfeasance—Joint and several liability—Qualification shares—"Fully-paid" shares—Promoter—Companies Act 1862.—There is no distinction between a payment to directors of cash out of promotion money and a transfer to them of fully-paid promotion shares by way of qualification shares; directors, parties to such transaction, being in either case all jointly and severally liable for the total amount of what they so receive. (*Re The Carriage Co-operative Supply Association.*) ... 286

Memorandum of association—Alteration of, in matters not required to be specified therein—Ratification—Acquiescence—*Ultra vires*—Preference and ordinary shareholders—Alteration of rights of.—By the memorandum of association of a limited company incorporated under the Companies Act 1862, the capital was defined, and it was declared that some of the shares were to be preference shares. The memorandum then expressly provided that the preference shares should have right to a dividend of 7 per cent. in priority to the ordinary shares, and to one-fifth of the remainder of the net revenue after deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares, which were also to be entitled to four-fifths of the remainder of the net revenue. In 1872 special resolutions were passed altering



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this appropriation of the net revenue as between the preference and ordinary shareholders, to the detriment of the ordinary shareholders. These resolutions were acted upon, and dividends were from time to time paid in accordance with them; and no question as to their validity was raised by any of the shareholders. In 1883 special resolutions were passed, whereby the original mode of appropriation of the revenue, as provided by the memorandum of association, was substantially restored. The question then arose as to how the revenue ought to be dealt with as between the preference and ordinary shareholders, and whether the resolutions of 1872, or the subsequent resolutions of 1883, or the memorandum of association of the company, were to prevail. Held, that the company could not, even with the assent of all the shareholders, alter the appropriation of revenue prescribed by its memorandum; that the resolutions of 1872 were therefore wholly *ultra vires* and invalid, and incapable of being ratified; and that the revenue must in future be applied in the manner originally prescribed by the memorandum. (*Ashbury v. Watson*.) ... .. page 766

Reconstruction—Right of dissentient shareholder to inspect books of old company—Arbitration—Companies Act 1862.—The liquidators of a company being voluntarily wound-up for the purpose of the transfer of its assets to a new company, offered a dissentient shareholder 5s. in the pound per share. She elected to have the price settled by arbitration. On summons by the dissentient shareholder against the liquidators for an order compelling them to produce the books and documents of the old company: Held, that the onus lay upon the liquidators to show in the arbitration that 5s. in the pound per share was a proper price; the summons, therefore, was unnecessary, and must be dismissed, with the costs of the adjournment into court. (*Re The Glamorganshire Banking Company; Mrs. Morgan's case*.) ... .. 623

Transfer of shares—Refusal to register—Liquidation of shareholder—Rights of trustee in liquidation—Companies Act 1862.—Where a shareholder has executed a transfer of his shares by way of mortgage, but the company have declined to register such transfer upon the ground that the shareholder was indebted to the company; the trustee in the liquidation of the shareholder is entitled to be entered in the register of shareholders, but subject to any equities that may exist in respect of the shares. (*Ex parte Harrison; Re Cannock and Rugeley Colliery Company*.) ... .. 324

Unlimited company—Call—Summons—Affidavit in support—Companies Act 1862.—This was a summons by an official liquidator asking that a contributory of the company might be ordered to pay within four days to him a sum of 819*l.* in respect of a call made before the commencement of the winding-up of the company, or otherwise to pay to him the said sum as being money required to be paid by the contributory for the adjustment of the rights and liabilities of members of the company among themselves. The debts of the company were not paid. The Court made the order, holding that an affidavit of the liquidator stating that "It was necessary in the winding-up of the company that the sums mentioned should be forthwith paid, and the order should be made," though not in the words of form 33 in the schedule to Gen. Ord. Nov. 1862, implied that the money was required for payment of debts, and was sufficient to bring him within sect. 102 of the Companies Act 1862. (*Re The Norwich Equitable Fire Assurance Company; W. A. Miller's case*.) ... .. 619

— Payment by director—Call—Set-off—Companies Act 1862.—A director of an unlimited company paid to the bankers of the company after a winding-up order, and after a call had been made, 500*l.* in respect of an overdraft of the company, for which he had become surety. On summons asking the court to declare that under sect. 101 of the Companies Act 1862 the director was entitled to set off this sum against 875*l.* due from him for calls on shares: Held, that the pay-

ment being made after the winding-up, this was not a case of a company carrying on business and incurring a debt to bankers in the ordinary way, and that the director was not entitled to set off the debt against calls. (*Re The Norwich Equitable Fire Insurance Company; C. Brasnett's case*.) page 318

## WINDING-UP.

Fraudulent agreement—Rescission.—In order to enable a company to show a good balance at their bankers in case of inquiries there, B. placed money to their credit, which they were to hold in trust for him. Some of the money was, with B.'s consent, drawn out, and afterwards the company was ordered to be wound-up. Held, that B. was not entitled to have the balance paid to him. (*Re Great Berlin Steamboat Company*.) ... .. 445

Judgment creditor—Discretion of court—Evidence of collusion.—Where upon the hearing of a winding-up petition presented by a judgment creditor, evidence is before the court upon which the issue of whether the judgment was or was not obtained by collusion can be decided, the petition will be forthwith disposed of, notwithstanding that the judgment has not been impeached in an action at law. (*Re The United Stock Exchange Limited*.) ... 687

Jurisdiction—Foreign company, with branch office, business, &c., in England—Pending foreign liquidation—Companies Act 1862.—A petition was presented by a creditor to wind-up a company which was registered under the Companies Act 1862 of the Legislature of New Zealand. The registered office of the company was in New Zealand, and the objects for which it was formed were primarily for carrying on business there. The company had, however, a branch office and a manager in London, and had contracted liabilities there. It had also assets in London, but of very small amount. The company had traded in England, but only as a colonial company, and its transactions in England formed but a small proportion of the business it had done since its registration. The petitioner's debt was in respect of goods supplied by him to the company pursuant to an order in writing, which came from the London office. Proceedings to wind-up the company were pending in New Zealand, and liquidators had been appointed there, but no authority to act in their name had been received by the London manager. Held, that the company was an unregistered company within the provisions of sect. 199 of the Companies Act 1862, and the court had jurisdiction to make a winding-up order; that, as no proceedings had been commenced to secure the English assets, the court was justified in taking steps to secure them until proceedings were adopted by the liquidators in New Zealand to make those assets available for the English creditors *pari passu* with the creditors in New Zealand; but that upon an undertaking by the London manager's solicitors that the English assets should remain *in statu quo* and undistributed until the further order of the court, the petition should be directed to stand over. (*Re Matheson Brothers and Co. Limited*.) ... .. 111

Official liquidator—Private examination of witness—Right of creditors to attend—Companies Act 1862—General order of the 11th Nov. 1862, rule 60.—The creditors of a company in the course of being wound-up, who have obtained an order giving them liberty to attend the proceedings in the matter at their own expense, will nevertheless not be permitted to attend a private examination of the late manager of the company upon a summons taken out by the official liquidator under the 115th section of the Companies Act 1862. (*Re The Norwich Equitable Fire Assurance Company*.) ... 404

Petition—Prosecution of directors—Application for petition to stand over—Discretion of the court—Companies Act 1862.—An *ex parte* application by way of petition was made on behalf of a liquidator of a company for leave to prosecute one of its directors. On behalf of some of the creditors of the company, who claimed a right to appear in opposition to the petition, it was asked that the petition might stand over, so that necessary evi-



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- dence in opposition to it might be filed; and it was submitted that the court could only adjudicate on this matter after hearing both sides. It appeared, however, that these creditors were nearly related to the directors who were to be prosecuted, and that if the petition were to be allowed to stand over justice might be frustrated, and that by the Companies Act 1862, s. 167, the discretion of the court was unshackled by any obligation of hearing evidence as to the propriety of a prosecution, and that it could direct a prosecution either on the application of any person interested in the winding-up, or *proprio motu*. Held, that the whole matter was in the discretion of the court, and that, as the court in this instance, from its previous knowledge of the circumstances of the case, was satisfied that the opposition to the petition arose from a desire, not of saving money, but of saving a director, it would make an order giving the liquidator leave to prosecute. (*Re Charles Denham and Co. Limited*) ... .. page 570
- Practice—Examination of officer of company—Pending action against him—Irregularity—Companies Act 1862.**—The pendency of an action against an officer of a company which is in course of being wound-up is not sufficient to justify him in refusing to be examined under sect. 115 of the Companies Act 1862, and it makes no difference whether such action was commenced before or after the winding-up. The official liquidator of a company may properly apply sect. 115 for the purpose of ascertaining whether proceedings should be continued or not against an officer of the company, or against any other person. (*Re The Metropolitan (Brush) Electric Light and Power Company Limited; Ex parte Leaver.*) ... .. 817
- Receiver—Official liquidator—Debenture-holders—Debenture trust deed.**—Where a company is being wound-up, the principle of the court is, not to sanction the continuance both of a receiver and a liquidator unless it is absolutely necessary, the latter being, except in special cases, the proper and sufficient officer of the court. Where a company has mortgaged property to trustees for debenture-holders by a deed as to which it is possible that questions may arise with regard to its nature and extent, the court will not, the company being in course of winding-up and a liquidator having been appointed, consider it necessary or expedient to continue a receiver who has been appointed in an action to enforce the deed. (*Tottenham v. Swansea Zinc Ore Company Limited.*) ... .. 61
- Stannaries Court—Winding-up petition—Cost-book mine—Inspection of documents—Discretion.**—A petition was presented to the Stannaries Court for the winding-up of a mining company conducted on the cost-book principle, and a *prima facie* case shown for winding-up; but the evidence being conflicting, the Vice-Warden adjourned the hearing of the petition to enable the petitioner to apply for an order for inspection of the books of the company: Held, that he had a discretion to do so, and had rightly exercised it, the petition not being a speculative one. (*Re West Devon Great Consols Mine.*) ... .. 841
- Unliquidated damages—Right of set-off—Expenditure by liquidator—Priority.**—A company which had contracted with the Commissioners of Sewers to pave a certain street, payment to be made on completion, and also to keep the street in repair for fifteen years if so required, was ordered to be wound-up. The liquidator completed the paving and claimed payment: Held, that the commissioners were not entitled to set off unliquidated damages not accrued at the date of the winding-up in respect of non-repair for fifteen years against the sum payable by them for paving, and that the liquidator was entitled to retain out of the moneys payable to the commissioners the amount expended by him in carrying out the contract in priority to mortgages of the contract moneys. (*Re Asphaltic Paving Company; Lee and Chapman's case.*) ... 321
- Withdrawal of petition by petitioner—Right of creditors appearing to support petition to costs—**
- Companies Act 1862.**—A petition presented by a creditor for the winding-up of a company was withdrawn on the application of the petitioner by arrangement, the company paying the debt, and the petition was dismissed with costs. Some other creditors and shareholders appeared to support it, in consequence of service on them. It was submitted that they were not entitled to their costs, as they had not appeared to oppose. Held, that they were entitled to their costs because, though they had appeared in support of the petition, they opposed its withdrawal, and had appeared rightly. (*Re The Naupai Gold Mining Company.*) ... .. page 900
- CHARGING ORDER.**
- Solicitors—Charging order for costs—Property recovered or preserved—Partnership action—Creditors of the partnership—23 & 24 Vict.**—An order charging a solicitor's costs upon property recovered or preserved in an action cannot, in the case of an action for dissolution of partnership, be made upon partnership assets in priority to the claims of the creditors of the partnership, unless those creditors are before the court. If, however, the creditors are before the court, such an order can be made. The order should be for "the costs, charges, and expenses properly incurred. (*Jackson v. Smith.*) ... .. 72
- CONTAGIOUS DISEASES (ANIMALS) ACT 1878**
- Action against constable for wrongful conversion of cattle—Local venue—Notice of action—1 & 2 Will. 4, c. 41, s. 19—2 & 3 Vict. c. 93, s. 8.**—Sect. 19 of 1 & 2 Will. 4, c. 41 (an Act by which special constables were appointed) provides that all persons sued for anything done in execution of the provisions of that Act shall be entitled to local venue and one month's notice of action. Sect. 8 of 2 & 3 Vict. c. 93 provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable has within his constableness by virtue of the common law, or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act. In an action brought against a constable ... for detainee and wrongful conversion of the plaintiff's cattle ... while acting under the powers and provisions of the Contagious Diseases (Animals) Act 1878: Held, that the right to local venue and notice of action given by sect. 19 of 1 & 2 Will. 4, c. 41, though extending to constables appointed under 2 & 3 Vict. c. 93, but acting under the earlier Act, does not extend to constables acting under the provisions of any subsequent Act, and, consequently, that the constable sued in respect of acts done under the Contagious Diseases (Animals) Act 1878 was not entitled to local venue or notice of action. (*Bryson v. Russell.*) ... .. 90
- CONTRACT.**
- Rescission—Sale of goods by instalments—Condition precedent—Set-off.**—The effect of sect. 10 of the Judicature Act 1875 is to import into the winding-up of companies the rules of bankruptcy as to a set-off for unliquidated damages. The respondents agreed to purchase from the appellant company a quantity of steel, to be delivered on board ship in five monthly instalments, payment to be made within three days after the receipt of the shipping documents. After a portion of the first instalment had been delivered, but before payment, a petition was presented to wind-up the company, and the respondents wrote that they were advised that they could not safely pay for the steel delivered while the petition was pending. The company replied that they should treat the refusal to pay as a repudiation of the contract. The liquidator, after some further correspondence, refused to make any further deliveries, and brought this action for the price of what had been delivered. Held, that payment was not a condition precedent to the delivery of the next instalment, and that

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the respondents had not acted in such a way as to show any intention of repudiating the contract, so as to release the company from their liability to deliver, and that they were entitled to set off the damages for non-delivery against the price of the instalment sued for in this action. (*Mersey Steel and Iron Company v. Naylor, Benzon, and Co.*) page 637

## COPYHOLD.

Admittance — Right to — Failure of trusts — Customary heiress of devise of surviving trustee — Beneficial ownership — Escheat. — The surviving trustee of copyholds devised them, but the devisee died without having been admitted. The trusts came to an end shortly after the devisee's death, and the original owner left no customary heir. Held, that there was no escheat, and that the customary heiress of the devisee was entitled to be admitted for her own benefit. (*Gallard v. Hawkins.*) ... 689

## COPYRIGHT.

Design — Infringement — Registration — "New or original design" — Patents, Designs, and Trade Marks Act 1883. — Under the Patents, Designs, and Trade Marks Act 1883, s. 47, the comptroller may, on application by any person claiming to be the proprietor of "any new or original design not previously published in the United Kingdom," register the design under the Act. In order to justify the registration of a design there must be some clearly marked and defined difference between it and the design of any similar articles previously known in the trade. There must not be a mere novelty of outline, but something which, having regard to the nature of the article, is a substantial variation. (*Le May v. Welch, Margetson, and Co.; Re Le May's Registered Design.*) ... 867

## COUNTY COURT.

Admiralty jurisdiction of — "Carriage of goods in any ship" — Passenger's luggage on board — Action by passenger against shipowner for loss of — Jurisdiction of County Court to try action — County Courts Admiralty Jurisdiction Acts 1868 and 1869. — The personal luggage of a passenger on board ship, and which is carried with him as a privilege incidental to the contract to convey the passenger himself, is not "goods" within sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 23 Vict. c. 51), by which County Courts, having Admiralty jurisdiction, are empowered to try claims "arising out of any agreement made in relation to the carriage of goods in any ship;" and there is therefore no jurisdiction in a County Court under that Act to try any action by a passenger against a shipowner for the loss of such luggage. (*Reg. v. The Judge of the City of London Court.*) ... 197

(See *BANKRUPTCY.*)

## COVENANT.

Building estate — Mutual restrictive covenants — Alteration of character of property — Breach of covenant — Injunction — Lord Cairns' Act (21 & 22 Vict. c. 27) — Statute Law Revision and Civil Procedure Act 1883. — A building estate was laid out in lots, which were sold to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot to restrain him from using his house as a beer-shop with an "off" licence. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced, and the plaintiff had for some time bought beer from his shop. There was evidence that several other houses built on others of the lots had been for some time used as shops, and that many of the houses adjoining the plaintiff's house were occupied,

not by a single tenant, but each by two families at weekly rents. Pearson, J. held, that the character of the property had become so changed that the original purpose for which the covenant had been entered into had failed, and that it would under the circumstances be inequitable to enforce the specific performance of the covenant: (48 L. T. Rep. N. S. 939; 24 Ch. Div. 180.) Held, on appeal, that the plaintiff had by acquiescence disintituled himself to enforce the covenant. (*Sayers v. Collyer.*) ... page 723

"House" — Water — Adjoining cellars — Percolation — Damage. — The defendants were the assignees of a piece of land which adjoined the plaintiff's, and which was subject to a covenant entered into with the plaintiff that no house should be erected upon the land of less value than 400l. The defendants commenced to build two houses or shops, each two stories high, upon the land, but the local board objected, for certain reasons, to the mode of building. In consequence of these objections the two houses were thrown together by making a communication between them on the ground floor. On the plan, as submitted by the defendants to the local board, there was also shown a communication on the upper floor, but this did not appear to have been carried out. As altered, the houses had two separate doors opening to the road, and two separate shop windows fronting to the road. They each had a separate staircase, but one of them had no kitchen. In the yard behind, which was common to the two houses, there was only one water-closet and ashpit. It was admitted that each of the two houses, if they were to be considered as separate, was of less value than 400l., but that the value of the two exceeded that sum. One of the houses adjoined a house of the plaintiff's. The defendants had fitted their house with pipes which did not communicate with any drain. The water flowing down these pipes settled in the cellar of the defendants' house, and thence percolated through the ground into the plaintiff's cellar, which was on a lower level and did some injury. The questions were, first, whether a breach of the covenant had been committed; and, secondly, whether the injury done to the plaintiff's cellar by percolation of water was an actionable wrong. Held, that the building substantially formed two houses and not one, and that, therefore, a breach of the covenant had been committed. Held, also, that the defendants, by allowing the water to escape from their cellar, had committed an actionable wrong, and were liable to pay damages. (*Snow v. Whitehead.*) ... 253

## CRIMINAL LAW.

Conspiracy — Joint indictment against two — Conviction of one only — New trial. — On an indictment against two persons jointly for conspiring together, they must both of them, if tried together, be either convicted or acquitted; and where one of them only was convicted, and the jury, being unable to agree as to the other, were discharged from giving a verdict, the court, on the application of the convicted defendant, made absolute a rule for a new trial as to both. (*Reg. v. Manning and another.*) ... 121

False pretences — Obtaining premium on policy of insurance — Policy treated as lapsed — Suppression of material facts — Knowledge by prisoner of facts which would have prevented payment — Misrepresentation by conduct. — P., an agent of a life assurance company, received from V. the premium for the year 1883 to 1884, on a policy effected by V. with the company in 1881, but, instead of giving V. the official receipt, gave him an informal receipt, appropriated the money and returned the official receipt to the company, who treated the policy as lapsed. On the 7th April 1884, P. called on V. for the premium for the year 1884 to 1885. V. being then unable to pay, P. called again on the 21st April, the days of grace allowed by the policy having to the knowledge of V. expired on the 15th April, and told V. that payment on that day "would be effectual," and V. understood that P.

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was to "apply to the company to let the policy go on." The company were in the habit of allowing lapsed policies to be revived, upon the payment of overdue premiums; and upon the representations thus made by P., V. paid him a sum of money. Upon a case reserved at the trial of an indictment which charged P. with having obtained this sum of money by false pretences: Held, that P.'s conduct on the 7th and 21st April amounted to a representation that the policy had not lapsed nor become void, and that he had authority to say that the payment on the 21st would keep the policy alive for another year, and that there was, therefore, sufficient evidence to support the conviction. (Reg. v. Powell.) ... page 718

Public place—Indecent exposure—Witnesses of offence trespassing at time of commission—Place to which public have access, but no legal right of access.—In order to support an indictment for indecent exposure in a public place, it is sufficient to show that the offence was committed in a place where an assembly of the public is collected. (Reg. v. Wellard.) ... 604

## CROSSED CHEQUES.

Unauthorised signatures *per pro.*—Liability of collecting banker—Bills of Exchange Act 1882.—The plaintiffs, B. and Co., appointed S. their traveller, and S. was to remit all cash, bills, and cheques to the plaintiffs every week. S. afterwards opened an account at the defendants' bank, and paid into this account, without the sanction or knowledge of the plaintiffs, seven cheques received by him on account of the plaintiffs, and payable to "B. and Co. or order." These cheques were indorsed by S. "*per pro.* B. and Co., H. S." without authority. The defendants, without inquiry as to S.'s authority to indorse, and with knowledge of his position, received the cheques as cash, and placed them at once to S.'s credit. Six of these cheques were drawn on other bankers than the defendants, three of these being crossed "and Co." when received by them, and three being uncrossed. These six cheques were crossed by the defendants with the name of their London agents for collection. The seventh cheque was drawn upon the defendants themselves, and was not crossed. S. afterwards absconded with the proceeds of these cheques. Held, in an action by the plaintiffs to recover the proceeds of these seven cheques, that the defendants were liable, and were not protected by sect. 82 of the Bills of Exchange Act 1882, because, as regards the three cheques that came to the defendants uncrossed, they did not become "crossed cheques" within the meaning of that section by being crossed to a banker for collection; and, further, as regards all the six cheques not drawn on the defendants, because the defendants had not merely "received payment for their customer," but had in fact under the circumstances received payment for themselves, and because the defendants had not received payment "without negligence," having made no inquiry into the authority of S. to indorse *per pro.* as required by sect. 24. Held, also, as regards the cheque drawn upon the defendants themselves, that they were not protected by sect. 19 of 16 & 17 Vict. c. 59, or sect. 60 of the Bills of Exchange Act 1882, as they had not "paid" the cheque within the meaning of those sections. (Bissell and Co. v. Fox Brothers and Co.) ... 663

## DISCOVERY.

Interrogatories—Adversary's case.—An order was brought by two persons on behalf of themselves and all other the proprietors and occupiers of lands or tenements in the parish of M. The claim stated that the inhabitants of M. had from time immemorial had rights of recreation over a portion of M. Common, known as B. Corner, that the owners and occupiers of lands and tenements in M. had an immemorial right of pasture, herbage, and estovers over the whole of M. common; that the plaintiff B. was seised in fee of a freehold house and 32a. 1r. 13p. of freehold land in

the parish of M., now in his own occupation; that the plaintiff N. was seised in fee of a freehold messuage used as a beerhouse, and three freehold cottages in the said parish, now in his occupation or that of his tenants; that the plaintiffs were respectively entitled in respect of their said holdings to the several rights claimed; that the defendant threatened to inclose B. Corner; and it asked for a declaration that B. Corner was part of M. Common, and that the plaintiffs and those on whose behalf they sued were entitled to the rights claimed, and an injunction to restrain the defendant from trespassing upon, or otherwise intermeddling with, the said land. The defendant's case was that the land in question was not part of M. Common, but of the manor of Wallington, of which he was the lord. In his defence he stated that N.'s beerhouse and cottages had no land attached thereto, and that such rights of common as were claimed could only be enjoyed in respect of land; that the rights of estovers claimed could only be enjoyed in respect of ancient tenements, and he did not admit that the plaintiffs' were such; that the rights claimed were uncertain and unreasonable. Otherwise he met the claim with a direct traverse. The defendant delivered to the plaintiffs interrogatories, which may be classified as follows: (1) Whether the messuages were ancient; (2) Whether any and what lands were held with the beerhouse and cottages; (3) Whether the tenements in question were held of any, and what, manor; (4) Whether there had been any user by the plaintiffs, or their predecessors in title, of the rights over the common. The plaintiffs declined to answer these interrogatories on the ground that they related exclusively to their title, and the particulars demanded formed part of the evidence they would have to bring in support of their case. On a summons by the defendant that the plaintiffs might be ordered to file a full and sufficient answer. Held, that the interrogatories coming under the second head must be answered, as they sought discovery in support of a substantive case set up by the defendant, viz., that no lands were held with the beerhouse and cottages, but the others need not be answered, as they sought discovery as to facts which the plaintiffs would have to prove at the trial, asking whether they were the facts or not, which was tantamount to asking the evidence by which they meant to prove their case. (Bidder v. Bridges.) ... page 816

Interrogatories—Order to answer by *videlicet* examination—Order XXXI., r. 11.—Under an order to further answer interrogatories by *videlicet* examination, only such answer can be required as would have been sufficient if originally given in writing. (Litchfield v. Jones.) ... 572

Interrogatory—Answer—Sufficiency of.—Professional confidence—Solicitor and client.—An action was brought for the specific performance of an agreement for sale, which was alleged to be contained in a receipt. The defendants denied that the receipt contained the true terms of the agreement. The plaintiffs thereupon delivered interrogatories, the second of which was as follows: "Is it not the fact that between the 13th Nov. 1883 and the date of the delivery of the defence in this action, numerous, or some, and how many, interviews took place, and a large amount of correspondence passed between the plaintiff's solicitor . . . and the defendant's solicitors . . . in relation to the said agreement, and to the terms and completion thereof?" The defendants declined to answer this interrogatory on the ground that they had no personal knowledge of these matters, and that the only information they had relating to these matters was derived from confidential communications between them and their solicitors in reference to their defence of the action. The plaintiffs took out a summons to compel the defendants to make a better answer to the interrogatory. Held, that it was not sufficient for the defendants to say that they had no personal knowledge of the subject of the interrogatory; that they were bound to state as to their information and belief; that the information obtained from their solicitors relating to these

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matters was not privileged; and that the defendants must, therefore, make a further answer. (*Foakes v. Webb*.) ... ..page 624

**Interrogatory—Privilege—Sufficiency of answer—** Answer as to matters within the knowledge of servants—Privileged reports sent in by servants or agents.—In an action for damage caused by the negligence of the defendants or their servants in the use of an engine, whereby sparks and red-hot cinders escaped from the engine and set fire to the plaintiffs' buildings, the plaintiffs administered the following interrogatory: "Have the defendants or any of their servants or agents any knowledge, information, or belief as to the cause of the fire in respect to the happening whereof this action is brought? If yes, set out the same fully, with dates and all particulars. If any of the said servants or agents have communicated to the defendants such knowledge, information, or belief, let the defendants set out the substance of such communications, with dates and all particulars." To this the defendants answered: "We have no information at all on the subject, save such as appears in the reports set out in the schedule to our affidavits, filed in this cause on the 28th May 1884, and which by the judgment of the Divisional Court of the 7th July last were held to be privileged from production, which we decline to produce." Held, that the answer was sufficient, as a further or better answer could not be given without disclosing the contents of privileged reports made to the defendants by their servants, which reports the defendants were not bound to disclose. (*The London, Tilbury, and Southend Railway Company v. Kirk and Randall*.) ... .. 599

## DIVORCE.

**Intervention—"Material facts not brought before the court"—23 & 24 Vict. c. 144, s. 7.**—A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial, which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervenor, and filed affidavits which were substantially the same as those used on this application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given to her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. Held, that, the facts alleged by the affidavits being material, and a case having been shown which ought to be investigated, the intervention must be allowed. (*Howarth v. Howarth*.) ... .. 872

**Practice—Variation of settlements—Capital—Jurisdiction—23 & 23 Vict. c. 61, s. 5—Appeal—Discretion of judge.**—A wife, who had obtained a divorce from her husband, having applied for variation of the settlements, the judge refused to give her any part of the capital of the fund, which had all been settled by the husband, although there were no children of the marriage, and he gave her a portion of the income. Held, by the Court of Appeal, that his decision must be affirmed, as, although the court had jurisdiction to deal with the capital, it would not be for the benefit of the wife to give her any part of it, and the court refused to interfere with the discretion of the judge as to the amount of income to be paid to him. (*Ponsonby v. Ponsonby*.) ... .. 174

## DOMICILE.

**Marriage between Englishwoman and Spaniard—Separate use—Settlement of English property—Death of wife without issue—Will—Spanish law**

of inheritance.—Upon marriage with a Spaniard, an Englishwoman can, with his concurrence, so settle property of hers in England as, notwithstanding the Spanish domicile which she acquires on such marriage, to be free to dispose of the property as she pleases; and, in the event of there being no children of the marriage, to defeat by her will her parents' indefeasible right under Spanish law to two-thirds of her immovable property. In a settlement made upon such a marriage, and in English form, a limitation of the wife's property upon such trusts as she shall appoint, and, in default of appointment, to her separate use without power of anticipation, means "separate use," according to English law. (*Hernando y Horcajo v. Sawtell*.) ... ..page 117

## ELECTION LAW.

**Municipal election—Election of town councillors—**

Four candidates elected—Three only petitioned against—Mayor's allowance of objections appealed against—Practice—Municipal Corporations Act 1882.—At a municipal election to fill four vacancies in the office of town councillor, A., B., and C. (the respondents), and D. were elected, and a petition was subsequently presented against the election of A., B., and C. on the ground of the alleged improper allowance by the mayor of objections to the nomination papers of certain other candidates, who were thereby prevented from going to the poll. An application by the respondents for an order to strike the petition off the file, on the ground that D., to whose election the same objection equally applied was not made a respondent to the petition, and that no relief could therefore be granted under it, as it did not pray that the election, as a whole, should be set aside, having been refused by Mathew, J. at chambers, the respondents appealed therefrom to this court, when it was held, that, under the Municipal Corporations Act 1882, a petition might be presented against the election of any one or more of the individuals elected, and that it was not necessary to petition against all of them, or to seek to avoid the election as a whole; and, therefore, to take the petition off the file would contravene the theory and spirit of the Act, which pointed directly to proceedings by petition against the election of any individual elected. *Per totam Curiam*: Where it is clearly shown on the face of an election petition that no relief can be granted under it, the court has power under the Act of 1882 to take it off the file. (Line and others, petrs., v. Warren and others, resp.) ... 359

**Parliament—County vote—Notice of objection to**

—Incorrect date in notice to overseers—Publication by overseers of list of objections—Waiver of defect in notice by—Registration Act 1843.—A notice of objection to claim for a county vote was delivered on the 18th Aug. 1883 to the claimant and also to the overseers, under sect. 7 of the Registration Act 1843 (6 Vict. c. 18), the notice to the claimant being correct in all particulars, but the notice to the overseers being, by oversight, dated 18th Aug. 1880. The overseers duly published the claimant's name in the list of persons objected to, and it was found as a fact by the revising barrister that he had not been inconvenienced or misled by the incorrect date. Held, that the omission of the correct date in the notice to the overseers was a defect which rendered the notice invalid, and which the overseers had no right or power to waive. (*Freeman, app., v. Newman, resp.*) ... .. 396

**Freehold rentcharge—Grant of, by A. to B., C., and D. to the use of A., B., C., and D.**

—Effect and operation of—"Actual possession"—Statute of Uses (27 Hen. 8, c. 10)—Reform Act 1832.—By deed of the 11th Jan. 1883, A., the owner in fee of rentcharges issuing out of freehold lands, granted them to his three sons, B., C., and D., their heirs and assigns, to the use of the said A., B., C., and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common. B., C., and D. claimed to be inserted in the list of voters for the county in respect of their one-fourth

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shares respectively, although no portion of the said rentcharges had been paid to or received by either of them before the last day of July 1883; and their claims having been disallowed by the revising barrister on the ground that, as there was no third party intervening between them and the grantor, they took their one-fourth shares by force of the common law and the Statute of Uses did not apply, it was, on appeal, therefrom: Held, that the grant operated under the Statute of Uses, and that as A., not being a grantee to uses, took under the statute, B., C., and D. took in the same way, and by force of the statute were in the "actual possession" of their shares from the date of the deed so as to be entitled under the authority of *Heekis v. Blaine* to be registered as county voters under sect. 26 of the Reform Act 1832. (*Lowcock, app., v. The Overseers of Broughton, resps.*) ... page 399

ELEMENTARY EDUCATION ACTS.

Power to impose home lessons—Detention of a child at school after school hours.—The master of a board school established under the Elementary Education Acts 1870 and 1876 is not authorised by those Acts in setting lessons to be prepared at home by children attending such school, and the detention of a child at school after school hours for not doing home lessons amounts to a criminal assault. (*Hunter v. Johnson.*) ... 791

EMPLOYERS' LIABILITY ACT 1880.

Defect of machinery or plant—Negligence of employer.—Plaintiff, a carpenter, was employed by defendants, who were builders, and in the course of his employment had to descend a ladder. A scaffold, which was put up under the direction of one of the defendants, rested on and was supported by the ladder. When plaintiff stepped on the ladder it broke in two and he fell and was injured. In an action to recover damages for the injury the jury found that the ladder was insufficient for the purpose for which it was used. Held, that there was evidence to go to the jury of a defect in the condition of the machinery or plant within the meaning of sect. 1 (1), and evidence of the negligence of the employer within the meaning of sect. 2 (1). (*Cripps v. Judge and another.*) ... 182

Omnibus conductor—Workman—Person engaged in manual labour.—An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of the Employers and Workmen Act 1875, s. 10. (*Morgan v. The London General Omnibus Company.*) ... 213

ENDOWED SCHOOLS ACT 1869.

Powers of commissioners—Denominational school—Evidence—Founder.—The Charity Commissioners have power under sect. 9 of the Endowed Schools Act 1869 to direct by a scheme that endowments should be no longer applied in carrying on a particular school, but in exhibitions for the benefit of a larger area of schools. (*Re The Parochial Schools of St. Leonard's, Shoreditch.*) ... 305

EQUITABLE MORTGAGE.

Delivery order—Goods not paid for—Bills of Sale Act 1878, s. 4—Ordinary course of trade or business.—Where the delivery order for goods was deposited with bankers by way of security for an advance, the said goods not having been paid for by the pledgor, who subsequently became bankrupt: Held, that such a transaction was not within the mischief of the Bills of Sale Act 1878, s. 4 (Amendment Act 1892), and did not require registration. (*Re Hall; Ex parte Close.*) ... 795

Deposit of deeds—Foreclosure or sale—Conveyancing and Law of Property Act 1881.—An equitable mortgagee by deposit of deeds applied under sect. 25, sub-sect. 2, of the Conveyancing Act 1881, for an order for sale instead of foreclosure. There was no memorandum of the charge, and no agreement by the mortgagor to execute a legal mortgage. The order asked for was made. (*Oldham v. Stringer.*) ... 895

ESTOPPEL.

Action in Probate Division—Compromise—Forgery—Judgment in Chancery Division—Revocation of probate—Jurisdiction.—An action in the Probate Division in which T. and G. propounded an earlier, and P. a later, will, was compromised, and by consent verdict and judgment were taken establishing the earlier will. An action was afterwards commenced by P. in the Chancery Division, to which T. and G. were parties, to set aside the compromise on the ground that the earlier will was a forgery. A jury returned a verdict that it was a forgery, and the compromise was set aside. In another action in the Probate Division for revocation of the probate of the earlier will: Held, that T. and G. were estopped from denying the forgery. (*Priestman v. Thomas.*) ... page 843

EVIDENCE.

Admissibility—Voting paper—Signature—Ambiguity—Evidence to explain.—A voting paper at the election of aldermen under this section of the Municipal Corporation Act 1882 was as follows: "I, the undersigned, F. M., vote for the following persons (names and addresses): signed, W. S." Held, that oral evidence was admissible to explain the ambiguity. (*Summers v. Moorhouse.*) ... 290

Hearsay—Declaration of deceased member of family—When admissible to prove birth—Pedigree.—The declarations of deceased members of a family, though admissible in cases of pedigree, as evidence to prove pedigree, are not admissible to prove the facts which constitute a pedigree, such as birth, death, or marriage, where the case is not one of pedigree. In an action for goods sold, an affidavit made by the deceased father of the defendant in another action, to which the plaintiff was not a party, stating the defendant's age was given in evidence to support the defence of infancy. Held, that the evidence was wrongly admitted, and there must be a new trial. (*Haines v. Guthrie.*) ... 564

EXECUTOR.

Creditor—Right to recover debt after standing by—Laches—Express authority—Devastavit.—A creditor of a deceased man, believing that the executors, who were authorised to carry on the business of the deceased by his will, had assets to meet his debt, allowed it to stand over, and received interest on it. On the failure of the business he sued for the whole of the debt. It was submitted that he had lost the right to recover his debt. Held, that mere laches by a creditor in not compelling the executors to realise a testator's estate immediately for the purpose of paying his debts would not deprive him of his right to sue the executors for *devastavit*, unless, by his conduct, or by his express authority, he has misled the executors, and so allowed them, or induced them, to part with assets which were, at the date of the death of the testator, liable to, and sufficient to satisfy his claim. (*Re Birch; Roe v. Birch.*) ... 777

Devastavit—Acquiescence—Statute of Limitations—Mortgage—Covenant for payment.—The onus of proving acquiescence in a *devastavit* is, by the ordinary rule, on the person alleging it, and in order to prove acquiescence he must show a standing by with full knowledge of what was being done. The plaintiffs, who were mortgagees, complained that the defendant, the surviving executor of the mortgagor, had been guilty of a *devastavit* in having administered the testator's estate without first paying off the mortgage debts, and they claimed that he might be declared answerable for all moneys forming part of the testator's estate received by him and not applied in payment of the testator's debts, &c. The defendant alleged that the payments constituting the *devastavit*, if any, or the greater part of them, were made more than six years before the commencement of the action, and he craved the benefit of the Statute of Limitations. Held, that the claim of the plaintiffs was not barred by the Statute of Limitations. (*Re Marsden; Bowden v. Layland; Gibbs v. Layland.*) ... 417

## SUBJECTS OF CASES.

## Power to compromise claims—Disappointed legatee.

—Executors distributed their testator's residuary estate among the persons they believed entitled thereto. After distribution W. claimed to share in the fund, but having a difficulty in procuring evidence of her relationship, the executors compromised the claim for 10*l*. W. subsequently brought an administration action against the executors, claiming the full amount of the legacy, which was 113*l*.: Held, that the executors had power under this section to compromise the claim, and having done so, W. was precluded by her acceptance from recovering. (*Re Warren; Weedon v. Reading.*) ... ..page 561

## Retainer by—Right of—Judgment and specialty debt.

—A testator having died on the 6th Sept. 1883, on the 27th the official liquidator of a company, to whom the testator was indebted as a contributor, obtained an order against him in the Palatine Court for payment of 225*l*. in respect of a previous call. On the 10th Oct. 1883 the liquidator commenced an action for the administration of the testator's estate, and on the 16th Oct. obtained an order against the executors for the payment of the 225*l*. On the 24th Oct. H., one of the executors, gave the liquidator notice of his claim to retain a sum of 306*l*. 10*s*. This sum was entered in the accounts furnished in the administration action as of the date of the 2nd Nov. 1883, and was claimed in respect of a mortgage made by the testator to two other persons and H., as trustees. Held, that H. was not entitled to retain the 306*l*. 10*s*. in respect of his specialty debt, but was bound by the balance order to satisfy the debt of the liquidator. (*Re Hubback; International Marine Hydropathic Company v. Hawes.*) ... .. 189

Wifely default—Loss by agent—*Onus probandi*—22 & 23 Vict. c. 35, s. 31.—Where an executor or a trustee properly employs an agent to collect money belonging to the estate, and such money is lost by the insolvency of the agent, the onus of proving that the loss has occurred by the default of the trustee or executor lies on the person who seeks to make him liable for the loss. (*Re Brier; Brier v. Evison.*) ... .. 133

## FALSIFICATION OF ACCOUNTS ACT 1875.

Making and concurring in making false entry—False memorandum handed by collector to employer's cash clerk—Memorandum copied by cash clerk into cash-book.—B., a collector in the employment of N., collected on the 22nd Feb. from Sheppard 8*l*. 14*s*. 10*d*. due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for moneys collected during the day, E.'s duty being to enter payments accounted for by B. in the cash-book. On the evening of the 22nd Feb. B. gave E. a slip of paper on which he had written, "Sheppard, on account, 5*l*." which E. copied into the cash-book, believing it represented the whole amount collected by B. from Sheppard. Held, that B. was rightly convicted under sect. 1 of the Falsification of Accounts Act 1875. (*Reg. v. Butt.*) ... .. 607

## FIXTURES.

Machinery—Driving belts—Mortgage.—Plaintiffs, who were mortgagees of certain works and plant, sued defendant, the trustee in liquidation of the mortgagor, to recover certain driving belts which were included in the mortgage deed, and which defendant had removed from the premises. Each belt passed over two drums on different parts of the machinery, and being joined at the ends, and fitting tightly to the machine, communicated the motion from one drum to the other. The belts could be slipped off the drums, and would then hang loose over the shaft, but they could not be taken off the machines without cutting the belts, or unfastening the joinings. The machines were fixed to the premises. Held, that the belts, being part of the machines, were fixed to the freehold, so as to pass by the mortgage deed, and therefore plaintiffs were entitled to recover. (*Sheffield and South Yorkshire Permanent Building Society v. Harrison.*) ... .. 649

## FORESHORE.

Licencee—Irrevocable licence—Compensation—Equitable right.—The equity to arise from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated. P. erected a jetty on the foreshore of the harbour of W. under a revocable licence from the Crown to use it for the purposes of a wharfinger; afterwards, at the instance of the colonial Government, he extended the jetty, and made other additions to it, and it was for some time used by the Government for immigrants. Held (reversing the judgment of the court below), that the licence had become irrevocable, and that the equitable right so acquired by P. was "an estate or interest in land" which could be the subject of compensation under local statutes. (*Plimmer v. The Mayor of Wellington.*) ... ..page 475

## FOREST OF DEAN.

Forfeiture of gale—Forfeiture when complete—Vacant gale—Application for gale—Priority—Re-entry by Crown—Forest of Dean Act 1838—Queen's Remembrancer Act.—An application for a gale in the Forest of Dean must be made at a time when the gale is vacant. Where a gale had become liable to be forfeited under sect. 29 of the Forest of Dean Act 1838 for non-working: Held, that the forfeiture was not complete nor the gale become vacant until the Crown had intimated its intention of enforcing the forfeiture. Actual resumption of possession by the Crown is not necessary to complete the forfeiture of a gale, and this independently of the Queen's Remembrancer Act (22 & 23 Vict. c. 21), s. 25. (*James v. Young.*) ... .. 75

## GOODWILL.

Sale of—Vendor to be allowed to set up new business—Soliciting old customers—Agreement.—P. sold all his interest and estate in the property and business of a potter (which the court held to include goodwill) to his partner, the agreement for sale providing that nothing therein should prevent P. from carrying on the business of a potter at such place as he should think fit: Held, that P., who had set up as a potter, was entitled to solicit the customers of the old firm. Per Baggallay and Cotton, L.J.J., (*dissentiente Lindley, L.J.*): The seller of the goodwill of a business is not precluded from soliciting the customers of the old business unless there is an express covenant or agreement by him not to do so. (*Pearson v. Pearson.*) ... .. 311

## HIGHWAY.

County—Borough—Expense of maintenance of road—County in which road is situate—Highways and Locomotives (Amendment) Act 1878—Highways Acts 1862 and 1864.—The borough of Over Darwen in Lancashire is a highway area within the meaning of the Act of 1878, having no separate court of quarter sessions, and the townships or parts of townships comprised within its boundary are assessed and contribute to a separate rate raised and charged upon the hundred of Blackburn. A road which ceased to be a turnpike road in 1877 passing through the borough, the highway authority sued the county authority to recover payment of one-half of the expenses incurred by the highway authority for the year ending 25th March 1883 in the maintenance of so much of the road as was situate within the borough. Held, on a special case stated in the action, that the word "county" in 41 & 42 Vict. c. 77, s. 13, is used in a geographical sense, and therefore the county of Lancaster was the county in which the road was situate, and the defendants, the county authority, were liable. (*The Mayor, Aldermen, and Burgesses of the Borough of Over Darwen v. The Justices of the Peace for the County of Lancaster.*) ... .. 630, 707, 739

Local authority—Expenses of diverting—Employment of solicitor by local board of health—The Highway Act 1835—The Public Health Act 1875.—The U. Land Company, being desirous of diverting

certain public footways on their estate in the parish of T., requested the T. Local Board of Health to assent to such diversion and to take the necessary steps to have the said footways legally closed. The T. Local Board assented, and instructed their solicitors to take the necessary steps, and, these having been duly taken, paid the bill of costs presented by them in respect thereof, and recovered the amount thereof summarily as "expenses" within the meaning of the 84th section of the Act of 1835. Held, on case stated, that the words of the 144th section of the Public Health Act 1875 "may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint," did not empower the local board to employ a solicitor to do the ministerial acts in question, and that therefore the solicitor's charges were not "expenses" payable by the land company under the 84th section of the Highway Act 1835. (*The United Land Company v. The Tottenham Local Board.*) ... page 364

Repair—Contribution from county—Turnpike trust—Cesser before expiry—Highways and Locomotive Amendment Act.—The trusts of a turnpike road within a "highway area" expired in 1877, but the road had in 1855 become vested by a local Act in commissioners who were the highway authority for the district, and the trustees had then ceased to repair it. Held, notwithstanding that the road had only ceased to be a turnpike road since the expiration of the trusts, and that the highway authority were entitled, under the Highways Locomotive Act 1878, s. 13, to recover from the county authority half the expense of repairing. (*Newton Improvement Commissioners v. Justices of Lancashire.*) ... 707

#### HUSBAND AND WIFE.

Separate estate—Agreement for separate use signed by the husband alone—Statute of Frauds (29 Car. 2, c. 3), s. 7.—An agreement made between an intended husband and wife before marriage, by which agreement the husband renounces his marital rights over the wife's real property, but which agreement is signed by the husband alone, is not sufficient to affect the fee simple of the wife with a trust for her separate use. Such an agreement is invalid as a declaration of trust of the fee, inasmuch as the husband has not such an estate as will enable him to bind the fee, and therefore such an agreement signed by him alone does not satisfy the 7th section of the Statute of Frauds. Therefore, upon the death of the wife during her husband's lifetime without issue, her heir-at-law and not her devisee will be entitled to the lands of which she is seized in fee. (*Dye v. Dye and another.*) ... 145

#### INFANT.

Advancement—Contingent legacy.—A testator, who died in 1883, by his will, dated in 1881, bequeathed to his trustees 5000*l.* New Three per Cent. Annuities upon trust to pay to A. the dividends thereof, the same to be applied by him for the maintenance and education of his two eldest children (a son and daughter), and the survivor of them, during their respective minorities; and subject thereto the testator directed that such sum of annuities should remain in trust for the children equally to be divided between them, or for the survivor of them living at the testator's decease, if either should die in his lifetime, for their respective absolute use, the share of the son, or the whole as the case might be, to be an interest vested absolutely in him if and when he should attain twenty-one, and the share of the daughter, or the whole as the case might be, to be an interest vested absolutely in her, for her separate use, if and when she should attain that age or be married, with benefit of survivorship between them, as to each share, in case they should be both living at the testator's death, until vested absolutely; and the testator declared that in case both of the children should die without such sum of annuities having vested absolutely, the same should fall into his residuary estate. The trustees

paid to A. the dividends of the sum of annuities, and the whole thereof, in addition to moneys of his own, were applied by him in the education and maintenance of the children, who were respectively about twenty and eighteen years of age. A. had also expended, out of his own pocket, sums amounting to nearly 200*l.* in connection with the advancement in life of the son, and in the purchase of necessaries for him. A.'s sole source of income was a pension of about 200*l.* He had a family of seven children to be educated and maintained, who were in addition to and younger than the children referred to in the will. Under these circumstances, A. asked, by summons, that it might be declared that the estate and interest of the son in the sum of annuities stood charged with the payment of the sums expended by A. for the advancement in life and benefit of the son. Held, that the application must be refused, the evidence being insufficient and unsatisfactory; and that the proper course would have been to have applied for an order as in *Re Arbuckle* (14 L. T. Rep. N. S. 533; 2 Set. 4th edit. 726). (*Re Tanner.*) ... page 507

Custody—Father's common law right subject to equity rule—*Habeas corpus*—Judicature Act 1873.—E., a yacht master, applied for the custody of his daughter, an infant aged nine, under the following circumstances: On his marriage with the mother of the child he told her that his former wife had left him and gone to America more than seven years before, and died there. After the marriage the mother was informed that the former wife was alive, and that a letter had been received from her. She thereupon left E., taking the child of the marriage with her to her parents, and continued to live with them, the child being then well cared for and well educated. An indictment preferred against E. for bigamy was thrown out by the grand jury. Held, that, as E.'s affidavit did not show that he had made any search for his former wife and failed to find her, the Court were not satisfied as to the validity of the marriage, and that, as E.'s occupation necessitated long absences from the country, and he did not propose to provide any suitable fixed home for the child, and there being also affidavits (which he, however denied) that he was a man of loose character, the Court in the exercise of its discretion would not, under such circumstances, order the child to be removed from the custody of the mother, where it was not questioned that she was being well cared for and well educated. (*Re Ethel Bowe, an Infant.*) ... 793

Guardians—Maintenance of ward—Voucher of items.—A guardian who is also trustee cannot discharge himself from his duty as guardian to see that the infant is properly maintained by paying over the income to his co-guardian, but where such guardian had paid over the income to his co-guardian who had maintained the infant the court held that the guardian so paying was entitled to be allowed what was found to be the proper amount for the maintenance of the infant on its being shown that she had been properly maintained and educated without vouching the items of expenditure. Trustee allowed his costs in the absence of misconduct. (*Re Evans; Welch v. Channell.*) ... 175

Legacies contingent on attaining twenty-one—Intermediate income—Maintenance—Conveyancing and Law of Property Act 1881, s. 43.—A testator by his will gave legacies to classes of persons who should be living at his death and attain twenty-one, and he gave the residue of his estate to other persons not identical with those forming the classes. The persons forming the classes to whom these contingent legacies were given were not children of the testator, nor persons to whom he was *in loco parentis*. Some of them were infants at the date of his death, and question arose whether the executors ought to apply the income of the legacies to which the infants were contingently entitled for their maintenance, and accumulate so much as should not be applied in that way, according to the provisions of sect. 43 of the Conveyancing Act 1881. Held, that



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the income of these legacies was not subject to the provisions of sect. 43 of the Conveyancing Act 1881. Under the will it would undoubtedly belong to the testator's residuary legatees until the infants attained twenty-one, and sect. 43 of the Act was not intended to apply to incomes to which infants never could become entitled, but which passed as residue to other persons. (*Re Dickson; Hill v. Grant.*) ... ..page 891

**Necessaries**—Infant sufficiently supplied when goods are ordered—Such fact not communicated to the person supplying—Admissibility of evidence as to such supply—Province of judge and jury.—The plaintiffs, who were tailors, brought an action for 22l. 18s. 6d. for clothes supplied by them to the defendant. The defendant pleaded that, at the time the clothes were supplied, he was an infant, and the plaintiffs replied that the goods supplied were necessaries, suitable to the estate and condition in life of the defendant. On this issue was joined. At the trial evidence was given to show that the defendant was already sufficiently supplied with clothes at the time when the goods in question were ordered, but this fact was not communicated to the plaintiffs. The learned judge withdrew this evidence from the jury, and left the question to them in the following terms: "Were the goods necessaries? It does not matter what amount of clothes he (the defendant) had in his box, trunk, or wardrobe, it not having been communicated to the plaintiffs." The jury found for the plaintiffs. On a motion on behalf of the defendant for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence: Held, that the evidence that the defendant was already sufficiently supplied with articles of the same kind when the clothes in question were ordered ought to have been admitted and left to the jury, notwithstanding that the fact of such supply had not been communicated to the plaintiffs, it being for the jury to judge of the effect of that supply on the question of necessaries. (*Baines and Co. v. Toye.*) ... .. 292

## INJUNCTION.

**Agreement for a lease**—Subsequent agreement—Vested rights—Saving clause in Act—Shooting hares and rabbits—Ground Game Act 1880 (43 & 44 Vict. c. 47), s. 5.—In a case where there was a good equitable agreement for a lease of land in existence before the passing of the Ground Game Act 1880, containing stipulations giving the landlord the exclusive right of shooting over the land and prohibiting the tenant from killing and taking ground game by a gun, which were at variance with the Act: the question came before the court, on a motion for an injunction, whether the saving clause of the Ground Game Act 1880 (sect. 5) was applicable to an agreement for a lease for years made previously to the date of the passing of the Act, but for a term to come into operation after that date (7th Sept. 1880). Held, that the agreement in question was within the saving clause, as the Legislature did not interfere with vested rights without providing compensation: also that sect. 3 of the same Act was not retrospective. (*Allhusen v. Brooking.*) ... .. 57

**Railway—Siding—Order of Board of Trade—Costs of repairs—Injunction**—5 & 6 Vict. c. 55, ss. 4, 6, and 12—Railways Clauses Act 1845.—A railway company requested the plaintiff in this action, the owner of a siding, to provide signalling or interlocking apparatus for his junction in accordance with an order of the Board of Trade, or to pay the cost of the work it done by the company. On his refusal the company took up the junction. On motion by the plaintiff to restrain the company from interfering with his junction, the Court held that the company was not entitled to compel the plaintiff to do the work, or pay the cost of it, and granted an injunction. (*Woodruff v. The Brecon and Merthyr Tydfil Junction Railway Company.*) ... 536

**Slander—Mandatory injunction—Dismissed servant**—Letters addressed to employers' office.—Where a defendant, who had been in the employ of the plaintiffs, had been making statements to the

plaintiffs' customers injurious to their business, and trying to interfere with their customers making payments to them, an interlocutory injunction was granted restraining him from doing so. An injunction was also granted, ordering the defendant, who had resided at the plaintiffs' place of business, to withdraw a notice given by him to the post-office, to send any letters addressed to him there to another address, the plaintiffs undertaking not to open any letter addressed to the defendant except at certain fixed times, with liberty to the defendant to be present. (*Herman Loog v. Bean.*)...page 442

## INSURANCE.

## MARINE.

**Insurable interest**—No specific appropriation of goods to contract—Property not passed to the assured—"Free on board."—D. and Co., sugar merchants of London, agreed in writing to sell to the plaintiff, a merchant at Bristol, 200 tons of sugar of a certain quality as regards saccharine matter, at the price of 21s. 9d. per cwt. f.o.b. Hamburg. The sugar was to be shipped from Hamburg to Bristol, and payment was to be made by cash in London in exchange for bills of lading. D. and Co.'s agents at Hamburg, in performance of this contract and also of another Bristol contract for another 200 tons of sugar, shipped thence per the steamship *City of Dublin* 400 tons of sugar, and consigned the same to Bristol. D. and Co.'s usual course of business was, as the plaintiff knew, not to apportion particular bags of sugar to particular buyers at the time of shipment, but to apportion the various bags and the bills of lading representing them between their various buyers at a particular port, after the sugar had been shipped and after D. and Co. had received the bills of lading. This was done in order that D. and Co. might with comparative accuracy make up to each buyer the amount of saccharine matter contracted for by him. The *City of Dublin* was lost on the voyage from Hamburg to Bristol, before any appropriation of sugar had been made by D. and Co., but D. and Co. afterwards appropriated 200 tons to the plaintiff and sent him an invoice, and the plaintiff thereupon paid for the sugar so appropriated to him. The plaintiff had a floating policy on goods, and on hearing of the loss declared thereunder in respect of these 200 tons of sugar in the *City of Dublin*. Held, in an action on such policy, that the plaintiff had an insurable interest in such sugar, because, although the property had not passed to him, the words f.o.b. in the contract made between the parties, having regard to their knowledge of the course of business, showed it to be their intention that the 200 tons bought by the plaintiff should be at his risk, and that he should be liable to pay for it whether it arrived or not. (*Stook v. Inglis.*) ... .. 449

**Time policy**—Warranty—Ambiguity—Maxim, *Fortius contra proferentem*—Judicial notice.—Whether the underwriters or the owners are to be considered as the *proferentes* in regard to a condition in a policy of insurance, depends upon the character and substance of the particular condition. The respondents, shipowners, claimed against the appellants, the underwriters of a time policy of insurance, as for a total loss, and the appellants resisted the claim on the ground of a breach of a warranty in the policy. The warranty was "No St. Lawrence" between certain dates, and it was admitted that the vessel had navigated the gulf of St. Lawrence within the prohibited time, but the owners contended that the warranty applied only to the river St. Lawrence. It was proved that the navigation of the gulf was dangerous at that season, but less so than that of the river. Held, that, in the absence of any evidence to that effect, the words of the warranty disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction as to negative words, and that both the gulf and the river were prohibited. A court should take judicial notice of the geographical positions of, and general names applied to a district as shown on the Admiralty chart. (*Birrell v. Dryer.*) ... .. 130



## SUBJECTS OF CASES.

## INTERPLEADER.

**Indemnity to auctioneers—Objection to interpleader by claimant giving indemnity—Interpleader Act (1 & 2 Will. 4, c. 58), s. 1.**—By Order LVII., r. 2, it is provided that the applicant (seeking relief by way of interpleader) must satisfy the court or a judge by affidavit or otherwise (*inter alia*) that he does not collude with any of the claimants. T. and W. both claimed certain goods. W. ordered auctioneers to sell. T. gave the auctioneers notice of his claim, and that if they sold he would hold them responsible. W. being informed thereof by the auctioneers replied that he would hold them indemnified. The auctioneers having sold the goods applied for an interpleader order that an issue should be directed to be tried between T. and W., which having been made at chambers, W. appealed on the ground that the auctioneers had colluded with one of the claimants, and were therefore not entitled to the order. Held, that the auctioneers had not colluded with either of the claimants within the meaning of Order LVII., r. 2, and were therefore entitled to the order prayed. (*Re An Interpleader Issue between Thompson and Wright and others; Richardson and Roper, applicants.*) ... page 634

## JUSTICES.

**Refusal of justices to hear case—Rule to show cause—Mandamus—11 & 12 Vict. c. 44, s. 5.**—By the 5th section of 11 & 12 Vict. c. 44, it is enacted that, "whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justices enabled and directed to perform it without risk of any action or other proceeding being brought or had against them; therefore in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done." An information having been laid against P. under the 51st section of the Highway Act 1864 (27 & 28 Vict. c. 101) for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bona fide*, and thereupon refused to hear the case on the ground of want of jurisdiction. The complainant having applied under the 5th section of 11 & 12 Vict. c. 44, for a rule for the justices to show cause why they should not hear and determine the case: Held, that the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties. (*Reg. v. Phillimore and others, Justices, and Pilling.*) ... 205

## LANDLORD AND TENANT.

**Assignee of reversion—Estoppel by payment of rent—Jus tertii.**—Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title, and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment. Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to show that the alleged assignee had no

title to the reversion. (*Carlton v. Bowcock and another.*) ... page 659

**Forfeiture entry on land—Damages—5 Rich. 2, stat. 1, c. 8—Re-entry for breach of covenant and non-payment of rent—Absence of notice of breach—Conveyancing Act 1881.**—Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, to long as he does him no personal injury. Lessors had not before re-entering upon premises for nonpayment of rent and breach of covenant served upon the tenant the notice required by sect. 14, sub-sect. 1, of the Conveyancing Act 1881, specifying the breach of covenant complained of. Held, that, by reason of sub-sect. 8 of the section, its provisions did not affect the law relating to re-entry for nonpayment of rent; and under sub-sect. 2 the court had a discretion to refuse relief against re-entry for breach of covenant on the ground of want of notice, and the circumstances of this case were such that the court would refuse such relief. (*Scott v. Matthew Brown and Co. Limited.*) ... 746

**Lease—"Rates, taxes, and assessments"—Paving expenses—Liability of occupier.**—An apportionment for the expense of paving a street under this section is in the nature of a statutory debt due from the owner of the improved premises, and is not payable by the occupier under a covenant by him to pay or to indemnify his landlord against "all rates, taxes, and assessments payable in respect of the premises during the tenancy, excepting the land tax and the property tax." (*Wilkinson v. Collyer.*) ... 299

**Quiet enjoyment—Breach of covenant—Act of person lawfully claiming through lessor.**—Where the lessee's ordinary and lawful enjoyment of demised land is substantially interfered with by the act of the lessor, or of those lawfully claiming under him, the covenant for quiet enjoyment is broken, although neither the title to nor the possession of the land is otherwise affected. Defendants demised a farm to the plaintiff, with a covenant for quiet enjoyment. Defendants had previously demised an adjoining farm to another lessee, with the right to use the drains through plaintiff's land for the purpose of carrying away so much water as they were adequate to carry. Water escaped from these drains, and caused damage to plaintiff's farm. Part of such damage was owing to the excessive use by the lessee of the adjoining farm of properly constructed drains, and part to the improper construction of other drains which he used properly. Held, that for the first-mentioned damage defendants were not liable, but that the last-mentioned damage was a substantial interruption, by a person lawfully claiming through defendants, of plaintiff's enjoyment of the land demised to him, and so constituted a breach of the covenant for quiet enjoyment, for which defendants were liable in damages. (*Sanderson v. The Mayor, &c. of Berwick-upon-Tweed.*) ... 495

**Water rates—Covenant by landlord to pay "all rates and taxes chargeable in respect of premises"—Waterworks Clauses Act 1847 (10 Vict. c. 17), ss. 3, 68, 72.**—A lease, under which premises were held, contained a covenant that the lessor should "pay all rates and taxes chargeable in respect of the demised premises." The landlord having refused to pay the water rate due in respect of the premises, the tenant was compelled to pay the same. In an action brought by the tenant against the landlord to recover the amount so paid: Held, that the water rate was a "rate" within the meaning of the above covenant, and that the landlord was bound to pay the same. (*The Direct Spanish Telegraph Company v. Shepherd.*) ... 124

## LANDS CLAUSES CONSOLIDATION ACT 1845.

**Company—Costs—Entry on land—Abandonment of line—"Taking."**—Where a railway company have paid a deposit, given a bond, and entered and used land under sect. 85 of the Lands Clauses Consolidation Act 1845, there is a case of "moneys deposited

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in the bank under the provisions of this Act," and a "taking of the land" within the meaning of sect. 80, and the court has jurisdiction to make orders as to the costs mentioned in that section. (*Charlston v. Rolleston*) ... page 612

Person of unsound mind not so found—Compulsory purchase of land—Purchase by agreement—Confirmation by committee—Confirmation by heir-at-law—Conversion into personality—Fund in court—Payment out.—A corporation gave notice under the L. C. C. Act 1845 of their intention to take lands belonging to a person of unsound mind not so found by inquisition. Her uncle assumed to act for her, and surveyors were appointed by him and the corporation, and the price fixed was paid into court to the credit of the corporation. The money was afterwards paid into court to the credit of the corporation. It was afterwards invested, and placed to the credit of an account "*Ex parte* the [corporation]; the account of P. T., a person of unsound mind." P. T. was afterwards duly found to be a lunatic, and committees were appointed, to whom the dividends were subsequently ordered to be paid for application in the same manner as the rents had been applied previous to the sale. No conveyance to the corporation was ever executed. Upon P. T.'s death the question arose whether the fund in court representing the purchase money was to be treated as realty or personality, and a petition was accordingly presented by the heir-at-law asking that it might be paid out to him, he being willing to convey the land to the corporation. Held, that the petition must be granted, on the ground that realty of a person of unsound mind could only be converted by the statutory and proper methods, which had not been observed. (*Re Tugwell*) ... 83

Railways Clauses Act 1845—Jervis's Act—Compensation—Settlement by two justices of the amount—Time.—The determination by justices under sect. 24 of the Lands Clauses Act 1845 of the amount of compensation to be paid by a railway company to a landowner whose lands have been injuriously affected by the construction of the railway is not an order for the payment of money within 11 & 12 Vict. c. 43, s. 1, and therefore sect. 11 of that Act does not apply, and the justices have jurisdiction although the complaint be not made within six months after the land has been so injuriously affected. (*Reg. v. Edwards (J stice)* and *Eastern and Midland Railway Company*.) ... 586

## LAW OF CANADA.

Right of barrister to sue for fees—Professional remuneration.—Where a skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must be held to employ him upon the usual terms according to which such services are rendered, in the absence of any stipulation to the contrary; and where the contract of employment is silent as to remuneration it must be taken to be an implied condition that he is to be remunerated for his services upon the same terms upon which they are usually rendered. The Canadian Government of Ottawa in the province of Ontario retained the respondent, a member of the Quebec Bar, to act as their counsel before a commission sitting at Halifax in Nova Scotia. By the law of Quebec a member of the Bar is entitled to sue for his fees, but in Ontario and Nova Scotia the English rule prevails, and he cannot do so. Held, that the respondent could recover as upon a *quantum meruit* in respect of the services rendered by him. (*Reg. v. Doutre*.) 670

## LAW OF CEYLON.

Roman-Dutch law—Right of subject to sue the Crown—Claim in reconvention—Set-off—Petition of right.—The petition of right does not exist in Ceylon, but by Ordinances of 1856 and 1868 an established practice of instituting suits against the Queen's Advocate in respect of claims against the Crown arising *ex contractu* is recognised and regulated. Held, that such practice must be held to be

incorporated into the law of the colony, whether the claim be made by an original action or "in reconvention" (by a counter-claim). Held, further, that though execution cannot issue against the Crown, a claim recovered against it may be set off against a claim recovered by it, and judgment may be given for the difference only. *Semble*, that by the Roman-Dutch law of Holland, as it existed at the date of the conquest of Ceylon, a subject could not sue the Crown. (*Hettihewage Appu and others v. The Queen's Advocate (Consolidated Appeals)*; *The Queen's Advocate v. Hettihewage Appu and others*.) ... page 401

## LAW OF JERSEY.

Set-off—Compensation—Liquid debt.—By the law of Jersey a claim for set-off, or "compensation," is admissible in the case of a "liquid" debt; that is, an admitted debt, or a debt capable of being readily proved, but not otherwise. (*Dyson v. Godfray*.) ... 580

## LAW OF MAURITIUS.

Bankruptcy Ordinance No. 33 of 1853—Evidence as to bankrupt's estate—Form of adjudication.—By sect. 43 of the Bankruptcy Ordinance, No. 33 of 1853, of Mauritius, a trader may petition for an adjudication of bankruptcy against himself, "provided always that unless such trader shall . . . make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges, to be estimated by the court, of prosecuting the bankruptcy, such petition shall be dismissed." Held, that the satisfaction required by the section is in the personal discretion of the judge, and that strict legal proof is not necessary, and that the adjudication is conclusive on the point. Held, further, that where a merchant carried on business under the style of "E. and Co.," being in fact himself the only person interested in the business, an adjudication against the firm was valid as against the individual, the defect being merely formal. (*The Oriental Bank v. Richer*.) ... 273

## LAW OF NATAL.

Surety—Power of attorney—Renunciation of privileges by married woman—Express words.—By the law of Natal a married woman cannot be effectually bound as a surety unless she specially renounces the benefits of the "*Senatus Consultum Velleianum*," and of the rule "*De Authenticis*," the effect of which is to render her deed void unless she has expressly renounced her right to plead them. The respondent, a married woman, gave a power of attorney by which she authorised her attorney (*inter alia*) "in her name to enter into securities . . . of what nature or kind soever, and generally for her and in . . . her name to . . . perform all such acts, matters, and things . . . as may be necessary." Her attorney professed to bind her personally as a surety to a bank for the floating balance that might be due from a firm of J. and Co., and renounced the above-mentioned privileges in her behalf. Held, that in the absence of express words in the power of attorney, or words from which it could be fairly implied that she intended to confer authority to renounce her privileges, the bond of suretyship was void. (*Maokellar v. Bond*.) ... 479

## LAW OF NEW SOUTH WALES.

Use of steam locomotives on tramways—Stat. 22 Vict. No. 19—Stat. 43 Vict. No. 25.—By the Tramways Extension Act 1880 of New South Wales (43 Vict. No. 25), sect. 3, the Commissioner of Railways was authorised to maintain and work a tramway constructed under a repealed Act of 1879, and to exercise all the powers and authorities conferred upon him by that Act and the Act 22 Vict. No. 19 incorporated therewith. The latter Act (the Government Railways Act) by sect. 100 made it lawful, under proper regulations, "to use and employ locomotive engines or other moving power,

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and carriages and waggons to be drawn or propelled thereby;" and by sect 141 the word "railway" shall be construed to extend to any tramway constructed or worked under the provisions of the Act. Held, that it was lawful to use a "steam motor" upon a street tramway worked under sect. 3 of the Tramways Act of 1880. (*The Commissioner for Railways v. Toohy.*) ... ..page 582

## LAW OF ONTARIO.

Riparian proprietor—Right to float timber—Dams and slides in streams—Stat. 12 Vict. c. 87, s. 5.—The Ontario statute, 12 Vict. c. 87, s. 5 (Consol. Stat. Up. Can. c. 48, s. 15), enacts "that it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in Upper Canada, during the spring, summer, and autumn freshets. Held, that this section does not apply only to such streams as are available at all places in their natural state for floating timber, and that where there is a natural obstacle in a stream, and a riparian proprietor owning the land on both sides of the stream has made artificial improvements in the stream for the purpose of overcoming such obstacle, the public have a right under the statute to avail themselves of such improvements for floating down their timber. (*Caldwell v. McLaren.*) ... .. 370

## LEASE.

Mistake—Lease—Annulment or rectification of.—Where there has been a mistake in the parcels contained in an executed lease, although it may be a mistake by the plaintiff only, the court will order the annulment, or, at the option of the defendant, the rectification of the lease. (*Paget v. Marshall.*) ... .. 351

Option to purchase freehold reversion—Intestacy of lessee—Benefit of covenant—Personal estate.—The benefit of a covenant, contained in a lease, that the lessor will sell the freehold reversion at a fixed price, is an integral part of the lease, and forms part of the personal estate of the lessee. A lease of lands contained a covenant by the lessor that if at any time after the date of the lease the lessee, his executors, administrators, or assigns should desire to purchase the freehold, the lessor would sell and convey the same to him, his heirs and assigns, or as he or they should direct and appoint, at a fixed price. The lessee died intestate, and without having exercised the option. Held, that the benefit of the covenant passed to the administrator of the lessee, and could only be exercised for the benefit of the next of kin of the lessee. (*Re Adams and the Vestry of St. Mary Abbots, Kensington.*) ... .. 382

(See BANKRUPTCY.)

## LICENSING ACTS.

Selling intoxicating liquor to a drunken person—Conviction for—Knowledge of condition of customer—No indications of insobriety—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 13.—Sect. 13 of the Licensing Act 1872 enacts that, "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding, for the second and any subsequent offence, twenty pounds." Held, that this section contains an absolute prohibition against selling liquor to a drunken person, and is not confined to those cases where the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk, the object of the Act being that, when licensed persons sell intoxicating liquor, they should find out that the person to whom it was sold was not drunk. (*Curdy, app., v. Le Coq, resp.*) ... .. 265

Selling liquor at an unlicensed place—Transaction in the nature of a sale—Wife licensed—Husband taking spirits to an unlicensed house to be raffled for—Whether husband an admissible witness—

Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 3, 51, 62.—The appellant, Mrs. S., a married woman who had a licence to sell intoxicating liquor, was convicted under the 3rd section of the Licensing Act 1872 of selling intoxicating liquor at a place where she was not authorised by her licence to sell the same. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence, to the effect that "on the 24th Dec. 1883 he took spirits from the licensed house of the appellant to the house of one B.; the drink was then raffled for, and he was present during the raffle; the money was put in a basin on the table, and it was afterwards brought to the inn and put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from the appellant's house by her husband was raffled for at B.'s house, the husband himself being present at the time. The justices convicted the appellant of selling the liquor at B.'s house. Held, that what took place at B.'s house was a transaction in the nature of a sale within the meaning of sect. 62 of the Act, and that, as the appellant was a competent witness and did not contradict the statement made by her husband, there was sufficient evidence to support the conviction (*Seager, app., v. White resp.*)page 261

## LODGER.

Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79)—Premises used for business purposes.—In order to constitute a person a "lodger" within the meaning of the Lodgers' Goods Protection Act 1871, it is necessary that he should live, i.e., habitually sleep, on the premises. The protection afforded by the Act does not extend to the occupation of premises for business purposes only. (*Heawood, app., v. Bone, resp.*)... .. 125

## LUNACY.

Alleged insanity—Order for inquiry before judge of High Court—Lunacy Regulation Act 1862.—It is not necessary that a writ of summons shall be issued previous to the trial of an issue directed by an order in lunacy under sect. 4 of the Lunacy Regulation Act 1862. (*Re Scott.*) ... .. 735

Appointment of curator by Scotch court—Omission from order of declaration as to unsoundness of mind—Transfer of stock—Lunacy Regulation Act 1863.—On an application by the curator of T., a person resident in Scotland, for the transfer of stock standing in his name to the curator, it appeared that the petition on which the Scotch court had appointed the curator stated that T. had been for several years of unsound mind, and was at that time incapable of managing his affairs. The only ground for the petition stated in the affidavits annexed was that T. was of unsound mind. By a memorandum indorsed on the petition the Scotch court appointed the curator, but the order contained no express declaration that T. was of unsound mind. It was shown that curators were appointed in Scotland, not only in cases of unsoundness of mind, but also where persons were, by illness or absence abroad, incapable of managing their affairs. Held, that the memorandum indorsed on the petition amounted to a declaration, within the meaning of sect. 141 of the Lunacy Regulation Act 1863, that T. was of unsound mind. (*Re Tarratt.*) ... .. 310

Divorce—Illegitimate child—Suit to perpetuate testimony—Rules of Court 1833, Order XXXVII., r. 35.—A lunatic, having several children, obtained a divorce from his wife on the ground of her adultery. It was alleged that one of the children born before the divorce was illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegiti-

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macy. Held, that the proper course was for the court to settle some of the lunatic's property on his children, and the legitimate children having raised the question as to the right of the child who it was alleged was illegitimate to participate, could then bring an action to perpetuate the testimony. (*Re Stoer*.)... ..page 141

Judicial separation—Permanent alimony—Allowance out of lunatic's estate—Assignment.—Alimony is not property within the meaning of sect. 25 of 20 & 21 Vict. c. 85. A decree was pronounced for a judicial separation, and an order made for the payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in Lunacy and in Chancery, certain dividends to which he was entitled in a Chancery suit were ordered to be carried to an account in lunacy, and out of them the sum of 60*l.* a year was directed to be paid to the wife in respect of her alimony, until further order. She afterwards mortgaged the annuity to secure the payment of a certain sum. Held, that the court would not order the payment of the annuity to the mortgagee, as whether it was considered as alimony or as an allowance made to the wife by the court in lunacy, she could not alienate it. (*Re Robinson*.)... .. 737

## MANDAMUS.

Jervis's Act—Rule for mandamus—Concurrent remedies—Applicant in person—11 & 12 Vict. c. 44, s. 5.—A rule under sect. 5 of Jervis's Act, and a rule for a mandamus calling upon justice to show cause why they should not proceed to hear and determine the matter of an application for a summons, are concurrent remedies. A rule under the 5th section of Jervis's Act is not confined to cases where the justices need protection in doing any act relating to their duties. A rule under this section may be moved for by an applicant in person. (*Reg. v. Biron and others*.)... .. 429

Return of unconditional compliance—Plea to—Rules of Supreme Court 1883.—Where a return is made to a writ of mandamus of unconditional compliance therewith, the prosecutor can still plead to the return, notwithstanding the provisions of Order LIII., r. 9, as the former practice is kept alive by Order LXVIII., r. 1, and Order LXXII., r. 2. (*Reg. on the prosecution of Hooley v. The Licensing Justices of Pirehill North, Staffordshire*.)... ..203, 534

## MARKET RIGHTS.

Injunction—Approaches to a market—District board of works—Metropolis Local Management Act 1855.—A district board of works gave notice of their intention, by virtue of the power given to them by sect. 108 of the Metropolis Local Management Act 1855, to place posts on the sides of the footways and carriage-ways leading into a market, and forming part of the market area. At the trial of the action, in which the plaintiff claimed an injunction against the board, the Court held, that, the plaintiff having established market rights over the entrance streets, with which the posts would interfere, and market rights being excepted by sect. 91 from the operation of the same Act, the board had no power to put up posts in the entrance streets, and granted an injunction with costs. (*Horner v. The Whitechapel District Board of Works*.)... .. 414

## MARRIAGE SETTLEMENT.

After-acquired property of wife—Covenant to settle.—By a marriage settlement, dated in 1852, it was agreed and declared by and among the parties thereto, and the husband covenanted with the trustees of the settlement, that all such real and personal estates and effects as the wife should be, at the time of the marriage, or as she, or the husband in her right, should during the coverture become possessed of or entitled to, should, when and so far as the rights, interests, or powers of the husband and wife, or either of them, in or over

the same would allow, be conveyed and assigned to the trustees of the settlement upon the trusts therein declared. At the date of the marriage the wife was entitled to a vested reversion in certain personal property. After the death of the husband and wife the reversion fell in. Held, that, although the clause as to settling after-acquired property contained no express covenant by the wife to do so, the act contemplated and intended to be done was an act as much to be done by the wife as by the husband, and consequently the reversionary interest was bound by the settlement. (*Re D'Estampes; D'Estampes v. Hankey*.) ... ..page 502

Setting aside—Fraudulent misrepresentation—Jurisdiction.—The plaintiff in an action to set aside a settlement made upon his marriage with the defendant I. S., then a widow, by his statement of claim alleged that, previous to the execution of the settlement, I. S. stated to him that her first husband had been divorced from her, and at her suit, by reason of his cruelty and adultery, and further, that she had not herself been guilty of adultery with G. W., to whom, after the death of her first husband, she was married. He further alleged that such statements were made to induce him to enter into the marriage and execute the settlement; that, in reliance on the representations, and in consideration of the marriage, he executed the settlement; that the marriage was solemnised, and the plaintiff had subsequently discovered, and it was the fact, that the representations were false to the knowledge of the defendant I. S., the truth being that she had herself been divorced from her first husband at his suit, and by reason of her adultery with G. W. Held that, the statement of claim disclosed no case upon which the court had jurisdiction to grant relief, and that it must therefore be ordered to be struck out under Order XXV., r. 4. (*Johnson v. Johnson*.) ... .. 537

Wife an infant—Life interest in property without power of anticipation—After-acquired property—Covenant to settle—Bequest—Election—Sequestration.—By a marriage settlement, dated in 1860, after reciting that it had been agreed that the wife (then an infant) and the husband should enter into the covenant thereafter contained for the settlement of her future estate and effects, the husband settled certain property upon trust for himself for life, then for the wife for life, and then for the children of the marriage; and the father of the wife settled certain property in which he gave her the first life interest for her separate use without power of anticipation; and the deed contained a covenant by the husband and wife to settle any after-acquired property of the wife upon the trusts therein mentioned. In 1883, and during the coverture, the wife became entitled for her separate use to certain property which was bequeathed to her. This was bound by the covenant of the wife, but, as she was an infant at the time of the marriage, the covenant was voidable. She elected to avoid her covenant as to the property, and to take it for her separate use, not under but against the settlement. Held, that the restraint upon anticipation did not prevent the court from giving compensation out of such life interest; that the income which would have been payable to the wife if she had not so elected, and all the other interest to which she would have been entitled under the settlement, ought to be applied in making compensation to the persons disappointed by her election; and that the trustees of the settlement must retain and apply the same accordingly. (*Re Vardon's Trusts*.) ... .. 884

## MARRIED WOMAN.

Life interests—Election—Restraint on anticipation.—A testatrix who was donee of a power of appointment amongst the children of J. W., by her will and oodils exercised such power in favour of persons, some of whom were objects of the power, and also in favour of others who were not, and also gave to two of the appointees, who were married women, and children of J. W., certain property of her own for life without restraint on

anticipation. The question arose whether the above-mentioned married women could be put to their election. Held, that, in the case of a married woman to whom a life interest with a restraint on anticipation is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the nature of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. (*Re Wheatley; Smith v. Spence.*) ... ..page 681

**Restraint on anticipation—Settled realty—Mortgage of income of.**—By a settlement, dated in 1864, freehold property was conveyed to trustees upon trust to let the same, and pay the rents and annual proceeds to C. S. W., a married woman, during her life, for her own sole and separate use, free from the debts, control, or engagements of her present or any future husband; and "the receipts of her ... for the said rents and annual proceeds to be given after the same shall become due" to be "good and effectual discharges" to the trustees for the same; and from and after the decease of C. S. W., then upon trust to pay the rents and annual proceeds to her husband, in case he survived her, during his life; with ultimate trusts for sale and division amongst the children and issue of C. S. W. by her then present or any future husband, as should be living at the time of such division. In 1881 C. S. W. and her husband mortgaged the income of the settled property to secure a loan of 1000*l.*, and in 1883 they further charged such income, together with other property, with the payment of 500*l.* Notices of the mortgage and further charge were duly given to the trustees of the settlement. C. S. W. did not receive any of the money secured thereby, but her husband received the same, and applied the whole in payment of his own debts. The question was, whether the mortgage was a valid charge upon the income of the settled property, and who was entitled to be paid such income. Held, that C. S. W. was restrained from anticipation, and her receipt was the only discharge which the trustees could accept. (*Re Smith; Chapman v. Wood.*)... .. 501

#### MARRIED WOMEN'S PROPERTY ACT 1882.

**Cause of action before Act—Right of married woman to sue alone.**—The Married Women's Property Act 1882, s. 1 (2), which provides that a married woman shall be capable of suing in all respects as if she were a *feme sole*, and her husband need not be joined as plaintiff, deals with procedure only, and therefore applies where the cause of action arose before the Act came into operation. Plaintiff, a married woman, brought an action for assault, libel, and trespass, and her husband was not joined as plaintiff. The alleged causes of action arose before the Married Women's Property Act 1882 came into operation. At the trial plaintiff was nonsuited. Held, that plaintiff was entitled to maintain the action without her husband being joined, and therefore the nonsuit was wrong, and there must be a new trial. (*Weldon v. Winslow.*) 643

**Separate estate—Reversionary interests—Payment out on separate receipt—Property acquired in possession after 1832—Malins' Act—Married Women's Property Act 1882.**—A tenant for life of a fund in court had died, and a petition for payment out was presented by parties entitled in remainder, two of them being married women, and married before 1883. The married women were entitled to their shares on the death of the tenant for life, and the question arose whether they were entitled to have their shares paid out on their separate receipt by virtue of the Married Women's Property Act 1882, s. 5. Held, that property to which a woman married before the Act of 1882 came into operation, was entitled in reversion at the date of the Act, but which had since the commencement of the Act become a title in possession, was within the scope of sect. 5, and therefore might be paid out to her on her separate receipt without the necessity of her separate examination. (*Baynton v. Collins.*) ... .. 681

**Separate use—Property acquired after contract—Married Women's Property Act 1882.**—The court was moved to enforce against the defendant, a married woman, an arbitrator's award made in pursuance of a consent reference by an order of April 1883. The cause of action was a contract entered into in 1879 by the defendant with the plaintiff, and it appeared that by the order of reference the defendant had agreed to pay the sum awarded by the arbitrator, and costs. It was submitted by the plaintiff that sect. 1, sub-sect. 4, of the Married Women's Property Act 1882 was retrospective, and that separate property acquired by the defendant subsequently to the date of the contract could be taken in execution, also that the consent order must be held to be equivalent to a new contract. Held, that sub-sect. 4 had no retrospective operation so as to include contracts entered into by a married woman before the passing of the Act, as it was not expressly stated that it was to be retrospective; but that an order made after the passing of the Act by consent in an action by a creditor against a married woman in respect of her contract before the Act (by which order all questions under the contract were referred to an arbitrator, who was to have all the powers of a judge of the High Court, and the parties bound themselves to keep the award) was an agreement by a married woman after the Act within sect. 1, sub-sects. 3 and 4; and that her separate estate which she had at the date of such agreement was liable to pay the amount found by the award to be due from her under the contract; and therefore, that any separate estate which the defendant had at, or after, the date of the contract was liable to be taken in execution of the judgment founded on the consent order. (*Conolan v. Leyland.*) ... ..page 895

#### MASTER AND SERVANT.

**Action for injury caused by dangerous premises—Knowledge of master—Ignorance of servant—Sufficiency of statement of claim.**—In an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery on premises or materials provided by the defendant for the purposes of the work, it is necessary, in order that the plaintiff may succeed, to prove that the danger or defect which caused the injury was known to the defendant and was not known to the plaintiff, and a statement of claim which does not allege both these facts discloses no cause of action and is bad. (*Griffiths v. The London and St. Katherine's Docks Company.*)... .. 533

#### MAYOR'S COURT, LONDON.

**Prohibition—Cause of action arising wholly or in part within the jurisdiction—Mayor's Court of London Procedure Act 1837.**—A verbal agreement was entered into outside the jurisdiction of the Mayor's Court, London, by which the defendant was to purchase from the plaintiff the lease of a shop situate at New Cross, in the county of Surrey, together with the goodwill and stock-in-trade of a drapery business carried on there. The terms of this agreement were embodied in two counterpart documents, one of which was signed by the defendant at Bow, in the county of Middlesex, and the other subsequently signed by the plaintiff, in the city of London, and these two documents were then exchanged between the parties' solicitors within the city. Neither of the parties dwelt or carried on business within the city of London or the liberties thereof. A sum of 50*l.*, being the balance of the purchase money, remaining unpaid, the plaintiff sued the defendant for this sum in the Mayor's Court. The defendant thereupon obtained at chambers a writ of prohibition restraining the Mayor's Court from proceeding with the action. Held, on appeal, that the prohibition was rightly granted, as no part of the cause of action arose within the jurisdiction of the Mayor's Court. (*Alderton v. Archer.*) ... .. 661

METROPOLIS MANAGEMENT AMENDMENT  
ACT 1862.

"General line of buildings"—"Decided by the superintending architect of the Metropolitan Board of Works"—Jurisdiction of magistrate—Architect's decision.—S., the owner of a house in the High-road, Lee, Kent, the frontage of which did not exceed fifty feet in distance from the said road, without obtaining the consent of the Metropolitan Board of Works, commenced to erect a building, extending the frontage of the house to the road. Subsequently the superintending architect of the Metropolitan Board of Works for the time being fixed the general line of buildings, of which S.'s house formed part, in such a position that S.'s new building projected beyond it, although it did not extend beyond the line of a stable, chapel, and shops abutting on the same road, east and west of the ends of the general line of buildings fixed as aforesaid. Held, on a case stated by a metropolitan police magistrate, that, on the hearing of a summons for a breach of the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), the magistrate is bound by the architect's certificate as conclusive, and has no jurisdiction to consider for himself what is the general line of buildings. (*The Plumstead District Local Board v. Spackman*.) ... .. page 757

## MINES.

Support of surface—Inclosure Act—Compensation.—By a private Inclosure Act all rights of commons over the waste of a manor were extinguished and allotments were made in respect of ancient dwelling-houses within the manor having right of common. Held, that the Act did not reserve to the lords of the manor a right so to work the mines as to let down the surface of the allotments of inclosed common land. (*Love v. Bell*.) ... .. 1

## MONEY-LENDING SOCIETY.

More than twenty members—Non-registration—Sect. 4 of Companies Act 1862—Loan to member—Subsequent registration—Acquiescence of debtor—Bankruptcy of debtor—Admissibility of society's proof.—A money-lending society, consisting of more than twenty persons, and not being duly registered under the Companies Act 1862, advanced 100l. to one of its members upon a promissory note, the amount to be repaid by monthly instalments. Subsequently the society was registered in accordance with the Act, and the debtor, who had duly paid instalments up to the time of registration, continued to pay further instalments up to the time of his bankruptcy. When he became bankrupt the society tendered a proof for the balance of his debt to them, but the trustee rejected the proof on the ground that the society, by reason of the non-registration at the period when the advance was made, could not have enforced any claim against the debtor, and were therefore not entitled to prove. The County Court judge, however, admitted the proof on the ground that the society might have enforced their claim against the debtor because, at the first meeting of the society, there were less than the prescribed number of members. Held, on appeal, that the society was within the scope of the 4th section of the Companies Act 1862, but that it must be inferred from the payment by the debtor of instalments after the registration that he had acquiesced in the registration; and that the several members of the society had entered into a mutual and binding contract to treat as binding the engagements of the old society, in which contract the agreement of each member was a good consideration for the agreement of the remainder; and further, that this acquiescence on the part of the debtor was binding on the trustee, and rendered the proof admissible. (*Re Thomas; Ex parte Poppleton*.) ... .. 602

## MORTGAGE.

Appointment of receiver by mortgagee—Subsequent distress by mortgagee—Injunction—Conveyancing Act 1881.—A mortgagee appointed a receiver of

the income of the mortgaged property under the Conveyancing Act 1881, and gave notice of the appointment to the mortgagor. The mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver. The mortgagor claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent. Held, that an injunction must be granted to restrain the mortgagor from interfering with the receiver, or receiving the rent. *Semble*, that even if the mortgagor had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests. (*Bayly v. Went*.) ... .. page 764

## Building society—Statutory receipt—Building Societies Act 1874—Legal estate—Priority—Notice.

—In 1872 A. mortgaged four freehold houses to a building society. In 1877 he sold and conveyed one of the houses to the defendant, who did not make any investigation of the title, nor require the production of any title deeds, nor did he know of any incumbrance; but he took possession immediately after the conveyance, and had continued in possession ever since. A. acted as his solicitor in the transaction. In 1881 A. applied to the plaintiff to pay off the mortgage and lend a larger sum. The plaintiff having agreed to do this, they attended at the office of the society, and the plaintiff paid the money due on the mortgage. The usual statutory receipt was indorsed on the mortgage deed, in accordance with sect. 42 of the Building Societies Act 1874, under which statute the society was incorporated. The mortgage and other title deeds were then delivered by the secretary of the society to the plaintiff. A. subsequently executed a mortgage of the four houses to the plaintiff, who knew nothing of the defendant's purchase. The question was, what was the effect of the receipt indorsed upon the mortgage, and whether the plaintiff or defendant had priority in title to the house which had been sold to the latter. It was contended that the plaintiff, who had no knowledge, must be treated as having constructive notice of the defendant's ignorance of the first mortgage, because the defendant was in possession of the house he had bought. Held, that the plaintiff had no notice that the defendant was ignorant of the mortgage to the society, and that, if he had known that fact, it would not alter his position. Held, also, that the statutory receipt vested the legal estate in the plaintiff, and that his mortgage, to the extent of money paid to the society and interest, was prior to the defendant's claim. (*Sangster v. Cochrane*.) ... .. 889

Disclaimer by one defendant—Notice of motion for foreclosure—Costs of defendant's appearance.—A first mortgagee brought an action for foreclosure against the mortgagor and a number of subsequent incumbrancers of whom G. was one. G. put in a defence disclaiming all interest and consenting to be dismissed without costs. It was admitted that G. had had an interest, and was properly made a party to the action. The plaintiff, instead of obtaining the common order to dismiss, served G. with notice of motion for judgment for a foreclosure decree against him. G. appeared at the hearing. Held, that it was unnecessary for him to appear, and he was not entitled to his costs. (*Lewin v. Jones*.) ... .. 59

Foreclosure—Costs of action for foreclosure of mortgages of two estates—Conveyancing Act 1881.—The costs of a foreclosure action brought by a mortgagee in respect of mortgages to him of two distinct estates by the same mortgagor to secure two distinct advances will not be apportioned between the two estates, but an account will be directed of what is due to the plaintiff for principal and interest under each mortgage and of the whole costs of the action, and the mortgagor will not be at liberty to redeem one of the two estates except upon payment of what may be so found to be due. (*Clapham v. Andrews*.) ... .. 96

—Rules of Court, Form 5, Appendix C.—Immediate judgment—Form of order.—In a foreclosure action, when the statement of claim

- followed Form 5, Appendix C., the defendant did not appear at the trial, and the plaintiff proved his debt and interest orally. The Court gave judgment for payment within ten days of principal, interest, and costs. Account to be taken and, in default of payment of certified amount within six months from certificate, foreclosure. (*Lee v. Dunsford.*) ... page 590
- Foreclosure—Subsequent incumbrancers—Time for redemption—Successive periods—Further time.**—In a foreclosure action the question came before the court whether a judgment for foreclosure nisi should, in the event of there being a second mortgagee entitled to redeem, give successive periods of redemption to such second mortgagee and the mortgagor. Held, that the ordinary right of the mortgagor was that he should have six months wherein he could redeem; that it was anomalous that a mortgagor by dealing with the equity of redemption should, by further mortgages, gain further time: that, though there was no settled rule, the practice of the courts had been to give one time only, and the court would adopt that practice in this case; that the court would give successive periods of redemption on the request of the puisne mortgagees, but not on the request of the mortgagor, and that, if the puisne mortgagees made such a request, their mortgages must either be proved by them or admitted by the mortgagor. (*Platt v. Mendel and others.*) ... 424
- Priority—Legal mortgage—Negligence in custody of deeds—Facilitating fraud—Postponement.**—C., being manager of an insurance company, executed a legal mortgage of some property of his own to the company, the title deeds being placed in the company's safe. To this safe C. had, as manager, a key; by means of it he abstracted the deeds and deposited them with W., who had no notice of the fraud, by way of equitable mortgage to secure an advance: Held, that the company had not been guilty of any such gross negligence as would require that their mortgage should be postponed to W.'s. (*Northern Counties of England Fire Insurance Company v. Whipp.*) ... 806
- Priority—Part of trust fund in court—Notice to trustees—Stop-order.**—C. mortgaged a reversionary trust fund to which he was entitled, part of the fund being in the hands of trustees and part in court, and the mortgagee gave notice to the trustees. C. afterwards mortgaged the same fund to an insurance society, who had no notice of the prior mortgage, and the society gave notice to the trustees and obtained a stop-order. Held, that, as to the part of the fund in court, the society was entitled to priority. (*Mutual Life Assurance Society v. Langley.*) ... 284
- Second mortgage—Notice to first mortgagee—Mistake—Rights of second mortgagee.**—The second mortgagee of leaseholds gave notice of their charge to the first mortgagee. The mortgagor, with the concurrence of the first mortgagee, and acting by the same solicitors, subsequently sold the property, and the proceeds of sale were distributed without having regard to the rights of the second mortgagee, whose notice of charge had been forgotten. Upon an action by the second mortgagee against the mortgagor and the first mortgagee for an account, the mortgagor not appearing: Held, that the fact of the notice of the second charge having been forgotten did not alter the rights of the parties; and that the first mortgagee was liable to the extent of the balance of the proceeds of the sale after the satisfaction of their charge. (*West London Commercial Bank v. Reliance Permanent Building Society.*) ... 325
- Voluntary settlement—Equity of redemption—Sale by mortgage—Effect of consolidation.**—Where a mortgagor has executed a voluntary settlement of the equity of redemption in the mortgaged property, a sale by the mortgagee under his power does not affect the right of the persons claiming under the settlement to the surplus proceeds of sale. The owner of the W. estate executed a voluntary settlement of it, and afterwards mortgaged it to M. A year afterwards he mortgaged other property to M. Held, that the statute 27 Eliz. c. 4, gave no right to consolidate against the persons entitled under the settlement. (*Re Walthamton Estate.*) ... page 280
- MORTMAIN ACT.**
- Interest in land—Mortgage of life interest in trust funds invested on mortgage of land—Mortgage of life interest and of estate in remainder in similar trust funds.**—A testator gave to trustees upon trusts in favour of charities certain property, including (a) 100l. due to him from a husband and wife, and secured by a mortgage by them of the wife's life interest under a will in a sum of money which was at the time of the testator's death invested upon a mortgage of freeholds; (b) two sums of 800l. and 200l., due to him from a widow and her two children, and secured as to the 800l. by a mortgage of the widow's life interest and one child's estate in remainder in settlement funds, and as to the 200l. by a mortgage of such life interest, and the other child's estate in remainder in the same funds. The settled funds were at the time of the testator's death invested upon mortgages of freeholds. Held, that the bequest of the 100l. debt was good, it being pure personality, since the testator could in no manner obtain possession of the land; but that those of the 800l. and 200l. debts were void as being impure personality, since he might, not necessarily, but by possibility, obtain possession of the land by foreclosure. (*Re Watts; Cornford v. Elliott.*) ... 85
- NEGLIGENCE.**
- Evidence of—Liability of harbour authority—Crown Suits Act 1881—Public work—"Work of like nature."**—The harbour of W. was under the control and management of the Executive Government of the colony. The staithes and wharves belonged to the Government, which received wharfage and tonnage dues in respect of vessels using them. There were no harbour dues, and the public had a right to navigate subject to the harbour regulations made by the Government, which had a right to remove obstructions in the harbour. A ship of the respondents, while lying alongside the wharf or staithes, in the usual and customary manner at the port, settled with the fall of the tide upon a snag lying at the water and sustained damage. There was evidence that the harbour master was aware, before the accident, of the existence of a danger at the spot, though not of its precise nature. Held, that it was the duty of the Government to take reasonable care that vessels using the staithes in the ordinary manner might do so without danger, and that they were liable for the injury sustained. The Crown Suits Act 1881, s. 37, enacts, "No claim or demand shall be made upon or against Her Majesty . . . unless the same shall be founded upon . . . a wrong or damage, independent of contract, done or suffered by or under" the authority of the Executive Government of the colony, "in, upon, or in connection with a public work as hereinafter defined. 'Public work' means any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by the Government of the colony." Held, that the omission to take reasonable care in this case was a wrong done by or under the authority of the Executive Government, and that the staithes were "a work of a like nature" within the meaning of the section. (*Reg. v. Williams.*) ... 546
- Railway company—Level crossing in station—Contributory negligence—Accident caused by deceased's own negligence—Provinces of judge and jury.**—The action was brought, under Lord Campbell's Act, by a widow, for the loss of her husband. The deceased intended travelling by the defendants' railway to N. by the train leaving W. at 9.50 p.m. He arrived at W. station about 9.30 p.m., and took his ticket at the booking-office, which was on the down platform. On the up platform, from which his train was to start, there was no waiting-room of any kind for passengers,



## SUBJECTS OF CASES.

and there was no shelter, except a shed, open in front, and without either fire or fireplace. As the night was very cold and dark, the deceased went into the waiting-room on the down platform, and there waited by the fire until the train was heard approaching. On hearing the train approaching, the deceased got up quickly and hurried to get over to the other side of the line from which the train was to start. There was no bridge or subway across the line, but only a level crossing, at each end of which a lamp was fixed. The deceased went to the level crossing, and attempted to cross the line, when the train was about twenty yards distant from the crossing, but before he was able to cross he was struck and killed on the spot by the engine of the train by which he intended to travel. The ticket-office being on the opposite side of the line to that from which the train was to start, it was necessary for the deceased, after getting his ticket, to cross the line, and there was no means of crossing except by the level crossing. At the approach of a train it was usual for a porter to stand at this crossing, to warn passengers against crossing when a train was approaching; but on the night in question there was no porter at the crossing to give warning of such danger, and no notice was given of the approach of the train; no whistle was sounded, and no bell was rung. The learned judge, holding that there was evidence of negligence on the part of the defendants in not having a porter at the crossing to warn passengers, and in not giving notice of the approach of the train, left the whole question to the jury, who found a verdict for the plaintiff for 100*l*. Held, that the judge ought to have withdrawn the case from the jury and directed a nonsuit, on the ground that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased, and showed that he had so far conducted, by his negligence, to his own death, as to disentitle the plaintiff to recover. Held also, that in an action for damages for the negligence of the defendants, it is not sufficient to entitle the plaintiff to have his case submitted to a jury that he has proved some negligence on the part of the defendants, if it also appears, in the opinion of the judge, that the plaintiff was guilty of such contributory negligence that no reasonable jury could find a verdict in his favour. (*Wright v. Midland Railway Company.*) ... ..page 539

## OVERHEAD WIRES.

Telephone—Injunction—Property of district board in street—Meaning of words "vest" and "street"—Metropolis Management Act 1855—Telegraph Act 1863.—By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96, "all streets being highways . . . shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." Defendants, a telephone company, fixed a telephone wire to a chimney, and stretched it across a street, which was vested in plaintiffs as the district board, at a height of about thirty feet from the ground. Plaintiffs brought an action for an injunction to restrain defendants from keeping up the wire. Held, that what was vested in plaintiffs was the property in the surface of the ground together with as much space, both above and below the surface, as amounted to the area of ordinary user; and that, as the wire in question was above this area, and was not shown to be dangerous, so as to amount to a nuisance, plaintiffs were not entitled to an injunction. Held, also, that defendants did not require plaintiffs' consent under 26 & 27 Vict. c. 112, s. 12, to entitle them to place the wire across the street. (*The Board of Works for the Wandsworth District v. The United Kingdom Telephone Company Limited.*) 148

## PATENT.

Infringement—Estoppel—Particulars of objection—Omission to deliver—Amendment.—H., the patentee of a loom machine, became bankrupt, and his trustee sold the patent. H. afterwards went

into partnership in loommaking with S., and the purchaser brought an action for infringement of his patent against H. and S.: Held, that there was no estoppel by record or deed or *in pais*, to prevent H. from impeaching, by way of defence to the action, the validity of his own patent, on the ground of want of novelty, but that H., not having delivered particulars of objection under 15 & 16 Vict. c. 83, s. 41, could not give evidence of the invalidity of the patent: Held also (*Bowen, L.J. dissentiente*), that H. could not be allowed to amend for the purpose of rectifying the omission to deliver particulars of objection. (*Cropper v. Smith.*) ...page 729

Infringement—User—Injunction—Instruments not ordered to be delivered up—Disclaimer of patent—Fiat of Attorney-General.—The L. and G. T. and M. Company became possessed of 800 telephone transmitters, which were proved to be an infringement of the "Blake patent," belonging to the U. T. Company. The transmitters had been kept dismantled and unused in the warehouse of the L. and G. T. and M. Company. When the case of another similar patent belonging to the plaintiff company (the Edison patent) was before the Attorney-General, he had issued his fiat allowing the plaintiff company to disclaim certain parts of the specification of that patent, on condition that no proceedings should be taken against the defendant company in respect of these 800 instruments in question, which were also an infringement of the "Edison patent." Held, that the fact of the defendant company being in possession of instruments which infringed the plaintiffs' patent, was of itself enough to give the plaintiff company a right to an injunction to restrain the user and sale of such instruments; but the court would not order them to be delivered up. Held, further, that the instruments were not protected by the fiat of the Attorney-General, which related only to the Edison patent. (*The United Telephone Company v. The London and Globe Telephone and Maintenance Company.*) ... .. 187

Issue of warning circular by patentees—Action to restrain—Infringement—Cross-action for—Undertaking by defendants to proceed with their action—Interlocutory injunction to restrain issue of circular refused.—The plaintiffs were the makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross-action, claiming an injunction to restrain the plaintiffs from infringing their patents. Held, that, as there was no evidence of *mala fides* on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay. (*Household and Rosher v. Fairbairn and Hall.*) ... .. 498

## PARTNERSHIP.

Partnership *inter se*—Share in profits and losses.—

By an agreement signed by W. and H. and Co. it was agreed that for the part taken by W. in the business then carried on by H. and Co., they should pay him a fixed salary of 180*l*. per annum, and in addition he was to receive one-eighth share of the net profits, and bear one-eighth share of the losses as shown by the books when balanced. W. agreed to leave with the business 1500*l*., which was not to be withdrawn by him during the continuance of the agreement, and in the meantime interest thereon at 5 per cent. per annum was to be paid to him. The agreement was to continue in force until the expiration of four months' notice in writing on either side, at the expiration of which the sum of 1500*l*., with any arrears of interest, salary, and profits, was to be paid to W., but H. and Co. were to be at liberty to pay 1500*l*. to W. on giving one month's notice in writing. Held, that no partner-



ship *inter se* was created by the agreement, which was only an agreement by a servant to give his services at a fixed salary, with a share of profits in addition, and a similar liability for losses. (*Walker v. Hirsch.*) ... ..page 481

#### PAUPER LUNATIC.

Estate of pauper lunatic—Guardians—Power to recover sums spent on maintenance out of estate of pauper after his death—Rules of Court 1883, Order XLV., r. 1.—Where A. was maintained as a pauper lunatic, though the guardians knew that he had some property which was just sufficient to support his wife, on summons under Order XLV., r. 1. of the Rules of Court 1883, for payment of a sum of 56l. 6s. in respect of such maintenance: Held, that, though the guardians had not obtained an order from justices during the lifetime of the deceased, they were entitled to payment. (*Re Webster; The Guardians of Derby Union v. Sharratt.*) ... .. 319

#### POOR LAW.

Delay in going to trial—Proceedings prosecuted with due diligence—Poor Law Boards (Payment of Debts) Act 1859.—An action was brought by an engineer, within the time limited by sect. 1 of the Payment of Debts Act 1859, for services rendered to the defendants, who were a rural sanitary authority acting under the Public Health Act 1875. After issue joined the plaintiff took out a summons to refer the matter to arbitration; this summons was opposed by the defendants, and was dismissed. The plaintiff then allowed two assizes at Leeds (where the action was to be tried) to pass without giving notice of trial; the defendants then took out a summons to dismiss the action for want of prosecution, after which the plaintiff gave notice of trial for the assizes then coming on. At the trial, the learned judge, with the consent of the parties, ordered the matter to be referred to an arbitrator, who found for the plaintiff for a certain sum. In an action for a *mandamus* to the defendants to levy a rate to satisfy the award: Held, granting the *mandamus*, that, as the action was a proper one to be referred to arbitration, and as the plaintiff had taken out a summons to refer, which the defendants opposed, the plaintiff had not, under the circumstances, failed to prosecute the proceedings in the action "with due diligence" within the meaning of sect. 4 of the Poor Law Boards (Payment of Debts) Act 1859. (*Rhodes v. Guardians of Pateley Bridge Union.*) ... .. 235

Select vestry—Workhouse and industrial schools—Power to pay Roman Catholic clergymen for religious ministrations—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 56; Poor Law Order 1867.—Sect. 46 of the Poor Law Amendment Act 1834 gave the Poor Law Commissioners power to direct the overseers or guardians of any parish or union to appoint "paid officers," which term, by sect. 109, was to include clergymen. By a Poor Law Order of 1867 "the guardians" (which included the select vestry of a parish) "might employ such persons as they should deem requisite in or about the workhouse premises, or on the land occupied for the employment of the pauper inmates, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable." Held, that the select vestry of L. had power, under the above statute and order, to appoint and pay Roman Catholic clergymen to minister to the Roman Catholic inmates of the workhouse, and the industrial schools connected therewith. (*Reg. v. Haslehurst.*) ... .. 95

#### POWER OF APPOINTMENT.

Exercise of, by will—Death of appointee before testatrix—Lapse—Settlement—Recital—Estoppel—Covenant for further assurance.—By a marriage settlement, dated in 1863, after reciting that B. (the wife) was "seised of or otherwise well entitled to" the freeholds therein described (subject to the life estate of J. C. P.), and that she was entitled to

leasehold premises and certain personal estate, the freeholds were conveyed to trustees (subject to the life estate of J. C. P.), and the leaseholds and the personal estate were assigned to them, upon trust as to 10,000l. for B. for life, and afterwards for A. (the husband) for life, and subject thereto, as to all the realty and personalty, as B. should appoint, and in default in trust for B. for life, and, if she should predecease her husband, in trust as to the realty for her heirs, and as to the personalty for her next of kin, as if she had died unmarried. The settlement contained the usual covenant for further assurance. At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds and leaseholds, subject to the life estate of J. C. P., whereas she was entitled to only thirteen-sixteenths thereof, and J. C. P. was then, and to the time of his death, entitled to three-sixteenths. J. C. P. died in 1866, having by his will given his property to B. B. made her will in 1880, and, in exercise of the powers in the settlement, and of every other power, gave all the freeholds and leaseholds comprised in the settlement to W. W. P. and T. H. P. equally; and she gave all the rest of her personal estate to trustees to pay the income to her husband for life, and afterwards to divide such estate equally between J. B. P., W. W. P., and T. H. P. She declared that her executors should have power to sell her real and personal estate. B. made a codicil in 1880, revoking the gift of any moneys or other properties which she should have accumulated from or purchased with the income of the property comprised in the settlement, or the corpus of any property not included in the settlement and otherwise acquired, and giving the same to her husband. T. H. P. died in B.'s lifetime, without issue. The questions were, who was entitled to the share of the residuary personal estate, the gift of which lapsed by the death of T. H. P.; who was entitled to the three-sixteenths of the freeholds; and who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of T. H. P. Held, that B. had made the personal estate which was included in the residuary gift part of her own assets, and that, so far as it lapsed, it passed to her next of kin, as though at her death it had belonged to her absolutely. Held, also, that the person claiming under the appointment had, as regards the three-sixteenths of the freeholds, the right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or that he had an equity to enforce the covenant for further assurance; that B. had made the property part of her own estate, and that, so far as it lapsed, it devolved upon her heir-at-law. (*Re Horton; Horton v. Perks; Horton v. Clark.*)...page 420

#### PRACTICE.

Account—Order silent as to settled account—Audited accounts of building society—Impeachment for fraud. In an action brought by three members of a building society, on behalf of all the members except the defendant, against the secretary, for an account of all moneys and property of the society come to his hands as such secretary, an order was made by consent for an account. The order was in general terms, nothing being said as to settled accounts being taken as conclusive. By one of the rules (rule 7) of the society "the books of the society . . . shall be audited every twelve calendar months by auditors appointed by the society, and signed by such auditors to denote the accuracy in the secretary's book . . . After each auditing and signing, the secretary . . . shall not be answerable for any mistakes, omissions, or errors that may be proved in such accounts hereafter." Held, that the ordinary rule, that settled accounts are not conclusive unless the judgment so directed, did not apply, inasmuch as the parties had agreed by the rules that audited and signed accounts should be conclusive; but that the rule of the society was no protection to the secretary in case of fraudulent statements in, or omissions from the account being proved. (*Holgate v. Shutt.*) ... 433

## SUBJECTS OF CASES.

**Adjourned summons—Limit of time—Companies Act 1862—Supreme Court of Judicature Act 1873—Rules of Court 1883, Order LVIII., r. 15.**—Where a summons, taken out on the 25th March 1884, was heard on the 30th June, when the chief clerk made no order, and on the 23rd Oct. the chief clerk refused an application to adjourn it into court on the ground of lapse of time; on summons on the 29th Oct. for the opinion of the judge upon the chief clerk's refusal to make an order upon the summons of the 25th March: Held, that though no time was limited for an adjournment into court by sect. 50 of the Judicature Act 1873, the court would not hesitate to act by analogy, and the application being in the nature of an appeal from the summons of the 25th March last, should have been made within twenty-one days from the hearing of that summons; the summons, therefore, must be dismissed. No order as to costs. (*Re The Norwich Equitable Fire Assurance Company; C. Brasnett's case.*) ... ..page 620

**Admissions before and after action—Evidence—Order for payment into court.**—An action had been brought by the *cestui que trust* against a sole trustee of a marriage settlement for an account, and the court was moved for an order directing him to pay into court sums which he had received as such trustee. It appeared that the defendant before the issue of the writ had written letters which contained admissions that he had received the sums for which an account was asked, that the settlement contained a recital that he had received the sums, and that there was an affidavit showing that he had accepted the trust, also that he had been ordered to deliver accounts, that he had failed to comply with it, and an order for his attachment had been obtained; also that he had failed to comply with an order for inspection, and that his defence had been struck out. He submitted that his letters written before the action could not be held to be admissions, as they were not admissions in the proceedings. Held, that a trustee would be ordered to pay trust funds into court upon admissions contained in letters written by him, either before or after action brought, that he has received the money, and upon a recital to that effect contained in a settlement, his execution of which had been proved, although there was not any actual admission on the pleadings that he had received and was in possession of the money; and that, as the defence had been struck out, the allegation in the statement of claim, that he was accountable for the money, was uncontradicted, and must be held to be admitted, and that the court would make the order asked for. (*Hampden v. Wallis.*) ... .. 357

**Affidavit—Prolixity—Taking off file—Costs.**—Although the Rules of Court contain no provision for taking a document off the file for prolixity, the court has an inherent power to do so, in order to prevent its records being made the instruments of oppression. Where an affidavit of documents was of very great length, which the court found was unnecessary and improper, but it appeared that delay and expense would be caused by filing a fresh one, the Court allowed it to remain on the file, but ordered the party filing it to pay the extra costs occasioned by its unnecessary length. (*Hill v. Hart-Davis.*) ... .. 279

**Appeal—Order on claim in administration—Admission of further evidence.**—An order on the claim of a creditor in an administration action, although interlocutory for the purpose of settling the time within which notice of appeal is to be given, is final in its nature, and therefore further evidence cannot be given on an appeal from such an order without special leave. (*Norton v. Compton.*) ... .. 277

**Staying payment out of court—R. S. C. 1883, Order LVIII., r. 16.**—On the further consideration of an action on the 8th Aug. 1884, Pearson, J. ordered that, subject to the payment of the costs of all parties, a fund in court should be paid out to the plaintiff. On the 13th June one of the defendants had given notice of appeal from the judgment at the trial. On the 11th Aug. Pearson, J.

refused an application by the appellant that pending the appeal the distribution of the fund should be stayed, but suspended payment out till after the Long Vacation, to enable the applicant to appeal. On appeal from this order it appeared that the plaintiff had been abroad for two years, and that his address was not known. Held, that, on the appellant giving security to make up to the plaintiff the difference between the present income and interest at 4 per cent. on the present market value of the fund in court, and to make good the difference, if any, between the highest market price of the stocks in which the fund was invested at any time before the appeal was heard and the price at the time of the appeal being heard, the payment out would be stayed. (*Bradford v. Young.*) ... ..page 550

**Appeal by way of revivor—Decree in 1872—Special circumstances.**—Where a decree had been made in 1872, in a suit to administer the trusts of a marriage settlement, and fully worked out, the Court refused, at the instance of the next of kin of the wife, who had been represented in the suit by the trustees of the settlement, in the absence of special circumstances, to revive the suit for the purpose of enabling the next of kin to appeal from the decree. (*Fussell v. Dowding.*) ... .. 332

**Appeal from County Court—Action for damages—Power to enter judgment for sum claimed—Order XL., r. 10.**—In an appeal from a County Court in an action for damages, the court has power to give judgment for the plaintiff for the sum claimed, if satisfied, upon the whole of the evidence before the County Court judge, that judgment ought to be so entered, although judgment had been given by the County Court judge for the defendant. (*King v. The Oxford Co-operative Society.*) ... .. 94

**Appearance—Address for service—Illusory or fictitious—Rules of Court 1883.**—Where a defendant in an action had appeared in person, and in the memorandum of appearance gave an address for service at an office in the city, but on inquiry it was found that, though once a partner in a firm on the premises, he had for some time ceased to have any connection with it, and had not authorised any person on the premises to take in, receive, or forward any documents left for or to be forwarded to him, and he had left the country: On motion *ex parte*, asking that the appearance might be set aside as illusory or fictitious under Order XII., r. 12, of the Rules of Court 1883, the court made the order. (*Eddell v. Cave.*) ... .. 621

**Attachment—Indorsement on order—Notice of motion—Form of.**—Where an order had been made enlarging the time for doing an act directed by a previous order and the order had not been complied with: Held, on motion for an attachment, that a memorandum of the consequences of disobedience indorsed on the first order was sufficient to satisfy Order XLI., r. 5. The memorandum need not be in the words given in Order XLI., r. 5, if it is to the same effect. "Default in obeying" certain orders (dates specified) indorsed on a notice of motion for an attachment held a sufficient statement, under Order LII., r. 4, of the grounds of attachment, the orders being for payment into court of a specified sum within a specified time. Evidence of nonpayment into court held waived by the defendant appearing on the motion for attachment, and resisting it on other grounds. (*Treherne v. Dale.*) ... .. 553

**Sheriff breaking open outer door to execute—Order for delivery up of documents—Non-compliance—Contempt.**—The officer charged with the execution of a writ of attachment issued for non-compliance with an order to deliver up documents may break open the outer door of the house to execute it, such disobedience to an order of the court being a wilful contempt. (*Harvey v. Harvey.*) ... .. 508

**Attachment of debts—Debt due to judgment debtor and another jointly—R. S. C. 1875, Order XLV., r. 2.**—A judgment creditor cannot by a garnishee order attach a debt due to the judgment debtor and another jointly in order to satisfy a judgment

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- obtained by him against the judgment debtor alone. (*Macdonald v. The Tacquah Gold Mine Company.*) ... ..page 210
- Chambers—Vesting order—Right to transfer stock—Trustee Act 1850.**—Where an order was made on petition to appoint new trustees, with liberty to apply at chambers for an order to vest the trust estate in the new trustees when appointed, and a subsequent order was made in chambers appointing the new trustees, and declaring that the right to call for a transfer of, and to transfer into their own names a sum of India Four per Cent. stock vested in the new trustees; on motion: Held, that the proceedings having been properly commenced by petition, the judge had jurisdiction under Order L.V., r. 2, sub-sects. 8 and 18 of the Rules of Court 1883, to make the order on summons in chambers, and that the Bank of England ought to be ordered to act upon it. (*Re Tweedy.*) ... .. 679
- Concurrent jurisdiction of courts—Costs.**—The Probate Division having made a decree absolute for the dissolution of a marriage on the husband's petition, made also an order that the trustees of the marriage settlement should pay an annual sum out of settled real property of the wife to the husband for the maintenance of the infant child of the marriage. The husband having died, whereupon the widow became absolutely entitled to the settled property, a further order directed that the settlement trustees should pay the annuity to the guardians of the infant, and that the settled property should stand charged with the annuity. There were, in fact, at that time no trustees of the settlement. The annuity was subsequently declared to be perpetual. The guardian brought an action in the Chancery Division against the widow, whose whereabouts was then unknown, claiming an account of the annuity; a declaration that the same was a charge on the settled property, and that it might be raised by sale or mortgage; appointment of new trustees of the settlement; an order that the defendant might execute all necessary instruments for giving effect to the charge; and a receiver. At the trial it appeared that the parties had agreed that the defendant should execute a deed securing the annuity on the settled property, and the plaintiff did not press for further relief. The Court ordered execution of the deed, but under the circumstances allowed no costs on either side, as the order now made might have been obtained by summary process in the Probate Division. (*Blackett v. Blackett.*) ... .. 427
- Costs—Action on contract which cannot be brought in a County Court—Breach of promise to marry—Verdict for less than 50*l.*—Order L.XV., r. 12.**—Order L.XV., r. 12, provides that "in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the court or a judge otherwise orders." Held, that this rule does not apply to an action for breach of promise to marry, inasmuch as such an action cannot be brought in a County Court. (*Saywood v. Cross.*) ... .. 601
- Action ordered to be tried in County Court—Jurisdiction of High Court.**—By R. S. C. 1883, Order L.XV., r. 4, "Where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 106, s. 26, the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the registrar's certificate of the result of the trial it shall appear that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court, in which case no costs shall be recovered unless ordered by the court or a judge." An action in which the defendant paid money into court was ordered to be tried in a County Court. At the trial the judge found that the plaintiff was entitled to recover for certain work done, and determined the rate at which the work was to be paid for, leaving it to the registrar to ascertain the amount due by calculation. The result was that the plaintiff recovered 2*s.* 3*d.* beyond the sum paid into court. The County Court judge expressed no opinion on the question of costs. The defendant applied to a divisional court for an order that the plaintiff should pay to the defendant his costs of the action, or that each party should pay his own costs. The Court held, that they had no jurisdiction to make an order, and refused the application on appeal. Held, that the words "subject to the provisions of the principal Act and these rules" in Order L.XV., r. 4, incorporated the provision in rule 1, that costs shall be in the discretion of the court or judge, and therefore the court had jurisdiction; order made, that the plaintiff should recover costs only up to the time of payment into court, and each party should pay his own costs of the trial. (*Emeny v. Sandes.*) ... ..page 641
- Costs—Bankruptcy of party to an action—Trustee in bankruptcy—Liability for costs.**—Where a party to an action becomes bankrupt, and the trustee in the bankruptcy elects to go on with the action, and thus approbates what has been done, he must take the action as he finds it, and he thereby renders himself liable to the opposite party for the costs which have been already incurred therein. (*Bornemann v. Wilson.*) ... .. 723
- Disallowance—Solicitor—Administration suit—Delay—Rules of Court 1883, Order L.XV. r. 11—Reference to taxing master to inquire into delay.**—Where very considerable delay had occurred in proceedings under a decree in an administration suit which, in the opinion of the court, ought to be accounted for, the Court, in exercise of the powers afforded by Order L.XV., r. 11, of the Rules of Court 1883, ordered that, in the taxation of the costs, the matter be referred specially to the taxing master, and he be directed to inquire into the cause of the delay, to make such disallowance of costs in respect thereof as he might think fit, and to call upon the solicitors engaged in the conduct of the case to show cause why that disallowance should not be made. (*Furness v. Davis.*) ... .. 854
- Executor of defaulting executor—Appearance in two capacities—Apportionment of costs.**—An action was brought for the administration of a testator's estate, against the executor of a defaulting executor whose estate was insolvent. Held, that the defendant, being before the court in two capacities, in one only of which he was entitled to costs, the most convenient order would be that he should have his costs of taking the accounts of the original testator's estate and half the remaining costs of the action out of the estate. (*Re Griffiths; Griffiths v. Lewis.*) ... .. 278
- Right of set-off—Debt due to trust estate—Solicitor's lien.**—Trustees were liable to pay costs to the amount of 49*l.* to W. as respondent to a petition presented by them. They were entitled to receive from W. a sum of 107*l.* for costs and mesne profits recovered by them in an independent action against W. Held, that they were entitled to set off the 40*l.* against the amount due from W. for mesne profits without regard to the lien of W.'s solicitor. (*Re Harraid; Wilde v. Walford.*) ... .. 441
- Taxation—Solicitor suing or defending in person.**—Where a solicitor sues or defends an action in person, and obtains judgment with costs, he is entitled to recover from his adversary the same costs as would have been allowed if he were not a party to the action, but were acting as solicitor for another person, subject to this, that the costs to be allowed must not include any items which the union of the two characters renders impossible or unnecessary; and where any items are attributable to the fact that the solicitor is acting in the two characters, such items should be treated on taxation as attributable to his character as party to the action, and not to his character as solicitor. (*London Scottish Permanent Benefit Society v. Chorley and others.*) ... .. 100
- County Court appeals—Rule nisi—Motion upon notice—Action remitted to County Court for trial.**—The County Courts Act 1856—Order XXXIX. r. 3—Order LII., r. 2—Order LXXII., r. 2.—In an action

- commenced in the High Court and remitted to a County Court for trial under 19 & 20 Vict. c. 108, s. 26, an application for a new trial must be made to a divisional court of the Queen's Bench Division before the expiration of four days from the day of trial, by motion calling upon the opposite party to show cause. (*Pritchard v. Pritchard.*) page 859
- Default of appearance—No proceeding taken for a year—Entry of judgment—Notice of intention to proceed.—By Order LXIV., r. 13: "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed." Defendant had failed to appear to a writ indorsed for a liquidated demand, and no proceeding had been taken for more than a year after service of the writ. Held, that the case came within Order LXIV., r. 13, and plaintiff could not enter final judgment under Order XIII., r. 3, but was bound to give defendant a month's notice of his intention to proceed. (*Webster v. Myer.*) ... 560
- Evidence—Witness abroad—Commission—Special examiner.—It is the duty of the applicant (whether plaintiff or defendant) for the examination of a witness abroad, when making the application, to bring such evidence as will satisfy the court that it is in the interest of justice that the witness should be examined abroad, and inconvenient for him to attend to be examined in this country, or improbable that such attendance could be procured. (*Lawson v. The Vacuum Brake Company.*) ... 275
- Executor—Action by one executor alone—Order XVI., r. 11.—H. deposited deeds with P. (one of the executors of A.), as security for moneys advanced by him, out of moneys in his hands as such executor. P. became bankrupt, and went abroad to escape prosecution for fraud. This action was brought by H., the other executor alone, for foreclosure. Held, on a summons that P. should be added as a party, and to stay proceedings till he was so added, that, if the facts alleged stated above were proved, there would be no object in adding P. as a party, and that, if they were not made out, the court could add P. so soon as it appeared he might have any interest. (*Drage v. Hartopp.*) 902
- Finding of jury—Judgment given contrary to finding—Order for new trial.—Under the Rules of the Supreme Court 1875 a judge, after leaving a question to the jury at the trial of an action, had no power to give judgment contrary to the finding of the jury on the question so left to them, and therefore where this course was adopted the Court of Appeal ordered a new trial. (*Perkins v. Dangerfield and Wife.*) ... 585
- Inspection of premises before trial—Experiment before trial—Breaking up defendant's soil—Interlocutory application—B. S. C. 1883, Order L., r. 3.—The old rule is now obsolete, that (as laid down in *Ennor v. Barwell*, 1 De G. F. & J. 529) "it is not according to the practice of the court to make, upon interlocutory application before the hearing, an order authorizing the plaintiff to break the soil of the defendant's property for the purpose of inspection." Order made, under Order L., r. 3, that, without prejudice to other rights, a certain plaintiff should be at liberty, on notice given, to enter upon defendant's premises for the purpose of experimenting as to certain drainage connections, and, for that purpose, to dig up the surface so far as might be necessary, plaintiff undertaking to do no unnecessary harm, and to replace the surface so soon as his investigation was completed, as quickly as possible, and at his own expense. (*Lamb v. Beaumont.*) ... 197
- Interlocutory injunction—Plaintiff's undertaking to be answerable in damages.—Where a plaintiff, on obtaining an interlocutory injunction, has given an undertaking to be answerable for the damages, if any, sustained by the defendant by the injunction being granted, and at the hearing it is decided that the interlocutory injunction ought not to have been granted, the plaintiff will be liable to the defendant under his undertaking, whether the injunction was wrongly granted owing to the misrepresentation, suppression, or other default by the plaintiff, or owing to a mistake of the judge without any such default. (*Griffith v. Blake.*) ... page 274
- Interrogatories—Revocation of patent—Petition—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 26—Rules of Court 1883, Order XXXI., r. 1—Order LXXI., r. 1—Judicature Act 1873, s. 100.—A petition was presented under sect. 26 of the Patents, Designs, and Trade Marks Act 1883 to procure the revocation of a patent, on certain grounds, which were stated in the particulars of objections. A summons was subsequently taken out, in pursuance of leave specially reserved, for directions as to the further conduct of the petition, asking that the petitioners might be at liberty to deliver to the respondent interrogatories, or, in the alternative, that the respondent might be ordered to furnish particulars of his answer to the petition. The question was whether the practice as to delivering interrogatories applied to a petition of this kind. Held, that interrogatories might be delivered upon the usual terms of making a deposit. (*Re Haddan's Patent.*) ... 190
- Joinder of causes of action without leave—Waiver of irregularity by appearance—Rules of Supreme Court 1883, Order XVIII., r. 2; Order LXX., r. 2.—Where a writ of summons was indorsed with a claim for the recovery of land, and also for a debt, without any leave having been obtained to join them, and the defendant entered an appearance thereto, and applied to strike out one or other of these claims. Held, that the application was too late, as the defendant, by entering an appearance, had "taken a fresh step after knowledge of the irregularity" within the meaning of Order LXX., r. 2. (*Mulkern and another v. Doerks.*) ... 429
- Judgment recovered—Action for negligence—Injury to vehicle—Personal injury caused by same negligence—Distinct cause of action.—Plaintiff sued defendant in the County Court to recover damages for injury done to plaintiff's cab in a collision caused by the negligence of defendant's servant, and obtained judgment. Afterwards plaintiff sued defendant in the High Court to recover damages for personal injury which he had suffered in the same collision. Held, that the damage to the cab and the personal injury constituted two distinct causes of action, and therefore the judgment recovered in the County Court was no bar to the subsequent action in the High Court, and plaintiff was entitled to recover. (*Brunsdon v. Humphrey.*) ... 529
- Notice of trial—Entry of trial—Dismissal of action for want of prosecution.—An action may be dismissed under Order XXXVI., r. 13, for want of prosecution, although notice of trial has been given within proper time, if by reason of non-entry such notice has under rule 16 ceased to be in force. (*Crick v. Hewlett.*) ... 428
- Power to abridge the time—Rules of Supreme Court 1883.—Order XXXVI., r. 12, provides that if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may before notice of trial given by the plaintiff give notice of trial. And Order LXIV., r. 7, provides that the court or a judge shall have power to enlarge or abridge the time appointed by these rules for doing any act or taking any proceeding. Held, that the period of six weeks mentioned in Order XXXVI., r. 12, is not a "time appointed for doing any act or taking any proceeding" within the meaning of Order LXIV., r. 7, and that therefore the court has no power to abridge that time, so as to enable the defendant to give notice of trial before the expiration of the six weeks. (*Saunders v. Pawley.*) ... 903
- Order for certain inquiries—Order LV., r. 3, s. 10—Rule 12—Effect upon powers of trustees.—A. by will appointed three trustees, one of whom was B., the tenant for life, and directed that any vacancy in the number of trustees should be filled

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- up within one year after it occurred. One trustee disclaimed, the other died after some years, leaving B. surviving. An action was commenced, asking for the general execution of the trusts of the will. The court, under Order LV., r. 3, sub-sect. 10, ordered only certain special inquiries, among which was an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for their appointment. Pending this inquiry B. appointed a new trustee. The plaintiffs now moved to restrain the funds being handed to him and his acting as trustee. Held, that the special inquiry made it the duty of B. not to fill up the appointment without the approval of the court, but that the power was not destroyed; all that was necessary was for B. to appoint a person whom the court would approve, and it not being alleged that the new trustee was an improper person, the court would not interfere with his appointment, and it was not necessary formally to sanction it. (*Re Hall; Hall v. Hall*)... page 901
- Parties, change of—Alteration in interest and liability—*Ex parte* application—Rules of Court 1883, Order XVII., r. 4.—Where a testator appointed his two infant sons trustees on their attaining the age of twenty-one, and an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a plaintiff and the elder son defendant; on the younger son attaining twenty-one, and becoming a trustee, and thus changing his interest and liability, the Court, on an *ex parte* application under Order XVII., r. 4, of the Rules of Court 1883, made him a co-defendant. (*Re Gould; Gould v. Gould*)... 417
- Payment into court—Denial of liability—Acceptance of sum by plaintiffs in satisfaction of cause of action—Motion for judgment—Taxation of costs.—In an action for breach of contract the plaintiffs alleged two distinct breaches, and the defendant denied generally his liability in respect of them, but in the alternative paid a sum of money into court in respect of one of the alleged breaches. The plaintiffs thereupon gave notice that they accepted the sum so paid into court in satisfaction of the whole cause of action. Held, that the plaintiffs were entitled to proceed to the taxation of their costs, and the mere denial of liability on the part of the defendant did not compel them to proceed to judgment to entitle them to their costs. (*M'Irwaith and others v. Green*)... 822
- Recovery of land—Joinder of other claims without leave—Omission of claim to recover land from statement of claim—Objection by defence—Embarrassment—B. S. C. 1883.—The plaintiff, without obtaining the leave of the court, joined a claim for recovery of land with other claims. By his statement of claim he altered his claim for relief by omitting the claim for recovery of land. The defendant by his defence raised the objection that the writ of summons was issued without leave of the court. Held, that the defence ought not to be struck out as embarrassing. (*Wilmot v. Freehold House Property Company*)... 552
- Scandalous and impertinent matter—Jurisdiction—Bill of costs delivered—Rules of Court 1883, Order XIX., r. 27; Order XXXVIII., r. 11.—An application was made that certain parts of a bill of costs delivered might be expunged for scandal and impertinency. It was contended, in opposition, that the jurisdiction of the court was confined to scandalous and impertinent matter in pleadings and affidavits, and that therefore the application could not be entertained. Held, that every proceeding, of whatever nature, in the Court of Chancery, which was made the vehicle for the introduction of scandalous or irrelevant matter, could be amended or otherwise dealt with under the general jurisdiction of the court. (*Re Miller and Miller; Re French; Love v. Hills*)... 853
- Security for costs—Order LXV., r. 6—Trustee in bankruptcy—Official name—Bankruptcy Act 1883—Insolvent trustee.—The fact of a plaintiff being a trustee in bankruptcy and suing in his official name is not *per se* a sufficient ground for requiring him to give security for the costs of the action. To justify such an order, insolvency or some of the other grounds required in the case of an ordinary plaintiff, must be shown. (*The Trustees in Bankruptcy of A. G. Pooley v. Whetham and others*)... page 195, 608
- Security for costs—Summons by official liquidator in the name of a building society under the 165th section of the Companies Act 1862 against the manager of the society—Companies Act 1862, ss. 69 and 165.—Where a building society, formed in accordance with the provisions of 6 & 7 Will. 4, c. 32, was being wound-up, and a summons was brought two years ago by the official liquidator, under sect. 165 of the Companies Act 1862, against the manager; on a summons by the manager, under sect. 69 of the Act 1862, for security for costs on the ground of delay, and that the assets of the society were insufficient to pay the costs of the first summons: Held, that the court had general jurisdiction to order the official liquidator to give security for costs before any further proceedings were taken in the matter. (*Re Seventh East Central Building Society*)... 109
- Service of writ of summons out of the jurisdiction—Action to recover rent—Defendants domiciled or ordinarily resident in Scotland.—By Order XI., r. 1., service out of the jurisdiction of a writ of summons may be allowed "whenever (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or (e) the action if founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." The plaintiffs, who were the executors of the lessor, brought an action against the defendants, who were the assignees of the lessee, to recover one quarter's rent of premises in Liverpool, and obtained leave to serve the writ upon the defendants, who resided in Scotland. On motion to set aside the service it was held by the Queen's Bench Division (51 L. T. Rep. N. S. 576) that it was not an action affecting land within the meaning of sub-sect. (b) of rule 1 of Order XI., but was an action founded on a breach of contract within the jurisdiction, and which ought to have been performed within the jurisdiction within the meaning of sub-sect. (e), and, as the defendants were domiciled or ordinarily resident in Scotland, the service of the writ must be set aside. Held, on appeal, that, as the defendants had not executed the assignment of the lease, and there was no evidence that they had accepted it, the judgment of the court below must be affirmed. (*Agnew v. Usher*)... 576, 752
- Settled account—Building society—Audited accounts—10 Geo. 4.—In an action brought by three members of a building society, on behalf of all the members except the defendant, against the secretary, for an account of all moneys and property of the society come to his hands as such secretary, an order was made by consent for an account. The order was in general terms, and contained no direction that settled accounts should not be disturbed. On the taking of the account in chambers, the defendant relied upon an account, which had been audited by the auditor of the society, as conclusive. A summons was taken out by the plaintiffs asking that this account might be disregarded. By the rules of the society it was provided that, after the auditing and signing of the accounts as therein mentioned, "the secretary shall not be answerable for any mistakes, omissions, or errors that may be found in such accounts hereafter." The Court of Appeal held that, though the audited accounts could not be disregarded, they were only *prima facie* evidence in favour of the defendant, and that the plaintiffs were entitled to impeach them on the ground of fraud. The plaintiffs afterwards raised the point that the audited account on which the defendant relied had not been audited in accordance

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- with the rules of the society, and was not therefore even *prima facie* evidence for the defendant. Held, that the account had not been audited in accordance with the rules, but that the defendant had the right to show that the audited account ought to be treated as a settled account upon any ground other than that it had been audited in accordance with the rules. (*Holgate v. Shute*, No. 2.) ... page 673
- Special indorsement—Action for recovery of land—Mortgagor attorning tenant.—A mortgagee to whom the mortgagor has attorned tenant at a rent representing the interest on the mortgage debt, and who has duly determined the tenancy by notice to quit, may specially indorse the writ in an action to recover possession of the premises under this sub-sec., and sign final judgment under Order XIV. (*Danbuz v. Lavington*.) ... 620
- Third party—Notice by defendant of claim to indemnity—Right of third party to counter-claim against plaintiff.—Where the defendant has served a third-party notice the court cannot allow the third party to counter-claim against the plaintiff. Although by sect. 100 of the Judicature Act 1873, "defendant shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings," the term "defendant" does not include a third party. (*Eden v. The Weardale Iron and Coal Company*.) 726
- Transfer of action to Chancery Division—Counter-claim for specific performance—Rules of Supreme Court 1883, Order XLIX., r. 3.—The plaintiffs agreed to purchase certain land from the defendants, and paid them a deposit. A dispute having arisen as to the defendants' title to the land, the plaintiffs refused to carry out the purchase, and commenced an action in the Queen's Bench Division to recover the deposit. The defendant counter-claimed for specific performance of the agreement, and applied to have the action transferred to the Chancery Division. Held, that, as the counter-claim was admittedly a *bond fide* one, and as the Chancery Division alone had the requisite machinery for giving the relief claimed, the action ought to be transferred to that division. (*London Land Company Limited v. Harris and others*.) ... 296
- Trial by jury—Action which before Judicature Act could have been tried as of right without jury—Change of place of trial—Delay—Costs.—An action to restrain the defendants from obstructing the plaintiffs' water rights was set down in the Chancery Division on the 27th May, and briefs were delivered on the 7th July. On motion by the defendants that the trial might take place at Manchester before a judge and jury: Held, that the defendants had an absolute right to trial by jury; that Manchester was the proper place for the trial; the costs to be reserved on account of the defendants' delay in bringing their motion. (*The Old Mill Company v. The Dukinfield Local Board*.) ... 414
- Trial of action—Document—Notice to produce—Secondary evidence.—Action to restrain alleged libel to the effect that the plaintiff was infringing the patent rights of the defendant, a rival tradesman. The defendant, in cross-examination, stated that he had been in the habit of consulting A., an engineer (one of his witnesses), as to his patents, and had received from him a written report. The plaintiff had not required from the defendant an affidavit of documents, and on the twelfth day of the trial notice was given by leave to the defendant to produce the report next day. The report not being produced next day the plaintiff's counsel, after the evidence for the defendant was closed, asked leave to recall the defendant or A. to be examined as to the contents of the report, or that A. might produce a copy of it. The Court refused to allow parol evidence to be given at that stage of the trial, with respect to a document as to which no proper notice to produce had been given. (*Sugg and Co. v. Bray and Co.*) ... 194
- Witness—Examination before examiner—Adjournment after depositions signed—Power to recall witness.—After the examination of a witness had been taken before an examiner of the court, and the depositions had been read over to him and signed, the examiner, on the request of the party at whose instance the examination was taking place, adjourned the further examination *sine die*. The witness did not consent to such adjournment. A notice recalling the witness was subsequently sent to him, but he objected to attend on the ground that, under Order XXXVII., r. 45, of the Rules of Court of Feb. 1884 (prior to being altered), which give an examiner power to adjourn the examination with the consent of the "parties," no adjournment could be made without the consent of the witness; and that, as the depositions had been signed and the proceedings thereby concluded, the witness could not be recalled without a fresh summons being taken out. Held, that the objection was not a valid one; that it would be improper in official proceedings not to allow a witness to be recalled; that rule 45 of Order XXXVII. required the consent of the parties, but not of the witnesses, to an adjournment; that the notice which had been duly served upon the witness when he was recalled was a proper and sufficient one; and that the witness must attend at his own expense. (*Re The Metropolitan (Brush) Electric Light and Power Company Limited; Ex parte Offor*.) ... page 816
- PREScription ACT.
- Right of way—User at long intervals.—"Enjoyment for the full period of twenty years."—The defendant claimed a right of way under the Prescription Act (2 & 3 Will. 4, c. 71), in respect of twenty years' user as of right. The user had been a user to cart timber along the way in question from a wood belonging to the defendant adjoining the way. The evidence showed that the timber had been cut in the wood in the years 1851-3, 1866-8, and again in the year before the action was commenced; and that in those years the timber cut was carted along the way in question as of right and without interruption, so that the defendant had in fact for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose. Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the Prescription Act, which Act did not apply to so discontinuous an easement as that claimed. (*Hollins v. Verney*.) ... 753
- PRINCIPAL AND AGENT.
- Contract in writing—Incorporation of custom in—Evidence—Admissibility of—Broker—Bought note containing clause referring disputes to broker—Custom of personal liability of broker on non-disclosure of principal.—D. and Co., acting as brokers for the buyers and sellers in the market of the sale and purchase of a quantity of hides, signed a bought note to the effect that they had purchased the same on account of B. and Brother, the buyers, containing the following clause: "If any difference or dispute should arise under this contract, it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers." In an action by B. and Brother against D. and Co. for breach of this contract, the plaintiffs tendered evidence of a custom of the City of London, by which, as they alleged, brokers failing to disclose the names of their principals within a reasonable time after the date of the contract become personally liable thereupon. Held, on motion for new trial, that such evidence was rightly rejected, as the custom, if proved, would have been inconsistent with the clause of the bought note referring disputes arising thereunder to the selling brokers. (*Barrow and Brother v. Dyster, Nalder, and Co.*) 573
- PRINCIPAL AND SURETY.
- Discharge—Payment by debtor to co-surety—Non-disclosure.—A surety to a bond is not entitled to be discharged from his liability to contribution



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because the principal debtor has applied part of the sum borrowed in payment of a debt due from him to his co-surety under an undisclosed agreement with such co-surety. (*Mackreth v. Walmsley.*) ... ..page 19

## PRISONS ACT 1877.

Superannuation—Compensation—Apportionment—Superannuation Act 1859—Special minute.—At the time of the coming into operation of the Prisons Act 1877 C. was the governor of a prison which had been under the control of the justices of M. as the local authority, but by the Act it was transferred to the Secretary of State for the Home Department. Shortly afterwards C., who was not incapacitated in any way, resigned his appointment in order to facilitate some improvements in the organisation of the prison, and the Commissioners of the Treasury granted him an annuity pursuant to sect. 36 of the Act, and apportioned it, in accordance with paragraph 4 of that section, between the county rates of M. and moneys to be provided by Parliament. No special minute within the meaning of sect. 7 of the Superannuation Act 1859 (23 Vict. c. 26) was made or laid before Parliament with reference to C. or his office. Held, that, upon the true construction of the Act, the commissioners had power to apportion the annuity as they had done, and that the provisions of the Act of 1859 as to a special minute were directory only, and not a condition precedent to the granting of an annuity such as that in question. (*The Justices of Middlesex v. The Queen.*) ... .. 513

## PROHIBITION.

County Court—Insufficient notice for new trial—Jurisdiction of judge to re-hear a case when an insufficient notice has been given.—Order XXVIII., r. 1, of the County Court Rules 1875, provides that a person applying for a new trial in a County Court shall give the opposite party seven clear days' notice in writing of his intention so to apply. A notice was given by the defendant to the plaintiffs by letter on the 8th Nov., stating that he would apply on the 12th Nov. for a new trial. The plaintiffs refused to accept this notice as being too short, and did not attend at the hearing on the 12th. The fact that the plaintiffs objected to the notice was brought before the judge, who, however, made an order for a new trial. The plaintiffs applied for a prohibition to restrain the judge from hearing the case on the new trial. Held, that a prohibition ought not to be granted, as the proper proceeding to have been adopted would have been to have made an application to the judge to set aside the order for a new trial as irregular. (*Trustees of Evan Jones v. Gittins.*) ... .. 599

## PUBLIC CORPORATION.

Elementary Education Act 1870—School Board—Compulsory purchase of lands—Exchange of the lands with a third party—Agreement prior to notice to treat—*Damnum absque injuria*—*Ultra vires*.—The School Board had taken some land compulsorily under the Elementary Education Act 1870. The plaintiff, who had been served by the defendants with notice to treat for his land, afterwards discovered that they had already agreed to exchange a portion of the land included in the notice for other land, thereby securing to the board additional land and other advantages, instead of allowing him to reap those advantages which he would have done had he remained in possession of his land, and he moved that the defendants might be restrained from using the land otherwise than for educational purposes. Held, that the principal question was whether or not the land taken from the plaintiff, and which had been exchanged, was taken *bond fide* within sect. 19 of the Elementary Education Act 1870, for the purpose of providing sufficient school accommodation; that, as the scheme of exchange was one which the Educational Department had sanctioned, and as the board had not (like a railway company) acquired the land merely for their own profit, and as the land taken

from him was used in an exchange advantageous to the schools, his views and schemes could not now be regarded; that, although he might have lost the chance of making a profitable bargain, such loss was no cause of action, but only a *damnum absque injuria*; and that his motion must fail: (*Rolls v. School Board of London.*) ... ..page 567

## PUBLIC HEALTH ACTS.

Bye-laws—Notice of intention to erect new buildings and send plans—Conviction for erecting new buildings without notice—Question of fact.—Bye-laws were made for the borough of S. under the powers given by sect. 34 of the Local Government Act 1858. This Act was repealed by the Public Health Act 1875, but by sect. 326 of the latter Act all bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be deemed to be bye-laws under that Act. The 27th bye-law provided that every person who intended to erect any new building should give one month's notice of such intention, and send in a plan of the works to the surveyor for the urban sanitary authority. The 31st bye-law provided that, if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*; and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said provision. The appellant contended that he was not bound to give notice or send a plan of alterations he proposed to make in his house, as the alterations merely consisted in raising the old walls a story higher, but he sent a plan, as he said, as a matter of courtesy. This plan was disapproved of, and notice of such disapproval was sent to the appellant, but he went on with the buildings. He was then summoned by the respondent, who was the surveyor for the urban sanitary authority, for neglecting to give notice and send plans as required by the bye-laws. The magistrate found that the structure was in fact a comfortable, good-looking dwelling-house, which previously it was not. He also found, as a fact, that the old building was partly pulled down to the ground floor, and that the buildings erected on the site thereof formed a new building intended for occupation, and that they were not adapted for personal occupation previously, and that they were "a new building" within sect. 159 of the Public Health Act 1875. The appellant was convicted and fined 40*s.* and costs, and a further sum of 20*s.* for each day the work should continue or remain contrary to the provisions of the said bye-laws. Held, that the question whether the alterations constituted a "new building" was a question of fact for the magistrate to decide, and that he had decided as a fact that they did constitute a "new building," and that the penalty of 5*l.* was payable in addition to the penalty of 40*s.* a day, though the information laid against the appellant was only for not having given the notice and plans under the 27th bye-law. (*James, app., v. Wyvill, resp.*) ... .. 237

Compensation for damage—Procedure—Arbitration—Dispute as to liability.—The arbitration clauses of the Public Health Act should receive the same interpretation as those of the Lands Clauses Act. By sect. 308 of the Public Health Act 1875, where any person sustains any damage by reason of the exercise of any of the powers of the Act, the local authority shall make compensation, "and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration." Held, that, although the local authority *bond fide* dispute their liability, the arbitrator has, nevertheless, jurisdiction under the section to make his award as to the fact of damage and the amount of compensation. The question of liability should be raised in an action on the award. (*Brierley Hill Local Board v. Pearsall.*) ... .. 577

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**Local Board of Health—*Ultra vires*—Premises beyond limit of district—Agreement for connecting sewer—Drainage of houses hereafter to be erected.**—The defendants were the owners of the Clewer estate of 142 acres, of which sixteen were within and the remainder without the limits of the borough of New Windsor, for which the plaintiffs were the local board of health. By an indenture dated the 3rd Aug. 1857 the local board of health of that date had granted to the predecessor in title of the defendants, his heirs and assigns, in consideration of his having constructed a certain sewer, and of a payment of 10*l.* a year, "leave and licence to drain, carry off, and permit to flow off into and through a certain drain within the limits of the said district all the drainage and sewage from the property and houses then belonging to him at Clewer, and any houses thereafter to be erected on the said property." There was at the date of the indenture only one street of houses on the said property outside the limits of the district; many others had since been built. This was an action to set aside this deed as *ultra vires* so far as it related to houses not erected at this date. Held, that sect. 48 of the Public Health Act 1848, under which the board acted in executing the deed, only gave them the power of making the terms and conditions upon which a sewer might be connected with their system, and so long as the sewer remained the same no complaint could be made of the amount of sewage sent down it; therefore the agreement was not *ultra vires*. (The Mayor, &c., of New Windsor v. Stovell.) ... ..page 626

**Sewering private street—Cost exceeding 50*l.*—Contract not under seal—Recovery of amount apportioned from the frontagers.**—Sect. 174 of the Public Health Act 1875 provides that every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority. Where an urban authority employs a contractor to sewer a street under sect. 150 of the Public Health Act 1875, at a cost exceeding 50*l.*, and pays the contractor for the work, and apportion the amount amongst the various frontagers, it is no defence, in an action by the urban authority against a frontager to recover the amount apportioned against him, to show that the contract for the work was not in writing under the seal of the urban authority. (The Bourne-mouth Commissioners v. Watts.) ... .. 823

## PUBLIC PEACE.

**Disturbance of—Salvation Army—Singing, shouting, and cornet playing in public streets—Hastings local Act (2 Will. 4, c. xci. s. 61).**—By the 61st section of the Hastings local Act (2 Will. 4, c. xci.) it is provided that if any person shall make, excite, or join in any brawl, or otherwise disturb the public peace, every person so offending shall for every such offence forfeit and pay any sum not exceeding forty shillings. A., B., and S., members of the Salvation Army, led a crowd by a circuitous route through certain of the streets of the town of H. to the meeting-house of the Army, S. during the march blowing a cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia" and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the Salvation Army present, much of the noise being caused by a mob of 400 or 500 persons following them, and hostile to their proceedings. Information having been preferred against A., B., and S. under the local Act for disturbing the public peace, it was found as a fact that A., B. and S. disturbed the public peace within the meaning of the statute, and they were convicted. Held, on case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the Act of disturbing the public peace, and that the conviction must be

quashed. (Beatty and others, appa., v. Glenister, resp.) ... ..page 304

## RAILWAY COMPANY.

**Compulsory purchase by—"House"—Company taking part of paddock and private road—Lands Clauses Consolidation Act 1845.**—The owner of a freehold property built a house thereon, and laid out ornamental ground and a garden, and surrounded the whole by a wall. Immediately to the rear of the house and garden was a paddock, by the side of which a private road passed, leading from the house and through double ornamental gates into a public road. A railway company gave notice to treat for a portion of the paddock and private road. The owner required them to take the whole of the property. Held, that the paddock formed part of the "house" within the meaning of sect. 92 of the Lands Clauses Consolidation Act 1845, and that the company must purchase the whole property. (Barnes v. Southsea Railway Company.)... .. 762

**Contract between railway company and passenger—Delay—Wilful misconduct—Liability of railway company.**—Plaintiff took a return first-class ticket from Paddington to Bridgnorth, a station on a branch of the defendants' main line, intending to travel by a train advertised to run through without interruption. There were printed on the face of the return half of the ticket the words "See back," and on the back of each half the words, "Issued subject to the conditions stated on the company's time-bills." The time-bills were published monthly in a book of about one hundred pages, and on the first or outside page was a notice headed "Train bills," that the company would not be accountable for injury which might arise from delays, unless in consequence of the wilful misconduct of the company's servants. On the day of the plaintiff's journey, being Christmas Eve, there was an unusually large number of persons travelling on the defendants' lines. The weather was foggy, and some five hours earlier there had been a collision between two trains on the main line. The advertised train was divided into two parts, and the plaintiff was put into the second part, which started thirteen minutes late; it was also delayed by the fog and the excessive traffic on the journey. In consequence the plaintiff missed the train which was advertised to run along the branch in connection with the main line train. He was detained at the junction, where there was but little accommodation, and being refused a special train, proceeded at his own request in a carriage attached to a goods train. This carriage was second-class, the station-master at the junction having no first-class carriage available. The plaintiff's journey took about ten hours instead of six hours as advertised. In a County Court action, on proof of these facts and the evidence of a letter from the defendants to another passenger by the same train, forwarding a sum of money demanded for compensation, the judge awarded the plaintiff 1*l.* damages for the delay and inconvenience he suffered. Held, upon a special case, that the conditions on the time-bills were incorporated in the plaintiff's contract with the company; that there was no evidence under the circumstances of the defendants' wilful misconduct, or of their liability; and that the County Court judge was wrong. (Woodgate v. Great Western Railway Company.)... .. 826

**Inequality of charges—Undue preference—"Agency commission" for developing particular trade—Equal rates for each of a "group" of places—"Passing only over the same portion of the line of railway"—The Railways Clauses Consolidation Act 1845—The Railway and Canal Traffic Act 1854.**—A railway company having induced a steamship company to coal their vessels at the port of G., on the understanding that they should be supplied with coal at a rate below the current price, made B. an allowance of 8*d.* per ton on the rates for carriage of coal from the South Yorkshire coalfield to G. in respect of all coal shipped on board the said



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vessels, giving no public or other notice that they were doing so, or would make a similar allowance to other persons under similar circumstances. The railway company also *bond fide*, and not with the object of giving a preferential rate of carriage, in consideration of B. providing vessels for the purpose of developing the coal trade between G. and English ports south of Harwich, and running the risk of the said traffic, allowed B. an "agency commission" of 6d. per ton on all coal shipped by him from G. by coastwise vessel to English ports south of Harwich, but no opportunity was afforded to the public in general or other persons sending coal by their railway to G. of earning the like payment by the like services. Held, in an action by the railway company against a South Yorkshire colliery company sending coals by their railway to G. for balance of carriage account, the colliery company counter-claiming for overcharges, that both the allowance and the "agency commission" were breaches of the provisions of the 90th section, and that the colliery company were entitled to recover the charges made to them in excess of the charge made to B. for similar services. The railway company also allowed B. a rebate of 2 per cent. on his net debit in respect of all the coal carried for him. Held, that notwithstanding that the railway company were allowed to take B.'s empty waggons to any colliery with which he dealt, and so carried his coals more economically than those of the colliery seeking to recover overcharges, yet, as the railway company did not prove that the allowance adequately represented the saving, it was a breach of the 90th section. The railway company charged the same rate for the carriage of coal to G. from each of forty-eight collieries grouped along a section of their line fifteen miles in length, of which the colliery seeking to recover overcharges was nearest G. Held, that, notwithstanding that the termini of the transit were different in the case of each colliery, the case came within the meaning of the words "passing only over the same line of railway," and that the charging of the same rates to the whole group was a breach of the section. Held, that, notwithstanding that the colliery company had refused to pay the alleged overcharges, their counter-claim to retain them was, in substance, an action for a contravention of the 2nd section of the Railway and Canal Traffic Act 1854, which by reason of the provisions of the 6th section of the Act will not lie. (The Manchester, Sheffield, and Lincolnshire Railway Company v. The Denaby Main Colliery Company.) ... ..page 698

Land—Easement—Lands Clauses Consolidation Act 1845—Special Act.—By the special Act incorporating the S. Railway Company, the Lands Clauses Consolidation Act 1845 was incorporated therewith, except where expressly varied thereby. By sect. 8 it was provided that the line of the S. Company should be carried in one place over, and in another place under, the line of the G. W. Railway Company by a bridge and a tunnel. It was further provided that the tunnel was to be the property of the G. W. Railway Company subject to the right of the S. Railway Company to run trains through it, and that the S. Railway Company were not to purchase any land of the G. W. Railway Company, or interfere with their land except for the purposes of the above crossings. The S. Railway Company were proceeding to make the crossings, but the G. W. Railway Company brought this action to restrain them on the ground that the whole of their capital had not been subscribed, and therefore, under sect. 16 of the Lands Clauses Act 1845, they could not put in force any of the powers of the special Act in relation to the compulsory taking of land. Held, by Lord Fitzgerald, that the easements granted by sect. 8 of the special Act were not "land" within the meaning of sect. 16 of the Lands Clauses Act 1845, and that the action was not maintainable. By Lord Bramwell, that sect. 3 of the Lands Clauses Act 1845, which says "the word 'land' shall extend to messuages, lands, tenements, and hereditaments of any tenure," must be construed to mean "of

whatever tenure if any," and that sect. 16 extends to incorporeal hereditaments such as those granted by the special Act, but that the S. Company must be held to have entered on the land under sect. 85 of the Lands Clauses Act 1845, and not to have taken it compulsorily under sect. 16, and that the action was not maintainable. (The Great Western Railway Company v. The Swindon and Cheltenham Extension Railway Company.) ... ..page 798

Solicitor—Notice to treat—Counter-notice—Acceptance of by solicitor—Lands Clauses Consolidation Act 1845—Companies Clauses Consolidation Act 1845.—The acceptance by the solicitors of a railway company of a counter-notice, served upon the company under sect. 92 of the Lands Clauses Act 1845 which is had does not bind the company. (Treadwell v. The London and South-Western Railway Company.) ... ..page 894

RATING.

Lighthouse—Rateability of—Not under control of general lighthouse authority—Part of tower used as telegraph station—"Beneficial occupation"—Adjoining buildings—Merchant Shipping Act 1854.—The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llanellian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305*l.*, and rateable value of 244*l.* Held, that the tower was incapable of profitable occupation as a lighthouse, but it being also used as a telegraph station, it was in that respect capable of a beneficial occupation, and therefore rateable, and that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connection with the tower, the assessment made on that footing was correct. Held, also, that the 430th section of the Merchant Shipping Act did not apply, and was applicable only to lighthouses under the control of general lighthouse authorities. (The Mersey Docks and Harbour Board v. The Overseers of Llanellian.) ... ..page 62

Telephone wires, poles, and attachments—Occupation—Rateability.—A telephone company were the owners of certain overhead wires, which were supported by poles fixed in the ground, and by attachments to the roofs and chimneys of buildings. The consent of the owners and occupiers of the land and buildings was in every case first obtained in written agreements, by which the company undertook to pay an annual sum as an acknowledgment, to make good any damage that might be done to the property, and to remove the wires, attachments, and poles, upon notice to that effect. The only access to the wires and attachments on the buildings was through the interior of the buildings by the permission of the owners or occupiers, and then only during business hours, the company having no key or other way of obtaining admittance thereto. Similarly the only access to the poles was by the permission of the owners or occupiers of the land. Held, that the telephone company had such an "exclusive occupation" of those parts of the buildings to which the wires were attached, and of the land in which their poles were fixed, as would render them liable to be rated, and that consequently they were rateable in respect of their wires, attachments, and poles taken as one entire system. (Lancashire and Cheshire Telephonic Exchange Company, apps., v. Overseers of Manchester, resps.) ... ..page 160

Validity of rate—Order under seal of district board requiring overseers to levy rate—"Issuing of such order"—The Metropolis Management Act 1855.—On the 9th April 1884 the Fulham District Board of Works affixed their seal to certain orders or precepts addressed to the churchwardens and overseers of the several parishes within their district, requiring them to levy and pay over to the treasurer of the board the sums therein mentioned. On the same day the clerk to the board wrote to the overseers informing them that the precepts

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had been sealed, and were ready to be issued, but stating that before issuing the precepts he was instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts. The precepts were retained by the district board, and were not, in fact, served upon the overseers until the 15th May 1884, on which day the overseers paid to the board the amount of the excess of the last year's precepts, and delivered a duly audited statement. Before the precepts were served on the overseers, namely, on the 19th April 1884, the churchwardens and overseers signed three several rates or assessments, entitled respectively a lighting rate, a general rate, and a sewers rate, and these rates were allowed by two justices of the county of Middlesex on the 19th April 1884. Held, that it was not necessary that the precepts should be actually served upon the overseers before the rates were levied, and therefore the rates were valid. (*Glen, app., v. The Churchwardens and Overseers of the Parish of Fulham, resps.*) ... ..page 856

## RENTCHARGE.

Action for arrears—Release of part of property charged—Liability of purchaser of part not released—Apportionment—22 & 23 Vict.—The devisee in fee of property subject to an annuity in favour of the plaintiff conveyed part of such property to the defendant, and afterwards conveyed the remainder to another purchaser. The plaintiff by deed released the last-mentioned part of the property from the annuity, but did not release the part conveyed to the defendant. In an action to recover arrears of the annuity: Held, that the arrears could be recovered by action, and that the effect of 22 & 23 Vict. c. 35, s. 10, was neither to release the defendant altogether, nor to entitle the plaintiff to recover the whole arrears from the defendant, but to apportion the annuity so that the plaintiff could recover a part of the arrears proportionate to the defendant's share of the property originally charged. (*Booth v. Smith.*) ... ..395, 742

## REVENUE.

Probate duty—Return of—How obtained—Petition of right—*Mandamus*.—The right mode of obtaining a return of excess of probate duty from the Commissioners of Inland Revenue is by petition of right. A *mandamus* is only to be granted where there is no specific legal remedy. (*Reg. v. Commissioners of Inland Revenue; Re Nathan.*) ... .. 46

## RIGHT OF WAY.

Purchase by railway company—General words in conveyance—User for purposes of railway.—By the conveyance to a railway company of certain land purchased under the powers of their Act, on which was a stable, the premises were granted together with all rights, members, or appurtenances to the hereditaments belonging or occupied, or enjoyed, as part, parcel, or member thereof. Some years previously the vendor, for his own convenience, had made a private road on his own land from the highway to the stables, and had used it ever since. The soil of this road was not conveyed to the company, and no express mention of it was made in the conveyance. Held, that the general words in the conveyance gave the company a right of way over the road so long as they used the premises as a stable, notwithstanding that the stables had been purchased for the purposes of their undertaking; and that the company was at liberty to use the stables as such until such time as they were required for the special purposes of the railway, or were sold as superfluous land. (*Bayley v. Great Western Railway Company.*) ... .. 337

## RIPARIAN OWNER.

Licence to non-riparian owner to take water—Absence of damage—Injunction—Rights of riparian owner in artificial stream.—A riparian owner

granted a licence to a person, whose land did not abut on the river, to take water from the river for use in his factory. The water was returned to the stream at a point six feet lower down than the point of withdrawal, unpolluted and undiminished. Held, that a lower riparian owner was not entitled to an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. The rights which can be acquired by a riparian owner in an artificial stream observed upon. (*Kenait v. Great Eastern Railway Company.*) ... ..page 862

## SALE OF GOODS.

Signature by broker—Arbitration clause—Dispute arising on contract—Jurisdiction of arbitrator—Question as to existence of custom.—Defendants sold a cargo to plaintiffs by a contract signed by defendants in their own name with the addition of the word "brokers." Plaintiffs knew that defendants were acting for a principal, but did not know who the principal was until afterwards. The contract provided for the settlement by arbitration of "any dispute arising on this contract." Plaintiffs having made a claim in respect of short delivery and inferior quality, defendants procured the appointment of arbitrators, who awarded that, in consequence of a custom which they found to exist, defendants were not liable. Plaintiffs brought an action, and the jury found that the alleged custom did not exist. Held, that the dispute as to the existence of the custom was not a dispute arising on the contract within the meaning of the arbitration clause, and therefore the arbitrators had exceeded their jurisdiction, and plaintiffs were not bound by the award, and were entitled to recover. (*Hutcheson v. Eaton.*) ... .. 846

## SEA WALL.

Sewers, commission of—Liability to repair a wall—Damage caused by extraordinary tide—Evidence of liability—Presentments—3 & 4 Will. 4, c. 22, ss. 13, 46.—The prosecutor was the owner of certain lands in the county of Essex, on the shore of the river Thames, known as Curry Marsh Farm, and within the jurisdiction of the Commissioners of Sewers for the Levels of Fobbing. All the land lies below the level of the river at high water, and is protected from inundation at every flood tide by sea walls constructed for that purpose. The sea walls were ancient, and the date of their construction was not known, and the wall in front of Curry Marsh Farm, belonging to the prosecutor, formed part of the southern boundary of the levels. On the 18th Jan. 1881 there occurred an extraordinary storm and high tide, and the sea wall fronting Curry Marsh Farm, and almost all the sea walls on the banks of the Thames in that neighbourhood, were breached by the water from the river, which flowed through and over the walls of the level generally, and submerged a large portion of the lands. Previously to the 18th Jan. 1881 the sea wall fronting Curry Marsh Farm was in a good state of repair, and sufficient to resist the flow of ordinary tides. Immediately after the 18th Jan. 1881 the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor to repair the wall, which he did, and on the 15th Feb. 1881, at a general court of sewers, the commissioners ordered the prosecutor to do certain further repairs to the sea wall, and which were rendered necessary by the extraordinary tide of the 18th Jan. 1881. This order, which was based on a presentment made many years previously, was complied with by the prosecutor. The prosecutor then obtained a writ of *mandamus* directed to the commissioners, commanding them to reimburse the expenses incurred by him in repairing the damage done to the sea wall fronting Curry Marsh Farm by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the commissioners, and to make rates and do all such acts as might be necessary for such reimbursement. The prosecutor contended that he was not liable to repair damage caused to the wall by extra-

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ordinary weather or tides; and, on the other hand, the commissioners contended that his liability extended to all repairs, whether rendered necessary by ordinary or extraordinary weather or tides, and they endeavoured to prove this liability by certain presentments of juries and other documents found among the papers and books of the commissioners. Held, that the burden of proof was on the commissioners to establish the extent of the prosecutor's liability, and that they had failed to prove that he was liable to make good all damage however caused; that the prosecutor was only liable to make good damage which could in some way be traced to his or his predecessors' negligence; and that the damage to the wall mentioned in the case was not such as he was bound to repair. Held, also, that the prosecutor was entitled to a *mandamus* to be reimbursed the expense of repairing the wall under the direction of the marsh bailiff, but not the expense of repairing the wall under the orders of the commissioners, because those orders were equivalent to a verdict after trial of a presentment, and, until they were reversed on appeal, or quashed by the court on *certiorari*, the prosecutor was bound by them, and therefore he was not entitled to a *mandamus* to reimburse him the expense he had incurred in obeying them. (Reg. on the prosecution of John Abbott v. The Commissioners of Sewers for the Levels of Fobbing) page 227

SETTLED ESTATES ACT 1877.

Married Women's Property Act 1882—Examination of married woman—Woman married before the 1st Jan. 1883—Property acquired before the 1st Jan. 1883.—In the case of a woman married before the commencement of the Married Women's Property Act 1882, sect. 1 applies only to property acquired by her after such commencement. It is therefore still necessary, upon an application to the court under the Settled Estates Act 1877, to sanction a lease of property of the above description, that the woman should be examined under sect. 50 of the latter Act, apart from her husband. (Re Harris's Settled Estate.) ... page 855

SETTLED LAND.

Sale of settled estate—Mansion-house—Heirlooms—Leave of court.—Where the tenant for life of an estate and mansion-house with heirlooms annexed devised in strict settlement was desirous of selling the mansion-house and heirlooms with the estate, and the trustees refused their consent on account of the provisions of the will, the Court, upon evidence that the changed character of the neighbourhood rendered the house unfit for such residence as the testator contemplated, and that the sale of estate and mansion-house together would be advantageous, granted the requisits leave. (Re Brown's Estate.) ... page 156

Settlement—Derivative settlements—Trustees for purposes of the Act.—The settlement, as defined by sect. 2 of the Settled Land Act 1882, means the original settlement under which a given interest is taken, and does not include instruments engrafted on that settlement. Persons who are related to each other ought not to be appointed the trustees of a settlement for the purposes of the Act. (Re Knowles' Settled Estates.) ... page 655

Tenant for life—Remaindermen—Improvements—Drainage—Terminable charges—Charge redeemable by instalments—Application of capital moneys—Improvement of Land Act 1864.—The words "incumbrances affecting the inheritance" in sect. 21 (ii.) of the Settled Land Act 1882 do not include terminable charges. Charges under the Land Improvement Act 1864, for drainage improvements made before the passing of the Settled Land Act, cannot therefore be paid out of capital under that section. Nor can capital be so applied even where the improvements effected have always been such as would now be sanctioned under sects. 25 and 26 of the Settled Land Act, these sections being prospective and not retrospective. (Re The Knatchbull Estate.) ... page 695

SETTLEMENT.

Business—Bequest of—Profits and losses—Tenant for life and remainderman.—A testator who died in 1879 bequeathed (*inter alia*) his share in a business in which he was a partner to trustees upon trust to pay the net profits of one moiety to his daughter for life, after her death the moiety to be held in trust for her children. The practice of the testator's firm was to divide at the end of the year the net profits, or if there was a loss to write it off the capital. The trustees carried on the business at a loss for 1881, but made large profits in 1882. Held, that the daughter was entitled to a moiety of the profits for 1882 without any deduction to make good the losses out of capital in 1881. (Gow v. Forster.) ... page 394

Covenant to settle after-acquired property—Gift to wife—Intention of donor.—On the marriage of S. and his wife, in 1870, three deeds were executed. By the first, freeholds were settled for the benefit of husband and wife, during their joint lives, in moieties; the wife's moiety for separate use with restraint on anticipation. By the second, husband and wife covenanted that personal property coming to the wife during coverture should be settled on trust for husband and wife during their joint lives in moieties, the wife's moiety for her separate use with restraint on anticipation. By the third, the wife's father covenanted to pay an annuity to the trustees on trust for the husband and wife during their joint lives, in moieties, the wife's moiety for her separate use with restraint on anticipation. In 1874 S., for value received from the wife's father and by his direction, assigned his interest in the annuity to the same persons who were trustees of the settlements, on trust for the wife, for her separate use for life, and after her decease on the trusts of the settlements. In this deed the two settlements were recited, but not the deed of covenant as to after-acquired property, and there was no clause restraining anticipation. In 1878 the wife, with the concurrence of the husband, purported to assign to a mortgagee all her interest in the annuity under the deed of 1874. Held, that the interest given to the wife by the deed of 1874 came within the covenant to settle, and therefore all the interest was subject to the restraint on anticipation, and that nothing passed by the mortgage. Where a married woman has entered into a covenant to settle after-acquired property, and property is given to her which comes within the covenant, any expression of intention by the donor that it shall not be affected by the covenant is inoperative. (Scholfield v. Spooner.) ... page 138

Life interest—Forfeiture on alienation—Subsequent settlement of life interest.—L. was entitled under a voluntary settlement to a life interest in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age leaving issue, with remainder over. The settlement contained a proviso for the determination of his life interest, and the acceleration of the subsequent remainders, if he should alien, dispose of, mortgage, charge, or in anywise incur his life interest, or if by reason of his bankruptcy, insolvency, or otherwise the income of the funds could be no longer personally enjoyed by him, but would, but for that proviso, become vested in, or payable to any other person or persons other than him. By a subsequent settlement made on his marriage, L., amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of L., and after his death upon such request, or at such discretion as therein mentioned, to sell the same, and pay the income of the proceeds to L. during his life, and after his death to his wife during her life, with remainder for the issue of the marriage as L. and his wife jointly or the survivor should appoint, and in default for all the children of the marriage in equal shares, sons at twenty-one, daughters at twenty-one or marriage, and in default of such issue for L. absolutely. The

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- question arose whether the marriage settlement produced a forfeiture of L.'s life interest under the voluntary settlement. Held, that no such forfeiture was produced, for the assignment contemplated by the forfeiture clause was one by reason of which the income of L.'s share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit. (*Lockwood v. Sikes.*) ... page 562
- Protector**—"Owner of prior estate"—Trustee—Tenant for life—Annuity—Fines and Recoveries Act (3 & 4 Will. 4, c. 74).—In considering who is "protector" of a settlement, as "owner of a prior estate" in settled lands, within the meaning of sect. 22 of the Fines and Recoveries Act, the principle is to consider who is to be deemed the substantial owner of such estate. Lands were devised to trustees taking the legal estate for a term of ninety-nine years upon trust to pay M. 250*l.* a year, to manage the estate, and to pay over all the surplus rents and profits to H.; and subject to this trust the lands were devised to H. for life, with remainder to his sons in tail. Held, that H. was the substantial owner, and therefore the protector of the settlement. (*Re Ainslie; Ainslie v. Ainslie.*) 780
- Renewable leaseholds**—Trust for renewal—Statutory prohibition—Purchase of reversion by assignee—Constructive trust.—B. was tenant for life and ultimate remainderman of renewable leaseholds devised to trustees upon strict settlement with a paramount trust for renewal. B. sold his equitable life interest to B., and B., under sect. 3 of this Act, bought the reversion in fee from the Ecclesiastical Commissioners: Held, that B. must be treated as having bought as trustee for the persons entitled under the will, subject to a lien in his favour for the amount which he paid for it. (*Re Lord Ranelagh's Will; Beeton v. London School Board.*) ... 87
- Setting aside marriage settlement**—Failure of consideration.—By a settlement executed in England in April 1877, in consideration of an intended marriage between F. and J., a sum of consols belonging to the latter was settled upon her, her intended husband, and the issue of the marriage, in the usual way, with the usual remainders in her favour in default of issue; but there was no provision that, in the event of the marriage not taking place within a certain period, the deed should be void. The settlement contained the usual trust for her, as settlor, absolutely until the marriage, and also the usual covenant for the settlement of property to be acquired during the coverture. The marriage was never solemnised, but the parties went together to South Africa, and cohabited in Natal, where they had three children. Held, in an action by F. and J. against the trustees of the settlement, that the consideration for the original contract had failed, and the contract being therefore definitively and absolutely at an end, J. was absolutely entitled to the fund. (*Essery v. Cowland.*) ... 60
- SHIP AND SHIPPING.**
- Bill of lading**—Indorsement of, by way of security for money advanced—Liability of indorsee for freight—Passing of property in goods—Bills of Lading Act (18 & 19 Vict. c. 111), s. 1.—The mere indorsement and delivery of a bill of lading by a shipper of goods by way of security for money advanced to him by the indorsee passes the property in the goods to the indorsee so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1. (*Burdick v. Sewell and another.*) ... 453
- Charter-party**—Exception in charter-party—Commencement of lay days—Loading prevented by frost.—By the terms of a charter-party a ship was to proceed to the port of loading, and there load a cargo of iron in the customary manner from the agents of the charterers. The charter-party contained the following clauses: "Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage at 40*l.* per day . . . except in case of . . . frost . . . or any other unavoidable accident preventing the loading." The ship arrived at the port of loading and went into dock, but after the loading had commenced a canal, through which part of the cargo had to pass in lighters in order to reach the dock was made impassable by a severe frost, and the loading was delayed. Held, that this delay was not within the exception in the charter-party, which referred only to delays in "loading," which would not have been interfered with by the frost if the cargo had been brought to the dock otherwise than by the canal. (*Grant and Co. v. Coverdale, Todd, and Co.*)... page 472
- Seaman's remedy against master**—Refusal of certificate—Discharge—Penalty—17 & 18 Vict. c. 104, ss. 17 and 524.—By the Merchant Shipping Act 1854, s. 172, upon the discharge of any seaman the master shall sign and give him a certificate, and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of 10*l.*, and by sect. 524 the whole or any part of the penalty may be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. In an action for damages caused by the refusal of the defendant, a master, to give the plaintiff, a seaman, discharged from his ship engaged in the coasting trade, a certificate, the County Court judge nonsuited the plaintiff. Held, that the remedy by penalty was exclusive under the provisions of the Act, and that the County Court judge was right. (*Vallance v. Falle.*) ... 158
- SOLICITOR AND CLIENT.**
- Bill of costs**—Substantial part improperly described—6 & 7 Vict. c. 73, s. 37.—Where a substantial part of a bill of costs is improperly set out and described, and a substantial part is properly set out and described, the whole bill is not bad, but the solicitor can recover upon those items that are properly described. Where therefore in a bill of costs for 51*l.* 16*s.* 6*d.*, a lump charge of 38*l.* 10*s.* was made for a number of items lumped together, and the remaining items, amounting to 13*l.* 6*s.* 6*d.*, were properly described, it was held that the solicitor could recover upon those items that were properly described. (*Blake v. Hammell.*) ... 430
- Costs of taxation**—Solicitors Act 1843—Judicature Act 1873.—A solicitor who has delivered to his client a bill of costs, offering at the same time to take less than the full amount, cannot, when on taxation such full amount is reduced by more than one-sixth, claim that the amount so taxed off shall be deemed to be diminished by the amount which he has himself offered to remit, and that the taxation has therefore reduced his bill by less than one-sixth, so as to entitle him under sect. 37 of the Solicitors Act 1843 to escape the costs of taxation. A bill of costs was delivered for "83*l.* 3*s.* 4*d.*—say 78*l.*" and signed by the solicitor. It was afterwards referred for taxation, and taxed and settled at 66*l.* 3*s.* 4*d.* Held, that the "bill delivered," within the meaning of the Solicitors Act 1843, was for 83*l.* 3*s.* 4*d.*, and that, as more than one-sixth of that amount had been disallowed, the solicitor must pay the costs of taxation. A solicitor delivered to his client a bill of costs for 360*l.*, offering to take 320*l.* The client having insisted on taxation, the 360*l.* bill, with the offer, was carried in, and reduced by the taxing master to 280*l.* The taxing master made a special certificate. Held, that, as there were special circumstances, the court had a discretion as to the costs of the taxation under the proviso in sect. 37 of the Solicitors Act 1843, and that as 40*l.* had been taxed off over the sum claimed, the solicitor must pay the costs of the reference. (*Re Carthew; Re Paull.*) ... 435
- Taxation**—Negligence—Disallowance—Jurisdiction of taxing master.—The taxing master, when taxing a bill of costs between a solicitor and his clients relating to the proceedings in an action, has jurisdiction to disallow the costs of proceed-

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ings which were rendered necessary only by the negligence or mistake of the solicitor. (*Re Massey and Carey.*) ... ..page 390

**Executor and trustee—Professional charges—Direction as to, in will.**—A testatrix, by her will, appointed C., who was her solicitor, and who prepared the will, one of her two executors and trustees, and stating that, it being her desire that C. should continue to act as her solicitor in the matters relating to her property and affairs, and should "make the usual professional charges," she expressly directed that he should, notwithstanding his acceptance of the office of trustee and executor, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of her will, or the management or administration of her trust estate, real or personal, as if he, not being himself a trustee or executor of the will, were employed by the trustee or executor; and that he should be entitled to retain out of her trust moneys, or be allowed to receive from his co-trustee (if any) out of the same moneys, the full amount of such charges, any rule of equity to the contrary notwithstanding; nevertheless without prejudice to the right or competency of C. to exercise the authority, control, judgment, and discretion of a trustee of her will. Under this direction C. delivered certain bills of costs, which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor himself without the assistance of a solicitor. Held, that all items which were not of a strictly professional character ought to be disallowed. (*Re Chapple; Newton v. Chapman.*)... 748

**Mortgage—Unqualified power of sale.**—A solicitor took a mortgage from his client containing a power of sale without the usual proviso that the power of sale should not be exercised unless there was default in payment of the principal after six months' notice, or some interest should be in arrear for three months. This omission was not brought to the mortgagor's notice. The mortgagee (without notice) sold part of the property at a time when interest was in fact three months in arrear, and other part when some interest was in arrear less than three months. The mortgagor brought an action against the mortgagee, claiming damages for wrongful sales. Held, that both the sales were wrongful as between the mortgagor and mortgagee, but the first sale not being at an undervalue, the court gave the mortgagor no damages in respect of it. The second sale, though not improperly conducted, was shown to have been in fact at an undervalue, and the court gave damages in respect of it. (*Cradock v. Rogers.*)... .. 191

**Profit costs—Mortgagee solicitor—Trustee solicitor.**—Where a solicitor was mortgagee with others of certain properties, the money lent on mortgage being trust money, and the solicitor sent in a bill to the mortgagor of costs incurred in an abortive sale, and a sale of part of the mortgaged property; on summons by the mortgagor to review the taxation, and disallow the solicitor's profit costs: Held, that the solicitor, not being a trustee for the applicant, did not lose his professional rights by discharging business necessary to the trust, and that therefore he was entitled to charge profit costs; also that the mortgagor should have raised the objection to profit costs in the petition for taxation. (*Re Donaldson.*) ... .. 622

## SOLICITORS' REMUNERATION ACT 1881.

General Order of Dec. 1882—Scale of charges—Matters commenced prior, but completed subsequently, to the 31st Dec. 1882.—The General Order made under the Solicitors' Remuneration Act 1881, regulating the scale of charges in respect of a purchase of land, applies to any matter taken up by a solicitor after the order came into operation, although the contract was entered into before

that time. (*Re Denne and Secretary of State for War.*) ... ..page 657

## SPECIFIC APPROPRIATION.

**Bill of exchange—Consignments.**—On the 16th March 1883 S. and S., who were merchants and bankers in London, granted to Q., a merchant at Shanghai (at the request of M., a London merchant acting as his agent), a letter of credit authorising Q. "to draw on us, at four months' sight, for any sums not exceeding 20,000*l.*, such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamer to London, and marine policies relating thereto, and those documents to be surrendered to us against our acceptances." The document continued: "And we hereby agree with you, and also as a separate engagement with the *bond fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn and negotiated on or before 31st Dec. 1883." It was also agreed that S. and S. should receive commission at 1 per cent. on all drafts drawn under this credit, and that M. should meet all their acceptances before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments." Q., in May and June 1883, drew, under the letter of credit, bills on S. and S. for 18,000*l.* against tea consigned by him to M., each bill mentioning the date of the letter of credit, and purporting to be drawn under it against a particular consignment of tea, "as per shipping documents herewith." The shipping documents were attached to the bills, and Q. advised S. and S. by post of the drawing of each bill, mentioning the tea against which it was drawn, and the name of the ship by which it was sent. The bills all matured between the 28th Oct. and the 24th Nov. Q. discounted each bill with a bank in China, and the bank forwarded the bill and shipping documents to their London agents, who obtained the acceptances of S. and S., the shipping documents being then delivered to S. and S. As the tea arrived in London, it was warehoused in the name of S. and S., who from time to time gave warrant or delivery orders for parcels to M., who gave them cheques for the value of the parcels. The amount of the cheques was carried to the credit of M. in a special account in the books of S. and S., and M. was also credited with 2½ per cent. for prepayment, and was debited with the amounts of the bills and with freight and other charges. The cheques were paid into the current banking account of S. and S., and the proceeds were applied in the ordinary course of their business. In October, before the bills had matured, S. and S. stopped payment, and on the 9th Oct. filed a petition for liquidation. Some consignments of tea remained in specie at the time of the stoppage. Held, that Q. was entitled to have the tea in specie applied in payment of the bills on the ground that it had been specifically appropriated to meet them, but that the bank which had discounted the bills was not entitled to have the proceeds of sale of the teas previously sold so applied. (*Ex parte Devers; Re Suse.*) ... .. 48

## STAMP ACT 1870.

**Charter-party.**—A charter-party wholly executed by both parties thereto abroad, is duly stamped so as to be admissible in evidence if it has been stamped within two months after it has been first received in the United Kingdom as provided by sect. 15 of the Stamp Act 1870, and it is not necessary that such a charter-party should be stamped under sect. 68 of the same Act. *Semble*, that such a charter-party must be stamped with an impressed stamp, and not with an adhesive stamp. (*The Belfort.*) ... .. 271

## STATUTE OF LIMITATIONS.

Acknowledgment of debt—9 Geo. 4, c. 14, s. 1.—An acknowledgment, in order to be sufficient

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- to take a debt out of the Statute of Limitations, must be absolute and unconditional—not controlled by any other language in the document—and must contain words of such a character that there may reasonably be inferred therefrom a promise to pay the debt. The acknowledgment must not only be clear in itself in order to raise the implication of a promise, but must be unaccompanied with words which prevent the possibility of the implication; though an expression of less than a promise will not necessarily put an end to the implication. It is not enough for the writer of an acknowledgment to refer to a debt as being due from somebody, but the letter, on its fair construction as read by the light of surrounding circumstances, must be an admission that the writer himself owes the debt. (*Green v. Humphreys.*) ... ..page 42
- Married woman—Action for tort—Removal of disability.—A married woman within two years after the commencement of the Married Women's Property Act 1882 brought an action for slander uttered more than two years prior to the commencement of the Act. Held, that the action was not barred by this Statute of Limitations, the statute having only begun to run from the time when the disability of coverture was removed by the Married Women's Property Act coming into operation. (*Weldon v. Neal.*) ... .. 289
- STOCK.
- Transfer into joint names of transferor and another—Intention to benefit.—M. S., who was a widow in 1880, in that year transferred stock, which had been acquired by her as the survivor of her husband, into the joint names of herself and R. B., who was a relative of her husband, and to whom she and her husband had stood sponsors at baptism. M. S., at the time of making the transfer, expressed her desire and intention of benefiting R. B., but she did not at the time inform him of the transfer, and she continued to receive the income. M. S. having subsequently married a second husband, sought to establish that the transfer into the joint names had been made only for the purpose of placing the fund in trust for herself. Held, that the presumption of an intention to benefit R. B. in the event of his being the survivor of M. S. was not negatived by the evidence, and R. B. could not be compelled to transfer the stock to M. S. (*Standing v. Bowring.*) 591
- TENANT FOR LIFE.
- Advance to stock farm—Trustees.—A testator gave his residuary personal estate and devised his real estate (subject as to the real estate only to two annuities) to his son for life, and then to his children, who were infants. A farm on the estate was vacant. On summons by the trustees for the sanction of the court to the advance of 1000*l.* to the tenant for life to stock the farm, the Court, holding that it was for the preservation of the estate, and following *Calthrop v. Calthrop*, before Bowen, J., in the vacation, the 17th Sept. 1879, made the order. (*Re Household; Household v. Household.*) ... .. 319
- TRADE MARK.
- Descriptive word—"Valvoline"—Five years' registration—Trade Marks Registration Act 1875.—A word which is simply descriptive of an article is not a trade mark, unless it has been so used before the passing of the Trade Marks Registration Act 1875, and the fact of its having been registered for five years as a trade mark will not prevent the registration being expunged, nor will exclusive user obtained by the protection of such improper registration give the holder any rights to restrain its use by other persons which he would not otherwise have possessed. *Quære*, whether such a prior user will enable the person using such a descriptive word to register it as a trade mark, and if so, whether prior user in a foreign country is sufficient. Such a descriptive word used alone is not a "heading" within sect. 10 of the Act, so as to entitle the person using it to register it, in the absence of user prior to the Act. "Heading," in sect. 10, only applies to a word when it is used in combination with some device. (*Leonard and Ellis v. Wells and Co.*) ... ..page 35
- Distinctive label or device—Name of manufacturer—Name combined with words in common use.—A mark consisting of the name of a manufacturer printed in ornamental type, in combination with words in common use, is not a trade mark within the requirements of sect. 64 of the Patents, Designs, and Trade Marks Act 1883. (*Re Price's Patent Candle Factory.*) ... .. 653
- Infringement—Design—General effect—Dissimilarity of detail—"Obvious imitation."—A firm of calico printers copied the general effect of a design registered by a rival firm, but carefully avoided copying the exact details of the design: Held, a "fraudulent and obvious imitation" within the meaning of this section of the Patents, Designs, and Trade Marks Act 1883. Injunction granted on the balance of convenience in preference to defendant's keeping an account. (*Grafton v. Watson.*) ... .. 141
- Injunction—Insurance company—Similarity—Probable deception.—An insurance company, registered under the Companies Acts, having carried on its business in the City of London for many years under the name of the Accident Insurance Company Limited, sought an interim injunction to restrain another insurance company, recently registered under the Companies Acts, and having its office and place of business in the City of London, from carrying on its business under its registered name of the Accident, Disease, and General Insurance Company Limited. Held, that the plaintiff company was entitled to the injunction to restrain the defendant company from using its registered name, or any other name calculated to cause the defendant company to be mistaken by the public for the plaintiff company. (*The Accident Insurance Company Limited v. The Accident, Disease, and General Insurance Corporation Limited.*) ... .. 597
- Rectification of register—Exclusive user—Five years after registration—Patents, Designs, and Trade Marks Act 1883.—L. had registered a trade mark in 1877, and appeared on the register as proprietor thereof; he brought an action in 1884 against B., alleging wrongful user, or imitation of the trade mark. B. now moved to expunge this trade mark from the register, and alleged common user of it before and after registration. Held, that the motion must succeed, as the mark ought not to have been registered; and that the right to the exclusive user of a trade mark after the expiration of five years from the date of registration given by sect. 76 of the Trade Marks Act 1883 is subject to and controlled by sect. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded, by the expiration of five years from the date of such registration, from showing that the mark ought not to have been registered. (*Re Lloyd and Son's Trade Mark; Lloyd v. Bottomley.*) ... .. 896
- Registration—Common mark—User—Fraud—Foreign proprietor—Laches.—In 1718 G.'s firm, who were manufacturers of iron at Leufsta, in Sweden, registered in Sweden, as their trade mark, the letter L inclosed in a ring or hoop, commonly known as the "hoop L." In 1878 they registered in England, under the Trade Marks Registration Act 1875, the hoop L mark alone, and also in combination with the word "Leufsta." Since 1835 they had exported iron of the highest quality to England for the manufacture of a particular kind of steel known as "blister steel." The hoop L mark was stamped upon the iron in combination either with the name of their English consignee, or with the word "Leufsta," or with both. They registered these in Sweden as bye-stamps in addition to their original hoop L mark. H.'s firm, who were English iron and steel and edge tool

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manufacturers, had for fifty years past used the hoop L mark, in combination with the name of their firm, as their trade mark upon blister steel manufactured by them from inferior brands of Swedish iron. For this purpose it was necessary to cut off the Swedish mark, as the bars of iron when converted into steel retained upon their surface, unless intentionally obliterated, any marks which might be stamped upon them. A similar practice was adopted by thirty other English firms of iron and steel manufacturers, but this practice did not come to G.'s knowledge until 1881. H. applied, under the Trade Marks Registration Act 1875, to register the hoop L mark in combination with the words "Brades Co., War-ranted." Held, that the application must be refused with costs, upon the ground that, what-ever might have been the practice as to the user, it was one which had its inception in fraud, and was calculated to deceive, and therefore, though apparently established by time and usage, could not receive the sanction of the court. (*Re Heaton's Trade Mark.*) ... ..page 220

TRUSTEE.

**Alleged lunacy of—**Petition for appointment of new trustee—Denial of lunacy—Jurisdiction—Trustee Act 1850—Trustee Extension Act 1852.—The court will not, on a petition under the Trustee Act 1850, remove a trustee against his wish. Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, and the insanity is denied by him, the court will not try the question whether the trustee is of sound mind, nor will it (under sect. 52) direct a commission in the nature of a writ *de lunatico inquirendo* to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the High Court to remove the trustee. (*Re Combs.*) ... .. 45

**Appointment—Conveyancing Act 1881.**—By a settlement made in 1849 four persons were appointed trustees. The settlement provided that if the trustees thereby appointed, or any future trustees to be appointed in place of them, or any of them "as hereinafter mentioned" should die, &c., it should be lawful for the surviving or continuing trustees, with the consent in writing of the tenant in tail in possession for the time being, to appoint new trustees. In 1854 the Court of Chancery appointed new trustees in place of two of the original trustees, and in 1872 the same court appointed four new trustees in the place of two original trustees and the two previously appointed by the court. It being necessary to appoint three new trustees, the continuing trustee claimed to exercise the power of appointment given by sect. 31 of the Conveyancing Act, without obtaining the consent of the tenant in tail in possession. Held, that he was entitled to do so, as the proposed new trustees, being in the place of trustees not appointed under the power in the settlement, but by the court, the event, in the settlement mentioned, on the occurrence of which the consent was required, had not happened, and therefore that sub-sect. 7 of sect. 31, by which the power of appointment given in the section is to apply if and as far as a contrary intention is not expressed in the trust instrument, did not apply. (*Cecil v. Langdon.*) ... .. 618

**Breach of trust—Investment of trust money—Change of investment—Improvident loan on mortgage—House property—Value—Insufficient security—Employment of agents—Liability of trustees.** (*Fry v. Tapson.*) ... .. 326

**Trust fund—Deposit at bank—Delay—Failure of bank—Liability of trustees.**—A will appointing trustees only authorised them to invest in parliamentary stocks or funds, or in freehold, copyhold, or leasehold hereditaments. The will contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise. The

trustees left the sum of 500l. on deposit at a bank, by way of interim investment, whilst they looked for a mortgage, for fourteen months, when the bank failed. Upon the question whether the trustees were liable for the loss thereby occasioned: Held, that fourteen months was too long for the trustees to leave trust money on deposit at a bank; that if after six months they could not get a mortgage they ought to have invested the money in Consols; that, from the moment they left it too long on deposit, they became responsible for the consequences of their default, and were therefore liable for the sum lost to the trust estate. (*Cann v. Cann.*) ... ..page 770

**Carrying on business—Indemnity—Creditor of trustees—Right against trust property.**—The trustee of a marriage settlement under the trusts of the settlement on the husband's insolvency entered into possession of a lunatic asylum, part of the settled property; but, instead of selling as provided, carried on the business without any authority to do so under the settlement. The business having been afterwards sold: Held, that, even if the trustee were entitled (which he was not) to an indemnity out of the proceeds of sale for the expenses of carrying on the asylum, a tradesman who had supplied furniture to the trustee could not stand in his place against such fund, there being no dedication of any part of the trust property for carrying on the business. (*Strickland v. Symonds.*) ... .. 406

**Investment—Mortgage—Negligence—Liability.**—A trustee advanced trust moneys to a brickbuilding firm upon the security of a first mortgage of their premises, freehold and leasehold, and some of the plant. In so doing he acted upon the advice of his solicitor, and upon a favourable report and valuation made by a respectable firm of architects and surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mortgage. The mortgagors failed three years afterwards, whereby their lease of that part of the property upon which was most of the clay and shale necessary for the carrying on of the business, became forfeited. The remainder of the property proved unsaleable, and rapidly went to ruin. An action was subsequently brought by the *cestuis que trust* to make the trustee liable for the loss sustained by them, and it appeared that the report and valuation proceeded, *ex facie*, in some respects upon faulty principles. Held, nevertheless, that the trustee had acted as a prudent man would have acted in dealing with his own property, and was therefore not liable. (*Re Pearson; Oxley v. Scarth.*) ... .. 692

**Power to appoint—"Continuing" trustee—Solicitor—Administration by the court.**—A trustee who has made up his mind to retire is not a "continuing" trustee, so as to be a necessary party to the appointment of a new trustee under a power given to the surviving or continuing trustee or trustees. Where trusts are being administered by the court, a solicitor who is the partner in business of the continuing trustee, and is acting both for the trustees and for some of the beneficiaries, is, by reason of his position alone, an improper person to be appointed trustee, and his appointment will not be sanctioned by the court. (*Re Norris; Allen v. Norris.*) ... .. 593

**Removal of, by court—Principles of equity—Misconduct of trustees.**—It is the duty of a court of equity to see that trusts are properly executed, and therefore, even though no charge of misconduct is made out against a trustee, the court will remove him if satisfied that his continuance in office would be detrimental to the proper execution of the trusts. Friction or hostility between the trustee and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee, but it will not be disregarded by the court, when grounded on the mode in which the trust has been administered. (*Letterstedt v. Broers.*) ... .. 169

**Sale out of court—Partition Act 1868.**—In a partition action the question arose whether the court had jurisdiction under sect. 8 of the Partition



Act 1868 to authorise certain trustees to sell out of court, where such trustees had no power of sale by virtue of the instrument appointing them, and where there were parties interested who were not *sui juris*. Held, that in a case like the present, where the court would not allow a plaintiff to sell out of court, the trustees would not be allowed to do so, inasmuch as to direct trustees to sell where there was a power of sale was not equivalent to giving a power of sale to trustees; and that there must be a sale in the usual way under the court, as the expense would not be much greater, and the parties not *sui juris* were entitled to the protection of the court. (*Strugnell v. Strugnell*.) ... ..page 512

#### TRUSTEE ACT 1850.

Agreement to grant a lease—Specific performance—Decree for—Refusal to obey order of court—Defendant declared a trustee—Appointment of person to execute lease—Trustee Act 1850 (13 & 14 Vict. c. 60), s. 30.—A decree was made for specific performance of an agreement to grant a new lease of certain premises, and the defendant was ordered to execute such new lease to the plaintiff. The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her. Held, that there having been a decree for specific performance, the court had jurisdiction, under sect. 30 of the Trustee Act 1850, to appoint a person to execute the lease in place of the defendant, and the motion was directed to be amended accordingly. The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff. (*Hall v. Hale*.) ... .. 22

#### TRUSTS.

Business property—Successive life tenancies—Loss during first life tenancy—Subsequent profit—Apportionment.—When a business property is settled upon successive life tenancies, and is carried on by a receiver and manager during one life tenancy at a loss, and during the subsequent life tenancy at a profit, the losses incurred during the first life tenancy must be made good out of the profits of the subsequent life tenancy. (*Upton v. Brown*.) ... .. 591

#### VALUATION (METROPOLIS) ACT 1869.

Supplemental valuation list—Alteration—Dock company—Diminution of profits—Sufficiency of evidence of alteration.—Upon an appeal against a supplemental valuation list, under the valuation (Metropolis) Act 1869, evidence showing a diminution in the profits of a dock company within the preceding twelve months is admissible as evidence of alteration in value, and is *prima facie* evidence of an alteration within the meaning of the Act. (Reg. on the prosecution of *The Assessment Committee of the Poplar Union v. The East and West India Dock Company*.) ... .. 97

#### VENDOR AND PURCHASER.

Conditions of sale—Restrictive covenants—Inquiry as to—"Requisition"—Right to rescind.—A purchaser in fee of a freehold property under the ordinary conditions of sale, upon receiving notice of restrictive covenants not disclosed by the abstract, applied to the vendor for a copy of the covenants, and, on this being refused, struck out from the draft conveyance the notice of the covenants. The vendor thereupon gave notice to rescind, treating the application for a copy as a requisition with which he was unwilling to comply. Held, that it was not a requisition, and that the vendor must convey according to the purchaser's draft. (*Monckton to Gilzean*.) ... .. 320

—Right to rescind.—A sale took place under a condition providing, that, if the purchaser shall take any objection or make any requisition as to the title, evidence or commencement of

title, conveyance or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale. The purchasers made fourteen requisitions. The vendor answered them. The purchasers considered several of such answers insufficient, and insisted on the requisitions. The vendor gave notice that he rescinded the contract. The purchasers then waived the requisitions, and, on the vendor neglecting to complete the contract, applied by summons for a declaration that they were entitled to a conveyance of the property. Held, that the vendor had expressed his inability or unwillingness, but the purchasers had insisted on their requisitions; that "unwillingness" meant unwillingness to go to the trouble and expense of removing or complying with requisitions; and that the vendor had a right to rescind the contract at any time without giving his reasons. (*Dames to Wood*.) ... ..page 109

Conditions of sale—Sale of two lots—Restrictive covenant between purchasers—Withdrawal of one lot from sale.—Two lots of land were put up for sale under conditions which, after reciting that the vendor was possessed of adjoining property not included in the sale, provided that each purchaser should, in his conveyance, enter into a covenant with the vendor and the purchaser of the other lot not to use any building on his lot as a public-house, and to the conditions was annexed a form of covenant to this effect: No provision was made for the case of a lot remaining unsold. Lot 2 was purchased at the sale, and the purchaser signed a contract embodying the conditions. Lot 1 remained unsold. Held, that the purchaser was bound to enter into the restrictive covenant with the vendor. (*Re Mordy and Cowman*.) ... .. 721

—Want of title—Right of vendor to rescind.—Trustees of the will of H., who died in 1858, contracted to sell to the plaintiff freehold premises containing five acres. The conditions of sale provided that if the purchaser took any objection or made any requisition which the vendors were unable or unwilling to remove or comply with, the vendors might rescind. The abstract showed a conveyance to the testator in 1855 of about 3½ acres of the property. The other 1½ acres had been inclosed by the testator himself, and had ever since been held with the property, and no other title was shown. There was no want of *bona fides* on the part of the vendors. The purchaser required and insisted on further evidence as to the 1½ acres. Held, that the vendors were entitled to rescind under the conditions. (*Heppenstall v. Hose*.) ... 539

Deposit—Sum payable on non-completion—Penalty—Liquidated damages.—An agreement for sale contained the two following provisions: (9) As an earnest hereof the purchaser has this day paid into the hands of S. the sum of 500*l.* as a deposit, the deposit to form part of the purchase money to be paid on the day of possession; and (10) should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500*l.* as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement. The vendor brought this action for specific performance of the agreement, or, in the alternative, payment of the 500*l.* as liquidated damages. It was contended that this 500*l.* was a penalty, and was therefore not recoverable. Held, that the meaning of the agreement was that the 500*l.* should be recoverable, not if some minute provision were not carried out, but if, owing to the fault of either party, the agreement were not carried out at all, and that that sum could be recovered in this case as liquidated damages. Held, that it could also be recovered if the action were looked upon as an action to enforce the forfeiture of the deposit. (*Catton v. Bennett*.) ... .. 70

Expenses of abstract—Open contract.—The provisions of sect. 3, sub-sect. 6, of the Conveyancing



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- and Law of Property Act 1881 are to be construed strictly. A vendor under an open contract furnished an abstract of title commencing with a deed of conveyance dated in 1860. The purchaser required to be furnished with an abstract of an earlier deed forming part of the title, but not in the vendor's possession. Held, that the expense of such further abstract must be born by the purchaser. (*Re Johnson and Tustin.*) ... page 656
- Lien—Unpaid purchase money—Land in register county—Purchasers without notice—Registration of lien—Inquiry.—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase money remaining unpaid, and allowed R. and W. to register the conveyance knowing that they wanted to do so in order to re-sell the land in lots: Held, that the trustees had by their conduct precluded themselves from asserting their lien for unpaid purchase money against *bond fide* sub-purchasers from R. and W. without actual notice, though the sub-purchasers had not examined, as it was their duty to have done, the conveyance to R. and W., a memorial of which was registered, and though the estate of one of the sub-purchasers was equitable only. A vendor's lien for unpaid purchase money need not be registered under 2 & 3 Anne, c. 4. The mortgagee of a sub-purchaser's lot left it to R. and W. "to manage the business:" *Semble*, he was not affected with constructive notice of the lien. (*Kettlewell v. Watson.*) ... 135
- Misrepresentation—Independent inquiry—Specific performance—Rescission of contract.—The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400*l.*), rates, and taxes. The defendants, however, relying on the statements in the particulars, authorised the secretary to attend the sale and to bid up to 5000*l.* The property was bought in at the sale, and the secretary purchased it by private contract for 4700*l.* It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence, and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries. Held, that the defendants were entitled to rescission of the contract. (*Smith v. Land and House Property Corporation.*) ... 718
- Sale by auction—Error of description in particulars of sale—Condition for compensation—Right to recover after conveyance completed.—The plaintiff purchased certain freehold property at a sale by auction. The particulars of sale erroneously stated the value of the rental, in consequence of which mistake the plaintiff gave more for the property than he otherwise would have done. The conditions of sale contained a provision that if any error should be discovered in the particulars the purchaser should be entitled to compensation. The plaintiff did not find out the error until after he had paid the purchase money, and had accepted the conveyance of the property. Held, that the acceptance of the conveyance did not bar the right of the plaintiff to recover compensation, and that he was entitled to receive it. (*Palmer v. Johnson.*) 211
- Sale by direction of the court—Duty of intending purchaser to give full information—Fraud by concealing material information.—On a purchase of property offered for sale by a court of justice, the maxims of *caveat emptor* and *caveat venditor* are not applicable as in an ordinary case of buying and selling. In such a case the person desirous of buying must either abstain from laying any information before the court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material the court should have to enable it to form a judgment on the subject under its consideration. If a party to an agreement to purchase property sold under the direction of the court obtain the sanction of the court by withholding information which is material and is known to be so, such withholding amounts to fraud, and the agreement will not be allowed to stand. (*Boeswell v. Coaks.*) ... page 242
- Trustee—Avoidance of sale.—J. C. carried on business in partnership with D., and by his will appointed B. and D. his executors and trustees and guardians of his infant children. B. proved the will, but D. did not, and he afterwards renounced by deed the office of trustee. D. purchased J. C.'s share of the partnership's estate from B. Held, that, in the absence of proof of misrepresentation or fraud, the sale could not be avoided merely on the ground that when entered upon the purchaser might, at his option, have become a trustee of the property purchased, he not having, in point of fact, done so. (*Clark v. Clark.*) ... 750
- Will—Disentailing deed—Resettlement—Construction.—A testator devised lands to trustees for a term of 500 years, upon and with certain trusts and powers, including a power of sale, at the request "of any person who by virtue of that his will should be tenant for life in possession;" and subject to such term he devised the lands to J. for life, with remainder to J.'s sons in tail male. J. and his eldest son F. (being of age) afterwards executed a disentailing deed by which, "with the consent of J., as protector of the settlement made by the will" they conveyed the premises to a trustee "subject and without prejudice to the uses and estates by the said will limited, which were prior to the estate in tail male of the said F., other than the uses and estates limited to the said J. during his life, and to the powers annexed to such prior uses and estates, or exercisable during the continuance thereof," so far as subsisting, to such uses as J. and F. should jointly appoint, with remainder to such and the same uses, upon such and the same trusts, and with and subject to such and the same powers, provisions, and declarations as were subsisting in the said premises, or capable of taking effect therein immediately before the execution of those presents, so as to restore and confirm the same uses, trusts, powers, provisions, and declarations." J. and F. mortgaged the property for J.'s benefit, and then by an indenture of resettlement jointly appointed that, subject to the said mortgage, it should, "subject and without prejudice to the uses and estates subsisting in the same premises by virtue of the said will" (in the same manner as in the disentailing deed), and subject, as to J.'s estate, to the said mortgage, "go, remain, and be . . . to the use of the said J. and his assigns during his life, without impeachment of waste, in restoration and by way of continuance and confirmation of the former life estate of the said J. under or by virtue of the said will," with remainders over. And the indenture also declared that nothing in it should "in anywise affect the power of sale contained in the said will, . . . and that the uses, estates, and powers limited or created by the then present indenture . . . should and might from time to time be overreached by the exercise of any of the powers contained in the said will," as if such uses, estates, and powers had been created by the will. A contract, having been entered into for the sale of the premises, the purchaser objected that a good title could not be made, the trustees having only power to sell at the request of a tenant for life "under the will," and there being no such person. Held, that the trustees could make a title, inasmuch as J. answered the description, the test being the intention of the parties. (*Wright to Marshall.*) ... 781
- Trustee vendors—Equitable tenant for life—Limited covenants for title—Condition of sale.—

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Certain property having been purchased by a company from trustees who had a power of sale, the purchasers required that the equitable tenant for life of the property, at whose request the sale was made, should enter into covenants for title. One of the conditions of sale was that "the vendors, being trustees, are to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees." Held, that the purchasers were entitled to require the equitable tenant for life to enter into the usual limited covenants for title, and that the condition of sale stated above did not deprive them of this right. (*Re Sawyer and Baring's Contract*.) ... page 356

Trustee vendors.—Receipt of purchase moneys.—Attendance of trustees.—Authority to co-trustees.—Breach of trust.—Where trustees are vendors a purchaser from them has, as a general rule, a right to insist upon paying the purchase money in the presence of all the trustees, or into a bank to their joint account, and is not bound to pay the money to one of their number on a written authority from his co-trustees. Payment in the presence of all is payment to all if they accept the payment. Freehold and leasehold property having been agreed to be purchased by the Metropolitan Board of Works from the trustees (three in number) of a certain will, the board made a requisition that the trustees should attend personally, on completion of the purchase, to receive the purchase moneys, or that they should give to the board a written direction, signed by the trustees, for payment of the same purchase moneys to their joint account at some bank. The trustees objected to this, and desired that the moneys should be paid to one of their number, to whom they proposed to give their written authority to receive it. Held, that the principle in *Re Bellamy and the Metropolitan Board of Works* (48 L. T. Rep. N. S. 801; 24 Ch. Div. 387) applied to the case, and that the requisition must be complied with. (*Re Flower and the Metropolitan Board of Works*.) ... 257

## VOLUNTARY SETTLEMENT.

Consideration.—Assignment of leaseholds.—Subsequent surrender and renewal.—27 Eliz. c. 4.—Renewal by settlor.—Benefit of fiduciary relation.—An assignment by way of settlement of leasehold property, although it contains no covenant on the part of the assignee to pay the rent, or perform the covenants of the lease under which the property is held, is not a voluntary conveyance within the statute 27 Eliz. c. 4. A settlor of leasehold property, who remained in apparent possession and received the rents thereof, by an indenture subsequent to the settlement surrendered the remainder of the lease, and took a renewed term from the lessors, not disclosing the fact of the settlement. Held, that he, and after his death his executors, were trustees of the renewed term for the persons entitled under the settlement, such renewed term having been practically obtained by virtue of the original lease. (*Re Lulham; Brinton v. Lulham*.) ... 584

## WILL.

Absolute interest.—A testator gave all his property unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will after her decease." Held, that the wife took an absolute interest free from any trust. (*Re Adams and Vestry of St. Mary Abbots, Kensington*.) ... 382

After-acquired property.—Specific or residuary gift.—1 Vict. c. 26, s. 24.—Testator, by his will, gave to his son G. for life "my cottage and all my land at S., on the especial condition that no fir or other trees or shrubs thereon (except when actually decayed) be at any time cut down or removed, and that the outside boundary fences be kept in good preservation, and the plantations, heathers, and

furze be all preserved in their present state;" and as to all other his freehold manor, messuages, lands, and real estate whatsoever and wheresoever, he gave the same to trustees upon certain trusts. At the date of his will the testator was seized of a cottage and about twenty-two acres of land at S. He subsequently contracted to buy from his son G. a mansion-house and about ten acres of land, also at S., but at the date of his death the contract had not been completed. The question arose whether the mansion-house and ten acres of land were comprised in the specific, or the residuary, gift: Held, that they were comprised in the specific gift. (*Porter v. Lamb*.) ... page 392

Condition repugnant.—Devise subject to option of purchase.—Leasing.—E. devised all his real estate to his son in fee, with a proviso that if his son should be desirous of selling the W. estate during the lifetime of E.'s widow, the widow was to have an option to purchase it for 3000*l.*, which was one-fifth of the selling value. Held, that the condition was repugnant and void, as also a similar one of leasing to the widow at a quarter of the rackrent. (*Re Roshier; Roshier v. Roshier*.) ... 785

Construction.—Gift to nephews and nieces nomination.—Settlement of share of niece.—Death in lifetime of testator.—Lapse.—A testator gave his personal estate upon trust for his nephew and nieces by name in equal shares, and directed that the share of each niece should be retained in trust for her separate use for life without power of anticipation, with trusts over, in default of her appointing by will, in favour of her sons and daughters equally at twenty-one years or marriage respectively. One of the testator's nieces married and died in the testator's lifetime intestate, but leaving an infant daughter. Held, that there was an intestacy in respect of the share of such niece. (*Re Roberts; Tarleton v. Bruton*.) ... 654

Legacy.—Condition.—A testator, who died in 1883, by his will, dated in 1876, gave legacies to his servants in the following terms: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages, in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition." In 1890 Peter Grieve, who had been in the testator's service for over thirty years, relinquished his situation, and when he did so the testator sent him 100*l.* The question was whether Peter Grieve was entitled to the legacy of 300*l.* Held, that the words "and to my gardener," &c., were governed by the condition that the servant should have been in the testator's service during twelve months preceding the testator's death, and as Peter Grieve had not fulfilled that condition he was not entitled to the legacy. (*Re Benyon; Beayon v. Grieve*.) ... 116

Legacy.—Residuary gift.—Charge of legacy on real estate.—Additional legacy given by codicil.—The principle that where a will contains a gift of legacies and residue the legacies are (in the event of the personal estate proving insufficient for their payment) to be deemed to be charged upon the real estate applies in favour of an additional legacy given by a codicil to a legatee named in the will. (*Re Hall; Hall v. Hall*.) ... 86

Vested or contingent interest.—Issue attaining twenty-one.—Settled Land Act.—"Tenant for life."—J. devised his residuary real estate in trust for his six younger children, and in case any one of such six children should die in his lifetime leaving issue living at his decease, "and which issue should live to attain the age of twenty-one," then the share of the deceased child was to be held on trust for such issue. One of J.'s younger children predeceased him, leaving two infant children, who were living at J.'s decease. Held, that such infant children took vested interest liable to be divested on their dying under twenty-one, and that they had the powers of a tenant for life under sect. 53, sub-sect. 1 (ii.), of the Settled Land Act. (*Re James' Settled Estate*.) ... 596

Conversion.—Direction for sale.—Discretion as to time of sale.—A testator gave to his children all his

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- residuary estate, together with all rents, interests, dividends, and profits arising therefrom, to be divided amongst them equally, and he directed his executors to sell and convert into money his property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all the money arising from the sale to be invested for the benefit of his children. Held, that the direction to sell and convert was imperative, and operated from the date of the testator's death. (*Re Raw; Morris v. Griffiths.*) ... .. page 283
- Devise of site with existing church—Secret trust—Church Building Act (43 Geo. 3, c. 108)—Practice—Demurrer.—The owner in fee of land, of about one acre in extent, upon which he had built a licensed chapel, devised all his real estate to his wife, and died some years afterwards. The devise was made in pursuance of a secret agreement that after the death of the testator, his wife should hold the property in question upon trust to convey it as a parish or district church in perpetuity. Held, that the devise was valid under 43 Geo. 3, c. 108, which contemplated the "providing" a church or chapel; and was not rendered illegal by the Mortmain Act (9 Geo. 2, c. 36). (*O'Brien v. Tyssen.*) ... .. 814
- Gift to children—Lapse—Limited power—Wills Act 1837, s. 33.—Sect. 33 of the Wills Act, which provides that there shall be no lapse of a devise or bequest made to a child or other issue of the testator dying in his lifetime, where the issue of the child or issue are living at the testator's death, does not apply in the case of the exercise by will of a special power of appointment. (*Holyland v. Lewin.*) ... .. 14
- Husband and wife—Gift to husband and wife and a third person—Gift divisible in moieties—Joint tenancy—Separate estate—Married Women's Property Act 1882.—A testatrix, who died in April 1883, by her will, dated the 8th Dec. 1880, gave all her property, both real and personal, unto M. and J. H., Esq., and E., his wife, to and for their own use and benefit absolutely, and appointed the same persons executors of her will. The Married Women's Property Act 1882 came into operation on the 1st Jan. 1883. Held, that the rule by which, prior to the passing of the Act, M. would, under such a gift, have taken one moiety, and Mr. and Mrs. H. the other moiety, was a rule of construction, and not a rule of law; that there was nothing in the Act requiring the court to construe a will made before the Act came into operation otherwise than such a will would have been construed if the Act had not been passed; and, therefore, that M. was entitled to one moiety, and Mr. and Mrs. H. to the other moiety. But held, that the effect of the Act was, that the moiety of Mr. and Mrs. H. belonged to them as joint tenants just as if she were unmarried, he taking in his own right, and she for her separate use. (*Re Marsh; Mander v. Harris.*) ... .. 380
- Power of advancement with consent of tenant for life—Bankruptcy of tenant for life—Exercise of power—Sanction of trustee in bankruptcy—Bankruptcy Act 1883.—A testatrix, who died in 1884, by her will, dated in 1883, gave to her trustees all her property upon trusts for conversion and investment, and she directed her trustees to stand possessed of the investments, as to one moiety thereof, in trust to pay the income of such moiety to her son J. C. during his lifetime, and so that he should not have power of anticipation, and, after the decease of J. C., in trust for W. J., the putative child of J. C.; and the testatrix declared that her trustees might raise any part or parts, not exceeding one-half, of the share of W. J., and apply the same for his advancement and benefit, subject to the consent in writing of J. C. during his life. J. C. was adjudicated a bankrupt in 1882, and was still undischarged. W. J. was an infant of about seven years of age. Neither J. C. nor the infant's mother had means sufficient to support the infant. J. C. stated that he was personally willing that the trustees should exercise the power of advancement contained in the will in favour of the infant. The sole question was whether J. C., being an undischarged bankrupt, could give his consent to the exercise of a power of advancement in a fund in which he had a life interest, and thus defeat his creditors. Held, that the power of J. C. to consent to an appointment by way of advance by the trustee of the will had not been extinguished by the bankruptcy; but that such power of consenting could not be exercised without the sanction of the trustee in bankruptcy, acting under the direction of the Court of Bankruptcy. (*Re Cooper; Cooper v. Slight.*) ... .. page 113
- Power to trustees to postpone sale—Profits of business during postponement—Tenant for life.—The real and personal estates of a testator were given to trustees upon trust for sale, and to pay the income of the proceeds to his widow for life, and after his death to divide such proceeds among his children. The trustees were empowered to postpone the sale, and were directed to pay the rents, profits, and income of the unconverted portion to the person to whom the income of the proceeds of sale would be payable. The business of the testator, which was the main part of his estate, but was not referred to in the will, was carried on by the executors for two years with a view to its sale as a going concern. Held, that the widow was entitled to the net profits of the business earned during the postponement. (*Re Chancellor; Chancellor v. Brown.*) ... .. 33
- Stock belonging to wife standing in joint names of husband and wife—Bequest by husband of life interest therein to wife—Claim of wife's representatives—Election.—A testator, after making certain bequests, and giving his wife a legacy of 3000*l.*, gave all the residue of his estate and effects, "including therein the money in my banking account in the Bank of England, and money in the public funds, and whether standing in my name alone, or jointly with my said wife," and all his shares and interest in any public company, and other effects, to his wife for her life, and after her decease to other persons. At the date of the will, and at the time of the testator's death, there was only one sum (*viz.*, 7110*l.* Consols) standing in the joint names of himself and his wife. This stock had by a previous will been bequeathed to the wife, subject to two executory gifts over, which did not take effect, one in favour of her children, if any, and the other of her husband, if he survived. The stock had been received by the testator, and by him transferred into their joint names. After the testator's death his wife received the income of all the residuary estate, including the 7110*l.* Consols, but made no attempt to deal with the stock as her own property. There was, however, no evidence to show that she knew what her rights were. She subsequently died, and her representatives claimed the stock. The question was, whether they were bound, under the doctrine of election, to compensate the residuary legatees, who would be disappointed by their taking the stock, to any and what extent. Held, that the testator intended the stock to pass, and was not dealing only with his right of survivorship; that he affected to give property belonging to his wife, and consequently the doctrine of election applied both to the wife and her representatives claiming under her; and that her representatives could only take the stock upon the terms of compensating the disappointed residuary legatees to the extent of the legacy of 3000*l.*, and of the amount actually received by the wife in respect of her life interest in the testator's own property. (*Re Carpenter; Carpenter v. Disney.*) ... .. 773
- Words of purchase or limitation—"Issue" with words of limitation superadded—Estate tail—Construction.—A testator by his will, dated 1860, disposed of all his real estate, subject to an interest therein to his wife for life, in favour of his six nephews, "and all my right, title, and interest to and in the same and every part thereof, to be equally divided amongst my six nephews, share and share alike, and their issue after them, to and

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for their heirs, executors, administrators, and assigns." The question arose whether the word "issue," with the words of limitation superadded, operated to give an estate tail, or whether the issue took as purchasers. Held, that the words in question created an estate tail in the six nephews; that the addition of a limitation to the heirs general of the issue would not prevent the word

"issue" from operating to give an estate tail as a word of limitation; that in this case the words "equally divided" made the estate divisible into six shares, and there were no words to subdivide those shares, and consequently that the subsequent words, "heirs, executors, administrators, and assigns," must be rejected. (*Williams v. Williams.*) ... ..page 779





# THE LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,  
THE SUPREME COURT OF JUDICATURE, IN BANKRUPTCY, AT  
NISI PRIUS, THE CRIMINAL COURTS, IN IRELAND, &c.  
FROM SEPTEMBER 1884 TO MARCH 1885.

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## House of Lords.

Feb. 28 and March 3.

(Before the LORD CHANCELLOR (Selborne), Lords  
WATSON and BRAMWELL.)

LOVE v. BELL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Mines — Support of surface — Inclosure Act —  
Compensation.

*By a private Inclosure Act all rights of commons over the waste of a manor were extinguished and allotments were made in respect of ancient dwelling-houses within the manor having right, of common.*

*The Act provided that the lords of the manor and their assigns should hold and enjoy all "mines, . . . in as full, ample, and beneficial manner to all intents and purposes, as they could or might have held and enjoyed the same in case this Act had not been made." It also contained a proviso that in case the mines under any of the allotments should be worked, such person or persons so working such mines . . . shall make satisfaction for the damages and spoil of the ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil; such satisfaction to be settled "by arbitration" and "not exceed the sum of 5l. yearly during the time of working such mines . . . for every acre of ground so damaged or spoiled."*

*Held (affirming the judgment of the court below), that the Act did not reserve to the lords of the manor a right so to work the mines as to let down the surface of the allotments of inclosed common land.*

*Duke of Buccleuch v. Wakefield (L. Rep. 4 H. L. 377; 23 L. T. Rep. N. S. 102) distinguished.*

*This was an appeal from a judgment of the Court of Appeal (Lord Coleridge, C.J., Baggallay and Lindley, L.JJ.), reported in 10 Q.B. Div. 547, and*

48 L. T. Rep. N. S. 592, affirming a judgment of the Queen's Bench Division (Manisty and Williams, JJ.) upon a special case.

The action was brought by the present respondents, who were respectively the tenant and the owner of a house which had been built in 1826 on a portion of what was formerly the waste of the manor of Elvet, but had been inclosed under a private Act passed in 1772, against the appellants, who were lessees under the Dean and Chapter of Durham, the lords of the manor, of certain coal mines. The plaintiffs alleged that the defendants had worked the coal under the house without leaving proper support, so that the surface of the land had subsided, and the house had been injured.

The defendants denied the right of support and contended that they had a right to work the mines as they had done under the provisions of the Inclosure Act.

The special case is set out in full in the reports in the court below.

The court below decided in favour of the plaintiffs, and this appeal was accordingly brought by the mine-owners.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *F. M. White*, Q.C., and *Edge* appeared for the appellants.

The arguments, and the sections of the Act, appear sufficiently from the judgments of their Lordships.

*C. Russell*, Q.C. and *Ridley*, who appeared for the respondents, were not called upon to address the House.

March 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: The authorities, which are numerous, from *Harris v. Ryding* (5 M. & W. 60), and *Dugdale v. Robertson* (3 K. & J. 695), down to *Davis v. Treharne* (6 App. Cas. 460), decided in this House in 1881, have, I think, fully established the general law applicable to the case of two owners, the one of the upper strata—the surface of the ground—the other of the lower strata containing minerals which are to be worked; and perhaps the most

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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convenient way of putting the matter will be to read a few words from the opinion of Lord Blackburn in the case of *Davis v. Treharne*. At p. 466, he says: "I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right it may be shown, the burden lying on those who wish to show, that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below; in which case, of course, the owner of the surface would be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and if there are mineral workings under the surface, to have a proper support left for it by pillars." Whoever claims against that has the burden of proof thrown upon him; and that, I think, is meant by some passages which occurred in the judgments of the learned judges of the Court of Appeal in this case, where it was said that it must be clearly made out; that I understand to mean only that it must be sufficiently made out to satisfy that burden of proof. In the same case, *Davis v. Treharne*, two pages later, Lord Blackburn deals with the question which there arose on this principle, that when the person on whom the burden of proof lies has to satisfy it, he will not be able to do so by showing that there are words, however large, applicable to the right of working, and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which may receive full effect consistently with the right of support. I will not refer in detail to that passage; it is, in my judgment, in accordance with what is to be found in the other authorities. Starting with these principles we have to consider this particular case. It is, I may say, an ordinary case of inclosure of open or common lands where the lord of the manor has certain rights, the right to the soil, and of course the right to the minerals below it, and the commoners have certain surface rights. The recital is, that by the inclosure this tract of waste ground, which then yielded little profit, might become "capable of considerable improvement." I shall have occasion to refer to that afterwards in connection with an argument which was suggested, that no improvement except by using the inclosed ground for agricultural purposes could be supposed to have been in contemplation. It goes on to allot to the lord in severally certain plots and parcels of ground. Whether it be more or less than that upon the inclosure is allotted to the lord can make no difference; it is equally a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or to have had determined for them by the authority which made the award. If one is to draw any inference from the fact that the greatest part of the land seems to have been allotted to the commoners, and a comparatively small part (if such is the fact) to the lords, the dean and chapter, the inference would rather be that the rights of the commoners in this case were very substantial, and that the rights of the dean and chapter, so far

as the surface was concerned at all events, were small in comparison with them. However, that is not important. Then there follows the allotment of the residue to the commoners in respect of the houses, some freehold and some leasehold, to which the right of common had been appurtenant or appendant, and they are to hold the allotted lands upon the same tenure on which they hold those houses. The particular allotments in question, being in respect of freehold houses, are freehold allotments, and we have to deal, therefore, with a freeholder having the ordinary rights of a freeholder to his allotment, except in so far as there is something in this Act to make them less than the ordinary rights. The question whether there is or is not anything of that kind in the Act depends entirely upon the clause of reservation, in favour of the lord, of certain rights, and the proviso which follows that clause. The reservation, though it includes mines, is by no means confined to them; it is plainly a reservation of the pre-existing interest of the lords in the manorial rights and royalties, and right also in the soil which previously belonged to them as lords of the manor. It says that nothing in the Act "shall prejudice, lessen, or defeat their right, title, and interest" to these things, but they and their successors "shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, powers of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony, or borough incident, appendant, and belonging or appertaining, other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said manor or common so to be inclosed as aforesaid, in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." So far we have nothing but reservation of pre-existing rights, and that not in terms specially applied to mines and minerals, although including them, not in terms from which an intention to deal specifically with powers connected with those mines and minerals can be inferred, in terms which are as much applicable to everything else mentioned as they are to the mines; no doubt not less applicable to the mines than to the other things which are mentioned. Well, now, what is there in that clause of reservation which can possibly be relied on as depriving the freeholder to whom an allotment has been made of the right of support to his freehold? The only words which have been insisted upon as capable of having that effect are the words "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same," which means, as I understand it, held and enjoyed those rights, titles, and interests which are reserved, "if this Act had not been made." Now, applying that to the mines, although it is not more applicable to the mines than to any other subject, I quite agree that it at least carries so much as this, that they were with the mines to have all usual powers and surface privileges over them. Supposing, in the clause of reservation, these words had been expressly inserted, "reserving the mines and minerals with all usual powers and surface privileges for working them," would that have given a right to let



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down the surface? Would that have destroyed the freeholder's right of support? I apprehend that it clearly would not, and, as was pointed out in the case of *The Duke of Buccleuch v. Wakefield* (L. Rep. 4 H. L. 377; 23 L. T. Rep. N. S. 102), it is impossible to understand such words as reserving the previous rights of working exactly as they were, without reference to the fact that an inclosure had been made, and as if the rights of common still continued to exist, and the rights of working were subject to the rights of common. The right given by those words must in that respect, although it is still a right to be held and enjoyed in a full, ample, and beneficial manner, nevertheless be a right to be held and enjoyed by the lord after inclosure, and against the owners of allotments, and no longer as against the commoners. But let us consider what was the nature of the enjoyment which existed before the inclosure. I apprehend that before the inclosure as much as afterwards, the lords, in the exercise of their powers as to the minerals, were subject to the principle *Sic utere tuo ut alienum non ledas*. They had not a right of working paramount to the surface rights of the commoners; they had only a right of working subject to the surface rights of the commoners, and any working which would substantially interfere with those surface rights would have been an unlawful working, and might have been restrained at the suit of the commoners. The only ground for saying that they might lawfully from time to time have let down portions, and perhaps ultimately the whole of the surface, is this, that they might have done so without injuring the surface rights of the commoners. They would not then have infringed upon the principle *Sic utere tuo ut alienum non ledas*. No *damnum*, no *injuria*, would have been suffered by the commoners, and therefore the lords might have been subject to no action, and to no restraint. But now the commoners, giving up the whole of their common rights, take in lieu of them these allotments. Why should not the lord in his altered position, with his reserved right, be subject in respect of those allotments to the principle *Sic utere tuo ut alienum non ledas* in its full extent, as much as he was before? I quite agree with what I think one of the learned judges of the Court of Appeal suggested on that subject, namely, that the substituted rights are not given with power to the lord to take them away, which he could not have done with regard to the original rights, and that this reservation, if it stood alone, must be construed subject to the surface rights of the persons to whom the allotments had been made. Then we come to the words of the proviso. Now, I quite agree that we should not be fettered by form, if we find in substance in the proviso something tending either to enlarge, or to explain in such a way as to enlarge, the effect of the reservation; but still we approach that proviso with due regard to the fact that what we have already seen is a reservation only, not a grant, by Act of Parliament or otherwise, of privileges which a mere reservation would not have conferred, and that this proviso which follows has for its office to deal with the compensation to be made for the exercise of the reserved rights so far as relates to those two particular subjects by which the surface might possibly be affected, namely, the working of the mines, and the power of using or laying

wayleaves, two subjects which throughout this proviso are separately kept in view. It appears to me that here the principles already mentioned throw, at all events as strongly as before, upon the appellants the duty of showing that there are words which dispense in their favour with the general rule of law, and give them a right to let down the surface, and deprive the surface owner of his ordinary right of support. I can find no such words. It is contended, however, that the usual powers of working mines do involve some right of interference with the surface, and that is contemplated by this proviso. But why should more be supposed to be contemplated? What word is there which shows more than this, that it is contemplated that in the working of mines, as well as in the use of wayleaves, there may be some interference with the surface, in respect of which compensation is to be made? That would necessarily follow from the usual powers of working; but this consequence which is now sought to be established would not follow from the usual powers of working. Why, therefore, should it be supposed to follow because the effects on the surface are contemplated which are provided for in the way of compensation? The whole proviso, in my opinion, is satisfied by only the ordinary surface damage such as might arise from the exercise of the usual working powers. The more the detail is examined the more strongly am I led to the affirmative conclusion that that is what was meant, and all that was meant. The detail tends to repel instead of to support the appellants' construction. First if all, it refers to the working of the "mines lying within or under any of the allotments," and to "satisfaction for the damages and spoil of ground occasioned thereby." I pause for a moment to observe that the word "ground" occurs, I think, four times over in the passage; and really it strikes me, to say the least, without dwelling too much upon it, as indicating the ordinary surface damage to the surface of the ground, and not at all damage such as might happen in the case of buildings, with which we are now dealing. Therefore it confirms, as far as it goes, the view which, as I have said, I take of the clause as a whole. But that is not all, for who is to receive this compensation? "The person or persons in possession of such ground at the time or times of such damage or spoil." It is manifest that the Legislature thought that compensation should be made to the proper person. But is it to be for a moment imagined in the case with which we are dealing, of injury to buildings erected upon the ground which by possibility might be entirely destroyed, justice would be done by giving the compensation not to the person injured, who would be the owner of the freehold, but to his tenant, to the person who might happen to be in possession at the time when the damage was done? There is then a limit, which limit is measured by the yearly value of "5l. for every acre of land so damaged or spoiled;" a reasonable limit enough, probably, for such surface damage as might arise from the exercise of the ordinary powers, which would not extend to the destruction of the surface, or of the buildings upon it, but to my apprehension a most improper, a most unreasonable, and a most unjust limit, if it had been intended to take away the ordinary right of support. It was said upon this, "Oh, but it must be supposed that it was never con-

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templated that there would be any buildings at all upon that ground; it does not appear that there were any at the time, and therefore we are to infer that the sort of improvement contemplated by the Act was the conversion of this moor land into agricultural land, and nothing more." But is it not perfectly extravagant to suppose that that was the only possible improvement of this land, there being no restriction whatever upon the mode of improvement which the persons into whose hands it might come might think expedient? The very principle of improvement and inclosure is that the land should be improved to the extent of its capacity by those persons who have the altered tenure, and would have an interest in improving it. Even if it had been let as agricultural land, we are not to assume that it was all let out to neighbouring farmers who had already sufficient farm buildings for all the purposes of agricultural cultivation. Even upon that hypothesis it cannot be imagined that it was out of contemplation in this improvement that there might be a residence for a farmer, a suitable house for him to live in, with stables, yards, and proper out-buildings, the damage to which would be of a very serious kind, in no degree whatever compensated for under this clause. But the truth is that there is no ground for any such contention. Of course the neighbourhood of the mineral works might make it a convenient and profitable mode of using the land to erect upon it cottages for persons employed in the mines; or the owner might wish to reside near the mines, and therefore erect a house for himself; consequently it is quite clear that we must take into account damage to buildings as well as other things. For damage to buildings this mode of compensation would be quite inappropriate, but it would not be necessary if the right of support exists. No authority whatever was cited in support of the appellants' argument, except the case of *The Duke of Buccleuch v. Wakefield* which appears to me to differ from the present case in every material particular. In the first place, the words to be construed there were not words occurring in an enumeration of various rights reserved of different kinds, but they were words having direct and special application to the subject of mines, minerals, and mineral working; and in connection with that it was said that the lord was to retain his former status, and to exercise his powers, not in the same way as if the Act had not been made, which words occur here, but the words are very emphatic and very remarkable, namely, in the same way as "if the lands had remained open and uninclosed;" that is to say, that for the purpose of giving effect to the reservation in the lord's favour and the rights expressly enforced upon him by the Inclosure Act, the hypothesis of the lands remaining in an uninclosed state was, as between him and the surface owner, established by the Act; and that was pointed out as one of the reasons for the conclusion which was arrived at by one of the noble and learned lords who then advised the House. But secondly, there was not there a mere reservation, but there were words operating by themselves to confer, by the authority of the Legislature, upon the lord, in respect of the exercise of those reserved rights, a great number of privileges, expressly enumerated and affecting the surface, which might or might not, but probably would not, have followed from the

mere reservation. And Lord Hatherley, L.C., in advising the House as to its judgment, said that that enumeration of those rights granted and not merely reserved by the Act of Parliament, was the reason which mainly weighed upon his mind leading him to the conclusion to which he came, he finding in those words, not indeed in express language a power to let down the surface, but what he thought was practically equivalent to it, namely, a power totally and permanently to destroy the surface, and to take away the beneficial enjoyment of any part of it from the persons to whom the allotment had been made. And thirdly, there was there, which was also much and justly relied upon, an absolute and unqualified clause of compensation, so that whatever might be the extent of the damage sustained, full reparation for that damage would be made to whoever might be the person who sustained it. All those things were relied upon, and all formed ingredients in that judgment; but all are absent here. I need say no more, but I move your Lordships to affirm the judgment appealed from, and to dismiss the appeal with costs.

LORD WATSON.—The respondents are the owners and tenant of a parcel of moor or waste within the manor of Elvet, allotted to the predecessors in title of the former by statutory commissioners acting under an Inclosure Act of 1772, in respect of, or as appurtenant to, their ancient freehold or leasehold dwelling-houses within the manor, and the Act provides that such parcel of land shall be "held and enjoyed" by the allottees "in the same manner" and by the same tenure as the dwelling-houses in respect of which the allotment was made were then holden. The appellants are mineral lessees under the Dean and Chapter of Durham, the lords of the manor of Elvet, to whom are reserved, by the express terms of the Act, all mines within the limits of the divided waste with power to work the same. The respondents being thus in right of the surface are entitled to have it supported by the subjacent strata, unless the appellants can show that by the terms of the statutory reservation in their favour the lords of the manor have the right to let it down in the course of their mineral workings. The principles of law applicable to a case like the present are, in my opinion, precisely the same with those which govern the mutual rights of the respective owners of the surface and of the minerals below, when the *plenum dominium* of the land has been split into these two estates by grants proceeding from the common author. The Act of 1772 declares that nothing therein contained shall prejudice the title or interest of the dean and chapter in and to the "royalties" incident to the manor, but that they and their successors shall ever thereafter "hold and enjoy" (*inter alia*) all "mines," and that "in as full, ample, and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." After the judgment of this House in *The Duke of Buccleuch v. Wakefield*, an authority upon which the appellants rely, I think it impossible to hold that a reservation expressed in these terms is *per se* sufficient to give the lords of the manor a right to work their minerals so as to let down the surface. In that case Lord Chelmsford said that the duke "must establish his right to work his mines notwithstanding the inevitable

injurious consequences to the respondents' surface, by proof either of a custom within the manor, or of an authority derived from the Act for inclosing the wastes of the manor." Here the existence of such a custom within the manor as would sustain the right asserted by the appellants is negatived in the joint case for the parties. It was no doubt decided in *Buccleuch v. Wakefield*, that the duke had the right which he claimed, under the provisions of the special Inclosure Act; but there the clause of reservation, besides expressly authorising a great variety of enumerated operations, both above and below ground, some of which involved the disturbance, if not the destruction, of the surface, concluded with a general power to the mine-owner to do all further and other acts whatever for getting the said mines and minerals and carrying on the works thereof, and disposing of and carrying away the same, in as full and ample a manner as if the lands had remained open and uninclosed or the Act had not been passed. The terms of the reservation to the Dean and Chapter of Durham present a marked contrast to the broad and comprehensive terms of the clause with which the House had to deal in *Buccleuch v. Wakefield*, a clause which, to use the words of Lord Hatherley, L.C., conferred the "largest imaginable power" upon the owner of the mines; yet in that case the decision of the House was given in his favour, not because the clause *per se* enabled him to work so as to cause subsidence, but in respect that its powers were made subject to the condition that those who worked the mines should make full compensation for all injury thereby occasioned to the owners of the surface. I concur in the opinion expressed by Mellish, L.J., in *Heat v. Gill* (L. Rep. 7 Ch. 699; 26 L. T. Rep. N. S. 502), that "no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there, the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion." But the contrast between the compensation clauses in that case and the present is also very marked. There every person whose interest in the surface was injuriously affected was to be fully indemnified: here, under the Act of 1772 no one is to receive compensation except the occupant of the surface for the time being; the amount of compensation is restricted to 5*l.* per annum for each acre of surface damaged; and all liability on the part of the mine owner to pay that restricted sum ceases the moment he desists from working. No compensation is provided for the owner of the surface who is not in personal occupation of it during the time of working, though his property may be permanently injured, and even if he does occupy himself he is not to be compensated for any damage accruing, as for instance from subsidence, after the workings have ceased. A compensation clause in these terms, so far from suggesting or supporting the inference that the mine-owner was to have power to let down the surface, points to the very opposite conclusion. I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumably the intention, of such a clause to define or extend the powers given to the mine-owner, and

it is frequently *ob majorem cautelam* and in the interest of the landowner expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character and extent of these powers, as was the case in *Aspden v. Seddon* (L. Rep. 10 Ch. 394; 32 L. T. Rep. N. S. 415), where the power reserved to the mine-owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not of itself have warranted letting down the surface, but it was made subject to the condition that the person working the mines should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable if not a necessary inference in that case that the kind of underground working contemplated and sanctioned was such as would cause subsidence, and injure buildings erected on the surface. But any such inference derived from the terms in which compensation is provided must, in my opinion, be plain and unequivocal, otherwise general words, which were only meant to include every possible injury that could be caused by working without disturbance of the surface, might be construed as a power to let it down. I agree with your Lordships that the judgment appealed from ought to be affirmed.

Lord BRAMWELL.—I also am of opinion that this judgment should be affirmed. Before the inclosure award the dean and chapter were owners of the soil, the surface, and everything on it and under it, subject indeed to a right of common the existence of which seems to me, however, immaterial. By that Act and the award they ceased to be owners of the soil generally, but remained owners of the minerals. If there had been nothing more in the Act, the dean and chapter would have had no right to touch the surface to get at the minerals; and if all the right the Act gave them was to use such part of the surface as was necessary to get the minerals, they would have no right in getting them to let down the surface. In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no right as against the surface in getting the minerals, except what the instrument of severance gives him, and if it give the right to get the minerals, without more, there is no right to let down the surface. This is well put, indeed the subject generally, and the questions that arise in this case, are very well treated, in *McSwinney on Mines, Quarries, and Minerals*, pp. 293-334. The appellants in this case say that rights are given to the dean and chapter by the Inclosure Act, not only to interfere with the surface to get the minerals, but also to let it down, and they rely on the general words, that the dean and chapter are to "hold and enjoy the mines in as full, ample, and beneficial manner as they could or might in case this Act had not been made." I cannot agree, for it is clear to me that that does not relate to working but to property. The section begins that the title of the dean and chapter to the royalties incident or belonging to the manor shall not be prejudiced, lessened, or defeated by anything in the Act, "but that" they, as owners of the royalties, shall hold and enjoy all rents, mines, &c., to the owners of the manor incident,

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belonging, or appertaining. This relates to property. The power of working, so far as given, is in the next section. Supposing that the previous section would, without the subsequent one, give the right claimed, it would give it without compensation. But the subsequent section being there shows what is to be compensated, and consequently limits the meaning which the former section might have if it stood alone. The appellants further say that the power is to be found, not indeed in express words, but as the result of the provisions for compensating the owner, which, it is said, include all kinds of damage, and therefore subsidence. I do not know if the antecedent probabilities are in favour of the respondent or the appellant. If the appellant is right, inasmuch as he contends that he may let down and destroy a house, and admits that for that the adequate compensation is not provided, it follows that until the minerals are exhausted and the subsidence finished, the owner of the soil cannot use it to the best advantage. On the other hand, if the respondent is right, the owner of the minerals can rightly take half of them only, and might be stopped from taking anything the result of which would be subsidence of the surface. Either way there seems a loss. We must examine the statute to find on whom it falls; and the problem we have to solve is a very common one, namely, what provision has been made for a case not contemplated; I say "not contemplated" for it continually happens that extensive words are used to comprehend cases not particularly contemplated. As I have said, the appellant does not say that the right he claims is given in express words, but is shown by the provision for compensation for damage. I am of opinion, however, that the damage contemplated is temporary only, a damage to the person in possession, not to any reversioner or remainderman. The statute uses the present participle, "working," "laying," "making," "using," and says that satisfaction shall be made for the "damage" and "spoil of ground" occasioned "thereby" to the person in possession at the time of such damage and spoil, and the damage is to be paid yearly during the time of working, or continuing, or using such ways, for every acre so damaged. This, I think, clearly contemplates temporary damage during the working from which the person in possession alone suffers. It is impossible to say subsidence is included in this, for the subsidence may not take place till long after the working. Certainly subsidence where a house or barn is let down is not contemplated. As to that, however, it may be said it is the folly of the landowner to build it. But even without any house being built the damage by subsidence is permanent. The level of the surface is destroyed, and if any gap or steep descent is made, the landowner would have to fence; anyhow subsidence is a permanent damage, and may be long after the working. There is no provision for compensating for that. I am not insensible to the force of the argument, that if the respondent is right, inasmuch as the damage from a spoil bank or a shaft is permanent, either there is no right to sink a shaft or make a spoil bank, or the Legislature has thought that compensation to the person in possession was enough; if so, why is not the same true of subsidence, it being always the surface that is injured? This is a strong argument. It is singular that no express power

is given to sink shafts or deposit spoil. Whether this matter was not thought of, or the right was supposed to be "incident" to the manor, or it was thought that damage to the reversion from shafts and spoil was not of sufficient consequence to the reversioner to require compensation to be provided, I cannot guess. Perhaps there is no right to sink shafts and deposit spoil. I think there is. But it does not seem to me that, because no provision is made for compensation to the reversioner for one permanent damage, there is therefore a right to inflict on him another one, which may damage him only, and not the person in possession during the working. In the result it seems to me that the compensation is to be for what the Legislature considered damage to the person in possession during working, that if it has authorised shafts and spoil it has considered them damages to that person, or sufficiently compensated for by payment to him, or forgotten the matter; anyhow, that it has not provided compensation for subsidence, and consequently has not authorised it being caused.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *White, Borrett, and Co.*

Solicitors for the respondents, *Munn and Longden.*

Nov. 29, 30, 1883, and March 10, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY v. KENT. (a.)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 16, sub-sect. 9, s. 34—Disputes between society and member—Reference to arbitration—Jurisdiction of High Court—Covenants in mortgage deed. The Building Societies Act 1874 provides by sect. 16, sub-sect. 9, that the rules of every society established under the Act shall set forth whether disputes between the society and any of its members shall be referred to the County Court, or to the registrar, or to arbitration; and by sect. 34 for the determination of disputes by arbitration where the rules so direct.*

*Held (affirming the judgment of the court below, the Lord Chancellor dissenting), that these provisions included questions arising under covenants in a mortgage deed executed by the member to the society, and that the High Court had no jurisdiction.*

*Hack v. London Provident Building Society (23 Ch. Div. 103; 48 L. T. Rep. N. S. 247) approved.*

*Mulkern v. Lord (4 App. Cas. 182; 40 L. T. Rep. N. S. 594) distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Cotton and Bowen, L.JJ.) affirming a decision of the Queen's Bench Division (Manisty and Stephen, JJ.).

The action was brought by the appellant society, which was a society duly incorporated and registered under the Building Societies Act 1874 (37 & 38 Vict. c. 42), against the respondent, a member of the society, to recover a sum alleged

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to be due, under the covenants in a mortgage deed, in respect of advances made by the society to the defendant on the security of certain leasehold premises comprised in the deed.

After the cause had been set down for hearing, a summons was taken out to stay the action on the ground that the court had no jurisdiction in the matter, the rules of the society providing that all disputes should be settled by arbitration in the manner prescribed by the Act.

The Divisional Court ordered a stay, and their order was affirmed by the Court of Appeal, who held that the case was governed by *Hack v. London Provident Building Society* (23 Ch. Div. 103; 48 L. T. Rep. N. S. 247).

The appeal was brought to the House of Lords.

*Davey, Q.C., T. Terrell, and H. Terrell* appeared for the appellants, and contended that *Hack v. London Provident Building Society* was wrongly decided. The question is whether the decision of the House of Lords in *Mulkern v. Lord* (4 App. Cas. 182; 40 L. T. Rep. N. S. 594) applies to societies under the Act of 1874. The principle is the same in both cases. The clauses apply only to disputes under the rules, not to questions arising on a mortgage deed, as to the effect of which see *Pugh v. Heath* (7 App. Cas. 235; 46 L. T. Rep. N. S. 321). Disputes between a mortgagor and a mortgagee are not disputes between the society and member as such:

*Fleming v. Self*, 3 De G. M. & G. 997; 24 L. T. Rep. O. S. 101;

*Morrison v. Glover*, 4 Ex. 490; 14 L. T. Rep. O. S. 188, 204;

*Farmer v. Giles*, 5 H. & N. 753;

*Reg. v. Trafford*, 4 E. & B. 123; 24 L. J. 20, M. C.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Willie, Q.C., Tindal Atkinson, and Calvert*, for the respondents, argued that *Wright v. Monarch Investment Building Society* (5 Ch. Div. 726) was not overruled by *Mulkern v. Lord*, and was an authority in the respondent's favour; see also *Reeves v. White* (17 Q. B. 995; 21 L. J. 169, Q. B.). This is in fact a dispute between the society and a member, within the meaning of the arbitration clause, for the transaction could not have arisen at all without membership. The cases cited on the other side all turn upon the point that the machinery provided by the Acts then in force was not adequate for dealing with the dispute in question, and therefore the jurisdiction of the court could not have been intended to be ousted by it; but under the present Act the machinery has been improved, and is adequate for enforcing the award; the principle, therefore, which underlies the earlier cases does not apply. The intention of the Act is to establish a domestic tribunal. See also

*Outbill v. Kingdom*, 1 Ex. 404; 10 L. T. Rep. O. S. 114.

*Davey, Q.C. in reply*.—I agree that a "domestic tribunal" is established by the Act, but it is intended to deal with domestic disputes only, such as arise out of the contract of membership founded on the rules, not with questions of property and the rights and liabilities arising out of a mortgage contract.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 10.—Their Lordships gave judgment as follows:

Lord SELBORNE, L.C.—My Lords: I have the

misfortune in this case to differ from the rest of your Lordships who heard the argument, and I have doubted whether it might not be best for me to abstain from stating publicly the reasons for the opinion which I have formed, since your Lordships, after considering them, have not found them satisfactory. But, inasmuch as the question is one of very great general importance to all these societies, whose welfare and due regulation are matters of public concern, and as it is possible that the operation of the laws relating to them may at some future time be found again to require attention from the Legislature, I think that, upon the whole, I shall best discharge my duty by stating what my judgment would be upon this question, if the power of judgment rested with me. It has been determined in the court below that a provision in the rules of a benefit building society governed by the statute 37 & 38 Vict. c. 42, for the settlement by arbitration of disputes between the society and any of its members, or their legal representatives, takes away the jurisdiction of the High Court to entertain an action by the society against one of its members for moneys due to it under covenants in mortgage deeds, executed by the defendant to the society. The object of the society, as stated in its second rule, was to raise, by the subscriptions of its members, a stock or fund for making advances to members out of its funds, upon security of freehold, copyhold, or leasehold estate, by way of mortgage; with power, "so far as necessary for the said purpose," to hold land, with the right of foreclosure, and to raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and to repay such funds when no longer required for the purposes of the society. A proviso was added that "any land, to which the society might become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption," should, as soon as conveniently might be, be sold. There were to be two kinds of "ordinary shares"—fully paid, and subscription shares, both of the nominal amount of 10*l*. The subscription shares were to be paid up by instalments of 1*s*. per month per share, and at the end of each year, interest at 5 per cent. per annum was to be credited upon them, provided the instalments due had been regularly paid. On reaching the amount of 10*l*., they were to become fully paid shares, with all the advantages of such shares. There was also power for the directors to issue preference shares. Members were to be at liberty, on certain terms specified in rule 5, to withdraw the amount standing to their credit in the books of the society; and also in the manner specified in rule 6 to transfer their shares. The 7th rule authorised the society to receive deposits or loans from its members, or other persons, subject to a limit of the amount to be at any time due in respect of such deposits or loans, to "two-thirds of the amount for the time being secured to the society by mortgages from its members." The 22nd rule regulated the law costs payable by borrowers on the security of freehold or leasehold property when all business might be transacted in town. The 23rd provided for the survey of properties offered to the society, and for the fees in respect of such surveys, to be paid by the applicants for advances. Rule 29 pro-

vided for certain fines and forfeitures on advanced shares; and rules 32 to 34 inclusive related to the terms on which advances might be made. Rule 35 provided that any member receiving an advance should execute a mortgage to the society to secure his future payments, "which mortgage should contain all such covenants and provisions as the solicitor might advise;" and that on the satisfaction of all claims of the society upon any property mortgaged, a receipt in a specified form should be indorsed upon the mortgage at the expense of the mortgagor. The effect of the eight following rules (36 to 43 inclusive) is, that a member who had obtained an advance might, if he pleased, sell the mortgaged property, and the purchaser might take it subject to the mortgage, and thereupon should become liable for the payment of all advance repayments in arrear, and all fines then due thereon, as well as for all future advance repayments and fines thereon from time to time falling due in respect of such mortgaged property. If the sanction of the board were given to the transfer, the vendor was to become entitled to a release from the society. For every payment in arrear the borrower in default was to be chargeable with a fine of one penny per share per month, and if the arrear should continue for three consecutive months, the directors might enter into possession and sell the mortgaged property, or collect the rents, and reimburse the society, and after paying all expenses, hand over the balance, if any, to the defaulting member. If incomplete works on any mortgaged premises should not be proceeded with in a manner satisfactory to the society, the directors might complete them, adding the cost to the amount due on the mortgage. All such property was to be insured by the society, and the member on whose account the premiums should be paid was, on demand, to refund the amount, or it might be deducted from any of his payments; and provision was made for the application of the insurance moneys which the society might receive in case of fire. The 43rd rule is in these words: "Any member desirous of redeeming the security held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments as ascertained by reference to the tables. All expenses incurred upon every sale, exchange, or redemption of any property shall be borne and paid by the member." The 47th rule empowered the society, on the sale of property mortgaged to them by a member, if such member were dead intestate, leaving an infant heir, to pay any surplus proceeds of the sale, not exceeding 100*l.* to the legal personal representative of the deceased member as part of his personal estate. There were tables showing the rates of repayment for various terms of years, with power for the society to vary them; and there were rules of the kind common in such societies, providing for the appointment, duties, and removal of directors and other officers, for the meetings of members, and generally for the management of the affairs of the society. The 49th rule, as to arbitration, is as follows: "In case of dispute arising between the society and any members thereof, or the legal representatives of any member, it shall be settled by arbitration. Arbitrators shall be elected by the board, none of them (directly or indirectly) beneficially interested

in the society; and, in case of reference to arbitration, the names of all the arbitrators shall be written on separate pieces of paper, and placed in a box; and the three whose names are first drawn by the complaining party, or someone delegated by him or her, shall be the arbitrators to decide the matter in dispute, and their decision shall be final." On a review it will be seen (1) that, although raising a fund for making advances to members was the purpose for which the society was established, it was not to consist of advanced members only; (2) that many matters unconnected with mortgages are regulated by the rules as between the society and its members (advanced or unadvanced), out of which disputes might from time to time arise; (3) that many matters connected with mortgages from advanced members, which are also so regulated, are in the nature of conditions of advances as between advanced members and the society, and independent of the legal and equitable relations of mortgagor and mortgagee, as constituted by deed; and (4) that the securities contemplated by the rules are mortgages in the proper and legal sense of that term—i.e., mortgages by deeds to be executed on each particular occasion, containing such covenants and other provisions as the solicitors of the society should think adapted to the circumstances of each case, the terms of which the rules do not in any case prescribe—mortgages subject to the usual equitable rights of foreclosure by the mortgagees and redemption by the mortgagors, and the equity of redemption of which the mortgagees might, without any consent, transfer to purchasers not members of the society. That the word "foreclosure" is used in the second rule in its legal and proper sense seems evident from the fact that it is there distinguished from "surrender, or other extinguishment of the right of redemption." If I had to construe the arbitration clause in these rules, without reference to any statute or other authority, it would certainly appear to me to have reference to disputes under the rules between members (in that character) or their representatives, in respect of their rights or liabilities as such, and the society, and not to questions arising out of covenants or special stipulations in deeds executed between members and the society and embodying contracts collateral and additional to the social contract, though of a nature contemplated and authorised by it; nor to any question between the society, as mortgagee, and one of its members as mortgagor, with reference to the legal consequences of, or rights and liabilities resulting from, the relation of mortgagor and mortgagee. All the authorities decided under the statute which regulated societies of this kind before 1874 are in accordance with that view. *Morrison v. Glover* (*ubi sup.*) was so decided, on the broad ground that a question arising out of breaches of contract in a mortgage deed, executed to a building society by one of its members, was a dispute "not between the society and the defendant as a member of the society, but between them as mortgagor and mortgagee." "If," said Pollock, C.B., "any other rule be established than this, that matters in difference between the society and its members, in the character of members, can alone be referred to arbitration, if we go once beyond that, then extraneous matters



of any kind which may happen to be in dispute between the society and any of its members ought to be the subject of a reference. It appears to us, therefore, that the words "matters in dispute" must be read "matters in dispute between the society and its members, as members, and not in any other capacity." The decisions in *Fleming v. Self*, *Reg. v. Trafford*, and *Farmer v. Giles*, are to the same effect, as is also the judgment of this House in *Mulkern v. Lord*. It is true that in some of those cases some of the learned judges or lords fortified their conclusions by pointing out the unsuitableness and inadequacy of the means of enforcing an award through an order of justices (the remedy given by the statute), except in simple questions between the society and its members, as such; but I do not consider any of them to have rested exclusively on that ground. No such ground of decision was suggested in *Morrison v. Glover* or in *Reg. v. Trafford*, nor in the opinion of Bramwell, B. in *Farmer v. Giles*. Lord Cairns, L.C. and Lord Hatherley, in *Mulkern v. Lord*, relied, not only on the inappropriateness of this remedy, but also upon the relative position and rights of mortgagor and mortgagee, as making it "impossible that those rights, and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided by 10 Geo. 4, c. 56, s. 27." Jessel, M.R. had taken a different view in *Mulkern v. Lord*; and in the case of *Wright v. Monarch Investment Building Society*, followed in the Court of Appeal by *Hack v. London Provident Building Society*, he determined that none of these authorities were applicable to exactly similar questions arising in a building society governed by the Act 37 & 38 Vict. c. 52. Those decisions were held to govern the case now before the House in the courts below; and it is from them, in effect, that the present appeal is brought. I agree with the principle stated in *Hack v. London Provident Building Society* by Jessel, M.R., that "it is the duty of the court to find out first what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts, when considering the construction of a plain statute, framed in different words from the former Act." But I think that the principle ought to be stated with this important qualification, that so far as a later Act, *in pari materia*, is conceived in the same, or substantially the same, terms as a former, the construction placed on those terms in the former Acts by decisions of high authority, and the principle on which those decisions have proceeded, ought not to be disregarded. Of course, if the later statute is plain, its plain meaning must prevail. The material clause in 10 Geo. 4, c. 56, sect. 27 (extended to building societies by 7 Will. 4, c. 32, sect. 4), provided that rules should be made specifying "whether a reference of any matter in dispute between the society, or any person acting under it, and any individual member thereof, or person claiming on account of any member, should be made to justices of the peace of the county, or to arbitrators, appointed as therein mentioned. Whatever award was made by the arbitrators was to be binding on all the parties, and was to be final, and was not to be removed into any court of law, or to be restrained, but might "be enforced by any two justices of the peace." The clauses in 37 and 38

Vict. c. 42, which relate to the same subject, are the 34th, 35th, and 36th sections. The 34th section provides, that "where the rules of a society under this Act direct disputes to be referred to arbitrators," arbitrators shall be appointed, as therein mentioned, of whom a certain number, not less than three, shall be chosen by ballot, "in each such case of dispute," in a manner to be determined by the rules. Then, after directing how the place of an arbitrator dying, or refusing, or neglecting to act, is to be supplied, it proceeds: "And whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute; and should either of the parties to the dispute refuse or neglect to comply with or conform to such award within a time to be limited therein, the court, upon good and sufficient proof being adduced of such award having been made, and of the refusal of the party to comply therewith, shall enforce compliance with the same, upon the petition of any person concerned. Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators." "The court" mentioned in this and the succeeding sections, is (in England) the County Court of the district in which the chief office of the society is situate. "The registrar" is the registrar for the time being of friendly societies. Sect. 35 enables the court to hear and "determine a dispute" in two cases—one, when there has been a failure in obtaining an arbitration under the rules; the other, "where the rules of the society direct disputes to be referred to the court, or to justices." Sect. 36 makes "every determination by arbitrators, or by the court, or by the registrar under this Act, of a dispute" binding and conclusive, without appeal or power of removal into any court of law, or of restraint by injunction in equity. But it enables the arbitrators, or the registrar, or the court, at the request of either party, to state a case for the opinion of the Supreme Court of Judicature on any question of law, and to grant to either party to the dispute such discovery, as to documents or otherwise, as might be granted by any court of law or equity. After considering these sections, and the rule of the appellant society founded upon them (which it may be observed is almost in the very same words with the 27th section of the Act of 10 Geo. 4), I think it is manifest that, although the "disputes," for the settlement of which they provide, are not (as in the former Act) in so many words defined as "any matter in dispute between the society or any person acting under it, and any individual member thereof, or person claiming on account of any member thereof," yet the sense of the shorter form of expression, "disputes," is the same. It cannot possibly be supposed to extend to questions between the society and strangers; and the repeated reference to the rules appears to me also to show that disputes arising under the rules must be intended. This being so, I cannot assent to the opinion that the decisions under the earlier Act, so far as they depend upon the meaning of the words by which the subject-matter of arbitration was therein defined, are displaced, or rendered inapplicable, by the use of words of either larger,

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or clearer, or in any way different, signification in the later Act. And it also appears to me that this is really the point on which the decision of the House, in the present case, ought to depend; because neither the better means provided by the later Act for enforcing an award, nor the more extended powers thereby given to arbitrators, nor the introduction of the County Court instead of justices as an authority which, in some cases, may itself arbitrate, can require, or by reasonable implication justify, a wider construction of the "disputes" to be referred, than that word otherwise ought to receive. It is not enough to show that some of the arguments formerly used as to the inefficiency of the machinery provided by the earlier statutes, which approved themselves to eminent judges or to noble Lords in this House, have now lost part of, or even all, their force, if the subject-matter of arbitration is still left substantially the same. It is to be added that such rights as that of foreclosure, and others which may arise out of breaches of covenants in deeds, do not necessarily imply a "dispute" as a condition precedent to their appropriate legal or equitable remedies, unless that word should be extended considerably beyond its natural and ordinary sense. It is undoubtedly true that some of the arguments, founded on the insufficiency of the means of enforcing awards provided by the earlier statutes have now ceased to be applicable; but I cannot admit that there are no similar arguments which still to a considerable extent apply. The machinery of an award by an arbitrator, and an application to a court to "enforce compliance" with it, on proof of "the refusal of the party to comply therewith," may conceivably be worked out to results by which the right of a mortgagor to redeem may be barred or extinguished, or the active assertion of that right prevented, and this may, perhaps, be thought equivalent to foreclosure; but, if equivalent, it is as a substitute, and not the same thing. The arbitrators are under no obligation to state questions of law for the opinion of the Supreme Court, though, at the request of any party, they have power to do so; and, if they do not, their decision of such questions, however contrary to law, is to be final. The Act enables any society, by its rules, to provide that all disputes shall be referred to the Registrar of Friendly Societies; and the effect must be the same in that case as when either of the other modes of arbitration is provided for. The Registrar of Friendly Societies may be a very suitable arbitrator for mere disputes arising between the society and its members under its rules; but it is to me inconceivable that the Legislature can have meant all questions of breaches of any of the various kinds of covenant as to title, buildings, lights, easements, or otherwise, which the solicitor of the society might have required to be inserted in any mortgage deeds, whether arising with the original mortgagors or with their assignees, trustees in bankruptcy, heirs, devisees, or personal representatives, to be brought, at the option of each particular society, before this public officer, and to make him also (to the exclusion of all ordinary jurisdiction) a judge of equity in suits for foreclosure and redemption, under the obligation of taking all the accounts which may be necessary in such suits. I am not convinced that his office is at all better consti-

tuted or adapted for such a purpose than that of a justice of the peace. It is never (as it seems to me) very safe ground, in the construction of a statute, to give weight to views of its policy which are themselves open to doubt and controversy. It is suggested that the policy of this statute is to withdraw all legal questions whatsoever, between these societies and their members, from the cognizance of the ordinary tribunals, because the members of building societies may be presumed to be, for the most part, poor persons. But they are not necessarily poor; your Lordships have had before you some instances of such societies in which the amounts advanced upon mortgage have been large. Nor is it clear to me that, remedies divided (or capable of being divided) between three jurisdictions, arbitrators as to the whole matter—the Supreme Court as to questions of law sent to it by the arbitrators, and the County Court for the purpose of enforcing an award—may not sometimes be more costly than those afforded by a single proceeding in the High Court of Justice. Reluctant as I always am to differ from those of your Lordships whom I know to entertain, in this case, the opposite opinion, I think that the principles on which *Morrison v. Glover*, *Reg. v. Trafford*, and *Mulkern v. Lord* were decided ought still to prevail, notwithstanding the difference between the two statutes, and that the order appealed from ought to be reversed.

LORD BLACKBURN.—This is an appeal from an order of the Court of Appeal, dismissing an appeal from the Queen's Bench Division. It was conceded before the Court of Appeal that the case of *Hack v. London Provident Building Society* was not distinguishable from the present case, and consequently the Court of Appeal, without any further argument, dismissed the appeal. The appeal, therefore, to your Lordships is in substance and reality, though not in form, an appeal from the decision in *Hack v. London Provident Society* as well as from the decision of the Queen's Bench Division in the present case. Jessel, M.R. had in *Wright v. Monarch Investment Building Society* to deal with a building society incorporated under the Building Societies Act 1874 (37 & 38 Vict. c. 42). He held that the matters therein disputed must under that Act be referred, and that the jurisdiction of the Superior Court was ousted. He says: "I cannot accede to the argument that the Act of 1874 must be construed by analogy with the decisions on the old Acts, or by the provisions of the Friendly Societies Act. The words of the Building Societies Act 1874 are in themselves sufficiently clear, and I must give effect to them without reference to anything else." There was no appeal against the order he made in *Wright v. Monarch Investment Building Society*, which was made in March 1877. But in Dec. 1877 he made an order in a case of *Mulkern v. Lord* which was appealed against, and on appeal was reversed by the Lords Justices. An appeal was brought to this House, when the order of the Court of Appeal was affirmed. The society with which the courts had to deal in *Mulkern v. Lord* was a benefit building society which had not obtained a certificate of incorporation under the Building Societies Act 1874, and consequently, notwithstanding the repeal of 6 & 7 Will. 4, c. 32, by sect. 7 of the Building Societies Act of 1874,



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the statute in force for regulating the affairs of the society was the 6 & 7 Will. 4, c. 32, and not the Building Societies Act 1874. There is no report of what passed either before the Master of the Rolls or the Lords Justices in *Mulkern v. Lord* (a), but, on referring to the papers in the library of this House, it appears that Jessel, M.R. commenced his judgment by saying: "The first point I have to decide (and I am told and believe it is a very important point, and there seems to be no decision upon it) is, what is the effect of the 27th section of the Act of Geo. 4 as to the appointment of arbitrators? Now, this statute still regulates societies like the society I have before me;" and, on that supposition that it was a new question untouched by decisions, he put his construction on 6 & 7 Will. 4, c. 32. James, L.J. very briefly says that if the cases referred to in the argument in *Mulkern v. Lord*, in the Court of Appeal, had been thought of in the court below, the decision would probably have been different. In *Hack v. London Provident Building Society*, as in *Wright v. Monarch Investment Building Society*, and in the case now at bar, the society has obtained a certificate of incorporation under the Act of 1874, and consequently as regards it the 6 & 7 Will. 4, c. 42, is repealed. Pearson, J. thought in *Hack's* case that both the Court of Appeal and this House, in *Mulkern v. Lord*, proceeded entirely on the former statute now repealed, and did not decide upon the construction of the Building Societies Act 1874; and it certainly is the fact that nothing is said in the opinions delivered in this House to the effect that *Wright v. Monarch Investment Building Society* was ill-decided, though the case was cited and relied on by the appellants. If the case is overruled it can only be as a consequence of the *ratio decidendi* of this House. Pearson, J. says: "I cannot help thinking that the Act of 1874 was passed purposely to give the arbitrator larger powers than he had under the former Acts, and I should be going counter to the provisions and spirit of that Act if I were to withdraw from the society and its members the right, which it appears to me they possess, of having their disputes determined by the arbitrator and instead thereof drive them to the expensive luxury of bringing an action in this court." I think there can be no question that, if by a legitimate application of the ordinary canons of construction to the Act of 1874, it appears that the intention of the Legislature was what Pearson, J. states, it is the duty of all courts of law to give effect to that intention. The question I think is whether it does appear. *Crip v. Bunbury* (8 Bing. 394) was decided in 1832, on the construction of the Savings Banks Act (9 Geo. 4, c. 92). But the reasons of the judgment were general. Tindal, C.J., after pointing out that the nature of a savings bank was an institution intended to comprehend a very large number of depositors, chiefly from the lower walks of life, many of them contributing very small sums, and that to allow actions at law would cause ruin to the institution by the expenses, proceeds to say: "It is evident, therefore, that the Legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes

by a reference in the mode pointed out in the Act instead of a more expensive, dilatory, and uncertain remedy by an action at law; and we think we should defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construe the words used as words which impart an obligation to refer, and which take away the right to sue in the Superior Court." Every word of this is applicable to a friendly society, and I do not think it is now disputed that 10 Geo. 4, c. 56, s. 27, is to be construed as importing an obligation to refer disputes between the members of friendly societies, and to take away the right to sue in the Superior Courts. In *Mulkern v. Lord*, Lord Cairns, L.C., without deciding that question, assumes it to be so. But a building society is more than a friendly society, and the disputes which may arise between the members of such a society may, and often do, relate to considerable sums of money. When the Legislature in the now repealed Act 6 & 7 Will. 4, c. 32, regulated benefit building societies, the 4th section was in these words, "That all the provisions of " 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40—the Friendly Society Acts—"so far as the same may be applicable to the purpose of any building society, and to the framing, certifying, enrolling, and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof in such and the same manner as if the provisions of the said Acts had been expressly re-enacted." There very soon arose a controversy as to the effect of this enactment. It was held, and the decision of this House in *Mulkern v. Lord* is that it was held rightly, that the provisions of the Friendly Societies Acts as incorporated in the 4th section of the 6 & 7 Will. 4, c. 32, applied only to such disputes as could arise between members of friendly societies as such, and which were of such a nature as might reasonably be referred to justices of the peace, that being the ultimate tribunal appointed by the 10 Geo. 4, c. 56, and, though I cannot bring myself to doubt that a dispute between the society and the member of a building society as to the terms on which his mortgage is to be redeemed, is a dispute between the society and him as a member of the building benefit society as such, yet I do not think it such a dispute as could arise between a friendly society and one of its members as member of the friendly society. I quite agree it is not a dispute which the Legislature could be reasonably supposed to have intended to leave to justices of the peace. The last decision in point of date on this subject was *Reg. v. Trafford* in 1854. In that case the opinion of the court, as I read it, was that where the referees had jurisdiction at all it was exclusive jurisdiction, but that over such a dispute they had no jurisdiction. There was a decision in *Callaghan v. Dolwin* (L. Rep. 4 C. P. 288) that the justices had no power to state a case when acting under the Friendly Societies Act. This was decided in 1869. Now, when in 1874 the Legislature repealed the 6 & 7 Will. 4, c. 32, and were considering what provisions they would enact in lieu of it, they could not possibly know what this House would hold in *Mulkern v. Lord* in 1879, but all concurred in building societies knew what had been decided on the repealed statute. I do not dispute that a few express words might have made it quite clear that the intention of the Legislature was to say that dis-

(a) The case is reported in the Court of Appeal in 38 L. T. Rep. N. S. 265.

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putes relating to mortgages and the redemption of them shall be referred and settled in no other way, the jurisdiction of the Superior Courts being ousted, and that those express words are not there. But I think it is enough if we can collect the intention to have been so, and I think we can. The Act 37 & 38 Vict. c. 42, by sect. 16 enacts what the rules of the building society "shall set forth." The 4th and the 9th seem to me material. There must be in the rules provisions as to the terms on which mortgages may be redeemed, and there must be provisions as to whether disputes between the society and any of its members (which surely must include disputes as to the terms on which mortgages may be redeemed) shall be settled by reference to the court (i.e., the County Court), or to the registrar or to arbitration. Those words exclude the notion of such disputes being disposed of in any fourth way, such as suing in a superior court. I quite assent to what is said by Lord Cairns, L.C. in *Mulkern v. Lord*, that though the rules provide that the jurisdiction shall be ousted, that alone will not be effectual. It must be shown that the Legislature have so provided. Here the Legislature have required that the rules shall so provide, which carries us a good way in saying what was the intention, more especially when knowing that the reason, or at least a principal reason, why the courts of law had held that the provisions of the Friendly Societies Acts, though incorporated in 6 & 7 Will. 4, c. 32, did not extend to disputes as to mortgages, was that the reference there was to justices, they appoint a different tribunal. But it does not stop there; there are sects. 34, 35, and 36. Sect. 35 provides that, where the matter is one which, by the rules, should be referred to arbitration, and one party has not, within forty days, complied with a request to join in appointing arbitrators, or the arbitrators have not made an award, the court (i.e., the County Court) may hear and decide the dispute. That seems to me equivalent to an enactment that no other court shall, in such a case, do so. And the 36th section not only makes the determination by arbitrators, or by the court, or by the registrar, final and conclusive, but makes a proviso, I think, plainly suggested by the case of *Callaghan v. Dolwin*, that a case may be stated on any question of law, which goes very far to remove any argument that the Legislature could not have intended to refer questions of law to such a tribunal. The result is that I come to the same conclusion as that come to by Pearson, J. in *Hack v. London Provident Building Society*. I need hardly say that I have carefully considered the reasons given for his judgment by the Lord Chancellor, and that I now speak with diffidence. But I still entertain the opinion I have expressed, and, that being so, I move that the judgment be affirmed, and the appeal dismissed with costs.

Lord WATSON.—I have come to the same conclusion with Lord Blackburn, not without hesitation, because I am sensible of the weight of those considerations which have been so forcibly stated by the Lord Chancellor against the view which I have taken. The provisions made by the Act 6 & 7 Will. 4, c. 32, and the Act 10 Geo. 4, c. 56, therewith incorporated, for the settlement of disputes arising between a building society and its individual members, differ from the enactments of 37 & 38 Vict., and the question

we have to consider shortly stated is, whether that difference is sufficient to take the present case out of the rule of *Mulkern v. Lord* (4 App. Cas. 182), and previous decisions upon the same point. By 10 Geo. 4, c. 56, s. 27, it is enacted that the rules of the society shall specify whether such disputes shall be referred to arbitrators or to justices of the peace; and, in the event of reference being made to arbitrators, the enforcement of their award, which is declared to be final to all intents and purposes, is committed to the justices. Where such disputes are by the rules referred to justices of the peace, sect. 28 provides for the manner in which these are to be heard and determined, and sect. 29 further enacts that every sentence, order, and adjudication of any justices under the Act shall be final and conclusive. These provisions of 10 Geo. 4, c. 56, are, by its terms, solely applicable to friendly societies, according to whose constitution members make money contributions to the society in return for which they themselves in case of sickness, or their representatives in case of their decease, receive certain payments, the amount of such contributions or payments, and the conditions attaching to them, being matters provided for by the rules of the society. It was not in the contemplation of those who framed the Act that a member and his society should, under the rules, stand to each other in the relation of mortgagor and mortgagee. The investment of the funds of the society on real or heritable securities, or heritable property, is sanctioned by sect. 13; but it is obvious that a member borrowing on mortgage under the authority of that clause would not be transacting with the society in his character of *socius*. 6 & 7 Will. 4, c. 32, which was passed for the regulation of benefit building societies, incorporates the provisions of 10 Geo. 4, c. 56, but that only "so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof." The Act of Will. 4 did undoubtedly contemplate that members of a benefit building society were, with a view to the erection or purchase of dwelling-houses, to receive advances from the stock of the society, to be secured by way of mortgage until the value of their shares has been fully repaid, together with interest and other fines and payments, and hence arose the contention that all disputes in regard to these mortgages must be settled by a reference to arbitrators, or to justices of the peace, in terms of the Act 10 Geo. 4. That contention was finally disposed of by the judgment of this House in *Mulkern v. Lord*. I understand the sole *ratio* of that judgment to be that, although the statutory machinery already provided for the settlement of disputes arising in friendly societies was made applicable by the statute of William to benefit building societies, yet its application was in the case of these societies limited to disputes *ejusdem generis* with those contemplated by 10 Geo. 4, c. 32. Earl Cairns, L.C., after pointing out the limited character and scope of the reference provided by the Friendly Societies Act of 1829, went on to say that it appeared to him to be impossible that the relative rights of the mortgagor and mortgagee, "and especially the rights of foreclosure and redemption, could be enforced or adjusted by such a reference to arbitration as is provided

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by 10 Geo. 4, c. 56, s. 27, and he said, "I therefore arrive at the conclusion that the provisions of that Act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage." The Building Societies Act 1874, under which the appellant society is incorporated, contains new enactments as to the tribunals by which disputes are to be determined. It provides by sects. 34 and 35 that the rules of the society may direct such disputes to be referred either to arbitrators or to the Registrar of Friendly Societies, who is also registrar under the Act, or to the "court," i.e., the County Court of the district in which the chief office or place of meeting for the business of the society is situate. Twelve arbitrators are (sect. 34) to be nominated, of whom a certain number, not less than three (such number to be fixed by the rules), are to be chosen by ballot in each case of dispute. It is declared (sect. 34) that the award of a majority of the number of arbitrators so fixed shall determine the dispute, and that the award of the registrar, when the rules direct reference to be made to him, shall have the same effect. No executive power is given to the arbitrators or to the registrar; but it is enacted that, in the event of either of the parties to the dispute refusing or neglecting to comply with their award, the "court" shall enforce compliance with the same upon the petition of any person having interest. The "court" is empowered (sect. 35) to hear and determine disputes, not only in the case of their being referred to it by the rules, but also in cases where one of the parties has failed within forty days to comply with the application of the other to have the dispute settled by arbitration, or where the arbitrators have refused, or for a period of twenty-one days have neglected, to make any award. Lastly, it is enacted (sect. 36) that every determination of a dispute, whether by the arbitrators, the registrar, or the court, shall be final and not subject to review, provided always that it shall be competent for any one of these tribunals to state a case for the opinion of the Supreme Court on any question of law, and that they shall each and all have power to grant to either party to the dispute such discovery as might be granted by any court of law or equity. I do not think it can be inferred from the character of the tribunals thus constituted, and the nature of the powers conferred upon them, that it is impossible that the Legislature should have intended to commit to their determination questions or disputes arising between an advanced member and the society in their relative characters of mortgagor and mortgagee. In 1865 the Legislature had already conferred upon County Courts (28 & 29 Vict. c. 99, s. 1) jurisdiction to exercise the power and authority of the High Court of Chancery in all suits for foreclosure or redemption, or for enforcing any charge or lien, when the mortgage charge or lien does not exceed in amount the sum of 500*l*. There does not appear to me to be any *a priori* improbability that the Legislature should in 1874 either intrust to these courts the duty of determining such questions between a benefit building society and its advanced members, or authorise them to pronounce when requisite an order for foreclosure or redemption, after the rights of parties had been ascertained by arbitrators or by the registrar;

but the important question still remains—whether the Legislature has, by the enactments of the statute of 1874, directed questions which involve the adjustment of rights created by mortgage to be referred to these tribunals. It is of very little consequence that they should be capable of dealing with such matters, unless it plainly appears from the provisions of the statute that the Legislature intended to give them jurisdiction. Are the questions arising as to the redemption of a mortgage given to the society by an advanced member, as required by the rules, in order to secure the future payments becoming due by him as a member of the society, "disputes" within the meaning of sects. 34, 35, and 36 of the Act of 1874? That question must, in my opinion, be answered in the affirmative. The 16th section of the statute expressly provides that the rules of the society shall set forth (*inter alia*) "the terms upon which shares may be withdrawn and upon which mortgages may be redeemed." Now, it appears to me that, in making that provision, the Legislature must have had in view, mainly if not solely, mortgages to be granted in security for the repayment of advanced shares; and that the object of the provision is to secure to all who become members of the society full disclosure of the rights which they acquire and of the liabilities which they thereby incur. I am unable to regard the liability of an advanced member under such a mortgage as the liability of a stranger, and not as the liability of a member. By sect. 14, the liability of a member in respect of any share upon which an advance has been made, is limited to the "amount payable thereon under any mortgage or other security, or under the rules of the society." The mortgagor is a member as regards the leading covenants of the mortgage, and I can see no reason for treating him *quoad ultra* as a mere stranger. In the case of every holder of shares upon which an advance has been made, it is an essential condition of his membership that he shall stand in the relation of mortgagor to the society as mortgagee. Unless he comply with that condition, he cannot become an advanced member, either in terms of the rules or within the contemplation of the statute. It therefore appears to me that every controversy arising between the society and a member upon whose shares an advance has been made, as to their respective rights under a mortgage executed in terms of the rules, is in reality a dispute between the society and a member within the meaning of the Act. I am strongly confirmed in that impression by the power which sect. 36 confers upon the arbitrators, the registrar, or the court to state, at the request of either party, a case for the opinion of the Supreme Court on any question of law, and also by the extensive powers of granting discovery conferred upon them by the same section. These powers appear to me to indicate that it was in the contemplation of the Legislature that the arbitrators and other referees might, in the exercise of their statutory jurisdiction occasionally encounter serious questions of law, in the solution of which it was proper that they should have the aid of the Supreme Courts of the country. The reference clauses of the Act (sects. 34 and 35) speak of "disputes" generally; but it is obvious from the context that the expression is only meant to comprehend those disputes which arise between the society and its members,

or persons claiming against the society, as in right of a member. In the concluding enactment of sect. 34 such disputes are defined as "any dispute arising in a society under this Act;" and sect. 21 enacts that the rules are to be binding "on the several members and officers of the society, and on all persons claiming on account of a member or under the rules." A stranger transacting business with the society must, of course, have regard to the powers of the society as constituted by its rules; but a dispute between him and the society would not, in my apprehension, be in any sense a dispute arising within the society. It was maintained in argument that the disputes which, by the Act, are made the subject of reference are, by its context, limited to disputes arising under the rules. The enactment chiefly relied on in support of that contention occurs in sect. 34, which (*inter alia*) provides that "whatever award shall be made by the arbitrators, or the major part of them, according to the true purport and meaning of the rules of the society, shall determine the dispute." I should have attached great weight to that argument had I been able to read the words "according to the true purport and meaning of the rules" as having reference to the award of the arbitrators; but I am satisfied that they refer to the "major part" of the arbitrators, because the due selection of these arbitrators, and the number required to constitute a majority, can only be ascertained by reference to the rules. I shall not refer in detail to the decisions which preceded *Mulkern v. Lord*. The ground of judgment upon which the House proceeded in that case had previously been adopted by Lord Cranworth in *Fleming v. Self*; but in other cases it has been expressly decided that questions relating to the redemption or foreclosure of mortgages, in the case of benefit building societies registered under the Act 6 & 7 Will. 4, c. 32, are not disputes arising between the society and its members in their capacity of *socii*. In the view taken by the House in *Mulkern v. Lord*, it became unnecessary to consider the point, so that the authority of these decisions is not impeached by that case. These decisions are, accordingly, direct precedents upon the construction of statutory provisions which are akin to the enactments of the Building Societies Act 1874. But the question whether certain proceedings are to be regarded as disputes between the society and its members, arising within the society, appears to me, in the case of each statute, to depend upon the intention of the Legislature, to be gathered from the whole provisions of the Act. In the present case the statute with which we are dealing differs from its predecessors, as regards the tribunals to which disputes are to be referred, the powers conferred upon them, and the matters connected with the mortgages of members which are to be provided for in the rules; and, as these new enactments have led me to form the opinion which I have already expressed, I do not conceive that I am fettered by those decisions which involve the construction of the earlier statutes.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors: For the appellants, C. A. Russ and Co.; for the respondent, Keep, Lane, and Co.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Jan. 31 and Feb. 19.

(Before Lord SELBORNE, L.C., COTTON and LANDLEY, L.JJ.)

HOLYLAND v. LEWIN. (a)

*Will—Gift to children—Lapse—Limited power—Wills Act 1837, s. 33.*

Sect. 33 of the Wills Act, which provides that there shall be no lapse of a devise or bequest made to a child or other issue of the testator dying in his lifetime, where the issue of the child or issue are living at the testator's death, does not apply in the case of the exercise by will of a special power of appointment.

*Griffiths v. Gale* (3 L. T. Rep. O. S. 17; 12 Sim. 354) followed.

*Contrary dicta of Jessel, M.R., in Freme v. Clement* (44 L. T. Rep. N. S. 399; 18 Ch. Div. 499) disapproved.

*The decision of Chitty, J. affirmed.*

WILLIAM LEWIN, by his will dated the 25th Jan. 1847, devised his real estate to R. Cooper and B. Croker, in trust for his wife Ann Charlotte Lewin for her life, and after her death, in trust for all or any one or more of his children, grandchildren, or other issue (such grandchildren or other issue to be born in the lifetime of his said wife), for such estates or interests, in such shares, with such directions, and to be vested in such manner as his said wife by will or codicil should "direct, appoint, give, or devise;" and the testator declared that his said wife might appoint to such children, grandchildren, or other issue absolutely, or to trustees with the usual powers to sell and pay the clear money arising therefrom to such children, &c., or invest the same for their benefit, as his said wife might direct as aforesaid, his will being that his said wife (in the events which happened) should have by her will, or any codicil or codicils thereto, the same power and authority of giving all or any part of his real estate for the benefit of all or any of his children, &c., as he had then.

The testator died on the 20th Nov. 1854, and his will was proved on the 7th Feb. 1855.

Ann Charlotte Lewin, his widow, by her will, dated the 27th March 1868, in exercise of the above-mentioned power, and of every other power in that behalf enabling her, "appointed, gave, and devised" the real estate devised by the testator's will to Thomas Holyland and Robert Hallam, upon trust for sale, and to stand possessed of the net proceeds, as to one-third part thereof, upon trust for Francis Braithwaite Lewin, son of her late husband, his executors, administrators, and assigns, absolutely, and as to the other shares, upon trust as therein mentioned.

Ann Charlotte Lewin died on the 25th Dec. 1880.

Thomas Holyland, the only executor who survived her, sold the real estate after her death, and received the purchase money.

Francis Braithwaite Lewin died in the lifetime of Ann Charlotte Lewin, on the 28th Aug. 1873, in-

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

testate, leaving a widow and three children, and one of the questions raised by special case for the decision of the court was, whether his administratrix or heir-at-law was entitled to his one-third share of the proceeds of sale, or whether that share had lapsed by his death in his mother's lifetime, and went as in default of appointment.

Chitty, J., on the 6th Feb., decided that the one-third share was personalty, and that the appointment to Francis Braithwaite Lewin failed by reason of his death in his mother's lifetime, expressing an opinion that he was bound by the decision of Shadwell, V.C., in *Griffiths v. Gale* (3 L. T. Rep. O. S. 17; 12 Sim. 327, 354).

Francis Lewin, a child of Francis B. Lewin, and who was appointed to represent the issue born after the testator's death, appealed.

*Whitehorne*, Q.C. and *E. Ford* for the appellant.—Sect. 33 of the Wills Act applies to the execution of limited powers, and prevents the shares from lapsing. The judge in the court below simply followed the decision of Shadwell, V.C. in *Griffiths v. Gale* (3 L. T. Rep. O. S. 17; 12 Sim. 327, 354). But the reasons given for that judge's decision extend to all appointments, whereas it is settled that appointments under general powers are within sect. 33:

*Eccles v. Cheyne*, 2 K. & J. 676.

There is a very recent decision of Jessel, M.R. in our favour:

*Freme v. Clement*, 44 L. T. Rep. N. S. 399; 18 Ch. Div. 499.

They also referred to

*Johnson v. Johnson*, 11 L. T. Rep. O. S. 118; 3 Hare, 157; Sugd. V. & P. (8th edit.) 463.

*Macnaghten*, Q.C. and *H. Fellows* for G. F. Lewin.—So long ago as 1867, Lord Romilly, M.R. considered it settled law that special powers were not within sect. 33 of the Wills Act:

*Freeland v. Pearson*, L. Rep. 3 Eq. 658.

The decision in *Griffiths v. Gale* has never been overruled, but has been recognised, except in *Freme v. Clement*, and Jessel, M.R. had no power to overrule *Griffiths v. Gale*. If the opposite construction prevailed, the Act would apply where an appointment was made to a person who was dead when the will was made:

*Winter v. Winter*, 5 Hare, 314;

*Wisden v. Wisden*, 24 L. T. Rep. O. S. 250; 2 Sm. & Gif. 396.

*Romer*, Q.C. and *Warmington*, Q.C.; *Ince*, Q.C. and *Solomon*; and *S. Williams*, for other parties, were not heard.

*Whitehorne*, in reply, referred to

*Eager v. Furnivall*, 44 L. T. Rep. N. S. 464; 17 Ch. Div. 115;

*Es Hensler*, 45 L. T. Rep. N. S. 672; 19 Ch. Div. 612.

*Cur. adv. vult.*

Feb. 19.—The following judgment of the court was delivered by

LORD SELBORNE, L.C.—In this case we were asked to overrule a decision of Sir Lancelot Shadwell, in 1844, upon the 33rd section of the Wills Act (7 Will. 4 & 1 Vict. c. 26) which provides against lapse by the death, in the lifetime of a testator, of any child or other issue of the testator "to whom any real or personal estate shall be devised or bequeathed," and who shall leave issue who may survive the testator. Sir L. Shadwell decided, in *Griffiths v. Gale*, that this

provision of the statute did not extend to the case of an appointee under a limited power. That decision had the assent and approval of Lord St. Leonards (see Sugd. V. & P. 8th edit. 463); and also of Lord Hatherley (*Eccles v. Cheyne*). It was said, and truly, by Lord Hatherley, that some of the observations made by Sir L. Shadwell were inapplicable if they were supposed to go beyond the case before him and to extend to that of a general power. But we see no reason for supposing that the learned judge who decided *Griffiths v. Gale* had, when he made those observations, any other case in view than that which was before him, namely, the case of a limited power. If the reasons on which *Griffiths v. Gale* was decided had been in themselves unsatisfactory, there would still be great difficulty in disturbing what has been regarded as settled law for the last forty years, a law on which many titles may possibly depend. But we are ourselves satisfied with the reasons for that decision. The words "devise" and "bequeath" are terms of known use in our law; the former, from Glanville's time, and earlier. In their ordinary sense they signify the declaration of a man's will concerning the succession to his own property after his death. Such a "devise" or "bequest" operates (on subjects which, either by common or by statute law, or by custom, can so be disposed of) by virtue of the will, and of that alone. On the other hand, an appointment under a limited power operates by virtue of the instrument creating the power; the execution, when valid, is read into and derives its force from that instrument. If the execution of the power must or may be by will, it must be a will duly executed and attested as such, according to law; and the word "will," in the statute, extends to such a testamentary appointment. But, that condition being complied with, the execution operates in the same way after the death of the appointor, as if the instrument were not testamentary. Before the Wills Act the law as to general powers was the same: "A mere general devise or bequest, however unlimited in terms, would not comprehend the subject of the power, unless it referred to the subject of the power itself, or generally to any power vested in the testator." (Sugd. Pow. 6th edit. vol. 1, p. 385.) It follows, we think, legitimately from these premises, that the words "devise" and "bequest," when used in the Wills Act without any indication of an intention that they should apply to appointments under powers, ought *prima facie* to be understood in their ordinary sense, viz., as referring to a gift by will of the testator's own property, and nothing else. Without laying very much stress upon the word "lapse," or upon the improbability that the Legislature could have intended to interfere with the law of powers in an Act relating generally to wills (except so far as such an intention is expressly declared), we think it enough to say that we find nothing in the 33rd section, or in any other part of the Act bearing upon it, which requires any extension of the words "devised" and "bequeathed" beyond their ordinary *prima facie* sense. Jessel, M.R. indeed (in *Freme v. Clement*, a case decided on the 25th section of the Act) seems to have thought it possible to collect from the general provisions of the Wills Act an intention to use those words in a sense *prima facie*

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inclusive of appointments under limited as well as general powers. We might have been doubtful of our own opinion, if it were merely our own, when we found it opposed to that of so eminent a judge; but in this case all previous authority is in accordance with our opinion. The case of general powers is expressly dealt with by the 27th section of the Act; which says that "a general devise" of the real, and "a bequest of the personal," estate of the testator shall be construed to include any real or personal estate "which he may have power to appoint in any manner he may think proper," and "shall operate as an execution of such power, unless a contrary intention shall appear by the will;" thus making the subject of a general power part of the property of a testator, for the purpose of his testamentary dispositions, and bringing it, by positive enactment, within the operation of a general "devise," or "bequest;" and therefore within the category of "real or personal estate devised or bequeathed," in the terms of the 33rd section, as was decided in *Eccles v. Cheyne*. But this express legislation as to general powers does not extend, either directly or in principle, to limited powers. On the contrary, it appears to us rather to repel than to support the idea that the Legislature intended to interfere with the previous state of the law as to the execution of limited powers.

*Appeal dismissed with costs.*

Solicitors: *Lee, Ockerby, and Everington*, for J. and A. Bright, Nottingham; *W. W. Wynne and Son*, for Brabnes and Court, Liverpool; *H. Montagu; Field, Roscoe, and Co.*, for E. and G. Toller and Sons, Leicester.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

May 6, 8, and 12.

(Before BACON, V.C.)

PHELPS, STOKES, AND CO. v. COMBER. (a)

*Bills of exchange—Counterfoils—Appropriation of shipments to meet bills—Agent of two firms—Notice.*

*Johnston, Pater, and Co., merchants, of Pernambuco, ordered goods of their agents Samuel Johnston and Co., of Liverpool, the principal partner in both firms being the same individual.*

*The Liverpool firm sent the order to their agent at New York, who bought the goods, and sent them and the bills of lading to Pernambuco.*

*In order to pay for the goods, the agent drew bills of exchange on the Liverpool firm, and sent the bills with counterfoils attached to Liverpool.*

*Each counterfoil was headed as follows, "Advice of draft. To Messrs Samuel Johnston and Co., Liverpool," and after stating the number, date, and amount of the draft, and the shipments against which it was drawn, concluded as follows, "Please protect the draft as advised above and oblige drawer."*

*Samuel Johnston and Co. accepted the bills, and detached the counterfoils.*

*The agent sold the bills to bankers in New York shortly before the Liverpool firm stopped payment. The agent gave notice, by telegram, of the failure, to the Pernambuco firm.*

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

*The Pernambuco firm received the proceeds of the sale of the goods, and applied them in payment of the balance due to them from the Liverpool firm. Held, on action by the bankers against the Pernambuco firm for payment of the bills, or an account, that there was no appropriation of the shipments, nor of the proceeds of the sale thereof, to meet the bills of exchange.*

THE plaintiffs in this action were bankers at New York, and the defendant, at the time of the transactions in dispute, was carrying on business as a merchant at Pernambuco under the name of Johnston, Pater, and Co., and at Bahia under the name of Johnston, Comber, and Co. In May 1879 Samuel Johnston and Co. were the bankers and agents at Liverpool of Johnston, Pater, and Co. and Johnston, Comber, and Co., and R. B. Borland was general agent in New York of all the three firms.

In May 1879 the Pernambuco firm ordered the Liverpool firm to send certain goods to them for some of their customers in Brazil; the Liverpool firm sent the order to R. B. Borland, who bought the goods in New York.

R. B. Borland sent the goods, and the bills of lading, by the steamship *Glensannoz*, to Pernambuco, and to pay for the goods drew three bills of exchange upon the firm of Samuel Johnston and Co. One numbered 401 was dated the 9th May 1879, and was drawn for a sum of 1500*l.* payable on the 23rd July 1879, and the other two, numbered respectively 402 and 404, were dated the 16th May 1879, and drawn for sums of 1500*l.* and 2000*l.* respectively payable on the 30th July 1879.

There was attached to each of the said bills, at the time when the same was drawn, a counterfoil, with a perforated line between the bill and the counterfoil.

Each counterfoil was headed as follows, "Advice of draft. To Messrs Samuel Johnston and Co., Liverpool," and after stating the number, date, and amount of the draft, and the shipments against which it was drawn, concluded as follows, "Please protect the draft as advised above and oblige drawer."

R. B. Borland sent the bills of exchange, and copies of the bills of lading, to Samuel Johnston and Co., and meantime sold the bills to Phelps, Stokes, and Co. in New York.

Samuel Johnston and Co. accepted the bills, and detached and retained the counterfoils.

On the 10th June 1879 Samuel Johnston and Co. stopped payment, and immediately on ascertaining this fact the plaintiffs and the said R. B. Borland telegraphed to Pernambuco, informing Johnston, Pater, and Co. (who had been previously instructed as to the purchase and shipment of the goods, and as to the three bills being drawn against and charged on the said goods) that they must hold the said shipments by the *Glensannoz*, and the proceeds of the sale thereof, as security to the plaintiffs as the holders of the bills. The telegram was as follows:

Having pledged documents and shipment *Glensannoz* hold proceeds subject order Phelps, Stokes, and Co. and Bank British North America.

The *Glensannoz* arrived at Pernambuco, and the defendant, or his firm of Johnston, Pater, and Co., after receiving the telegram, obtained possession of the goods, transferred them to the Brazilian purchasers, and received the proceeds, and



applied the same in the payment of the balance due to them from the Liverpool firm.

The plaintiffs claimed payment of the bills, or an account, and an order for payment out of the proceeds of the goods, and a receiver.

The defendants denied that R. B. Borland was agent of the three firms, or had authority to pledge the goods.

By an agreement made the 11th Dec. 1877, between Carruthers Charles Johnston, of Liverpool, of the one part, and Robert Bell Borland of the other; after reciting that C. C. Johnston was desirous of appointing the said R. B. Borland as agent to represent the partnership firms of Samuel Johnston and Co. of Liverpool, Johnston, Pater, and Co. of Pernambuco, and Johnston, Comber, and Co. of Bahia, on commission in the United States of America for the term of five years from the 1st Jan. 1878, upon the terms and conditions therein-after contained, it was agreed between the parties thereto as follows:

That the said R. B. Borland shall for and during the period of five years from the said first day of Jan. 1878, enter into the service of the said C. C. Johnston, and well and faithfully act for him as agent on commission, as may from time to time be required by him the said C. C. Johnston, in the United States of America, and shall and will, during the said term, diligently attend the business concerns of the said C. C. Johnston, and the said firms of Samuel Johnston and Co., Liverpool, Johnston, Pater, and Co., Pernambuco, and Johnston, Comber, and Co., Bahia. That all business transactions by the said R. B. Borland on behalf of the said firms shall be charged by commission only, in conformity with the rates which have been heretofore charged by the said R. B. Borland since Jan. 1, 1873, under a written agreement and power bearing date 28th Dec. 1872. Provided, however, that in cases of mutual agreement, the scale of commissions may be modified by the parties to this agreement as circumstances warrant.

That the said R. B. Borland shall not enter into any speculative business whatever, but confine himself entirely to that of commissions only, and in case of any other commissions being offered to him by other firms, he shall first submit the same for the approval of the said C. C. Johnston, in writing, before proceeding with the transaction thereof.

That the said R. B. Borland shall be at liberty to make advances on shipments of produce consigned to the said C. C. Johnston, to the extent of not exceeding three-fourths of the net value thereof, and he is hereby authorized and empowered to draw on the said Samuel Johnston, and Co. for the amount of all such advances, and also for the amount of any orders given by the said firms of Samuel Johnston and Co., Johnston, Pater, and Co., and Johnston, Comber, and Co.

That the said R. B. Borland shall use his best endeavours and utmost exertions in obtaining consignments of and orders for produce, in connection with the said firms.

Charles Carruthers Johnston was alleged by the plaintiffs to be the chief partner in all the three firms, and the evidence of W. H. Brown, the broker who sold the bills of exchange, and of S. P. Slater, clerk of the plaintiffs who bought them, and also of one of the partners of the plaintiffs' firm, was taken in New York before examiners, with a view to show that the plaintiffs bought the bills on the understanding that the goods shipped by the *Glensannox* were appropriated to meet the bills.

The evidence of R. B. Borland was also taken on this point, and on behalf of the defendants, to show that pressure was put upon him by the plaintiffs to send the telegram of the 10th June 1879.

O. C. Johnston, Thomas Comber, and Thomas Comber Griffiths were also examined in England with regard to the connection of the three firms,

and the authority of R. B. Borland to act as agent for them, or to pledge the goods.

*R. T. Reid, Q.C., M.P.* and *Northmore Lawrence* for the plaintiffs.—The question to be decided in this action is, whether Borland had authority to create any charge on the goods consigned by the *Glensannox*, or on the proceeds of the sale of them, whether he purported to create such charge, and whether the plaintiffs bought the bills of exchange on the faith of his making such charge. The agreement of the 11th Dec. 1877 made Borland agent of the three firms, and under it he had authority to pledge the goods, and the evidence of Brown and Slater showed that the bills of exchange were purchased on the faith of Borland pledging the goods, and being authorised to do so. In *Frith v. Forbes* (7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409) the court held that there was appropriation of cargo to meet bills of exchange. *Ex parte Carruthers* (3 De G. & Sm. 510) was a different case. In *Robey and Co. Perseverance Ironworks v. Ollier* (27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695) *Frith v. Forbes* was discussed, and the references to that case in the judgments of James and Mellish, L.JJ. are in our favour. Then the defendant received the goods, after notice that they were purchased by means of the bills of exchange, and that they were pledged to meet the bills. It was not competent for them to receive the goods and dishonour the bills. There was a clear intention that there should be an equitable lien on the cargo. All the three firms had notice of the transactions.

*Marten, Q.C.* and *F. Thompson* for the defendant.—The letters of advice on the counterfoils, if purporting to pledge the goods, were only a security to Samuel Johnston and Co. The letters of advice were detached by Samuel Johnston and Co. when they accepted the bills, and could confer no benefit upon the plaintiffs. The plaintiffs had nothing to rely upon but the credit of the acceptors of the bills. If the bills of lading are not annexed to the bills of exchange, the only security is the credit of the acceptors:

*Robey and Co. Perseverance Ironworks v. Ollier*, 27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695.

In the present case the bills of lading had gone to Pernambuco. [BACON, V.C.—The question I have to decide is, whether from all the documents Borland had the power to make, and did make, an equitable assignment.] The advice and draft on the counterfoil does not amount to an equitable assignment. The bills of lading and the goods went to Pernambuco; it is clear that no charge was intended:

*Es Entwistle*; *Es parte Arbuthnot*, L. Rep. 3 Ch. Div. 477;

*Es parte Banner*; *Es Tappenbeck*, 34 L. T. Rep. N. S. 199; L. Rep. 2 Ch. Div. 278.

There was no appropriation to meet the bills, therefore no equity arose in favour of the holders of the bills to have the proceeds applied in payment of the bills under the doctrine of *Ex parte Waring* there referred to. No specific lien was given to Borland on the goods or the proceeds of the sale of them:

*Thomson v. Simpson*, L. Rep. 5 Ch. App. 659.

As to Brown and Slater, a conversation between them could not alter the letter of advice:

*Citizens Bank of Louisiana v. First National Bank of New Orleans*, L. Rep. 6 E. & Ir. App. 352.

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As to the agreement of the 11th Dec. 1877, there was no authority given by that to Borland to give any pledge in respect of goods bought by him in New York on commission. In executing orders Borland might draw to the full amount, but he had no authority to pledge the goods. The evidence of Carruthers Charles Johnston showed that he never authorised Borland to make any pledge or charge in respect of the goods ordered, or in respect of the proceeds of the sale of the goods. The counterfoils were merely letters of advice, as between the drawer and drawee of the bills of exchange, the plaintiffs could not have the benefit of them. Mr. Johnston said that, though he was partner in all the three firms, he did not communicate the agreement of the 11th Dec. 1877 to the Pernambuco and Bahia firms. *Prima facie* there was no intention of appropriation. As to the conversation between Slater and Brown, general information was given to Slater, the buyer, on behalf of Phelps, Stokes, and Co., that the bills were drawn against consignments for the purpose of showing that the bills represented *bona fide* transactions, but no specific information was given by Brown, the broker, as to the shipment against which the bills were drawn. The mere fact of the bills being drawn against goods does not of itself create a charge; and, in this case, the parties never intended, and never did create a charge.

R. T. Reid, Q.C. in reply.—*Frith v. Forbes (sup.)* is in our favour, and *Robey and Co. Perseverance Ironworks v. Ollier (sup.)* differs from the present case in that here it was impossible for the bills of lading to be sent with the bills of exchange; the bills of lading had to accompany the goods to Pernambuco. In *Ex parte Banner*; *Re Tappenbeck (sup.)*, the doctrine of *Ex parte Waring* was introduced by the circumstances of the bankruptcy. He referred to

*Re Envoistie*; *Ex parte Arbutnot (sup.)*;  
*Rankin v. Alfaro*, 36 L. T. Rep. N. S. 529; L. Rep. 5 Ch. Div. 786.

As to the counterfoils, why were they appended except to show that the bills were drawn against the shipments? As to the evidence, both Brown and Slater thought that the bills were drawn against shipments, and that there was an hypothecation. If on the facts it was the intention of Brown and Slater that there should be an hypothecation, that disposes of the question of law. Then the defendant says that Borland had no authority to pledge the goods, but by the agreement, and on the evidence, he clearly had authority, and all the firms had notice. Then the defendant, if he refuses to pay the bills of exchange, ought to give up the bills of lading:

*Shepherd v. Harrison*, 24 L. T. Rep. N. S. 857; L. Rep. 5 H of L. 116.

If the principal takes the bills of lading from his agent, he must take the bills of lading subject to the charge made by the same agent in favour of the acceptors of the bills of exchange. Borland was entitled to raise money by pledging the goods, and his principals are bound by his acts.

BACON, V.C.—The course of mercantile business with regard to specific appropriation is well known, and in the present case I must rely upon the facts, the law upon the subject being plain. Johnston and Co. were merchants at Liverpool, and also at Pernambuco under another firm name. They employed Borland as their agent in

New York. The firm at Pernambuco wrote to the firm at Liverpool desiring a purchase to be made in the United States, and the Liverpool firm sent the necessary instructions to Borland. He, without any funds or credit that I know of, had to pay for the goods purchased and ship the goods to Pernambuco. Acting within the scope of his authority, he drew bills on the Liverpool house, and to each of these bills was attached a counterfoil stating the particulars of the draft, and of the shipments against which it was drawn. His duty being to charge the Liverpool firm with a commission, he drew the bills and sent them to that firm for acceptance. In the meantime he sold the bills of exchange to the plaintiffs in New York, and he had to transmit the bills of lading to his principals at Pernambuco. It was impossible that the bills of lading could go to Liverpool, for they had to accompany the goods to Pernambuco. There was no hypothecation of the bills of lading to the plaintiffs or any one else. It was said the plaintiffs had a charge on the proceeds of the goods, but there was no intention on the part of any of the three firms, or their agent, to create a charge in favour of the plaintiffs. By his letter Borland merely said, "You may properly accept the bills of exchange because I have shipped the goods." The plaintiffs relied on the solvency of the Liverpool firm, and the counterfoils only meant that the shipments had been made. When the bills were presented for acceptance, Samuel Johnston and Co., as the drawees of the bills, kept the counterfoils. The firm at Pernambuco did not receive any notice of the particulars of the bills. They only knew the goods had been purchased, for they received the goods, and the bills of lading, which were indorsed in favour of the purchasers, who it appeared paid the money to the firm at Pernambuco. The plaintiffs said that the Pernambuco firm should have applied the proceeds of the goods in discharge of the bills, but there was no contract whatever to this effect. The evidence of Brown and Slater, and the telegram of the 10th June 1879, carry the case no further. I find nothing in the shape of an appropriation for payment of the bills out of the proceeds of the goods. It appears to me that the case is entirely covered by the decision of the Court of Appeal in *Ex parte Banner*; *Re Tappenbeck* (34 L. T. Rep. N. S. 199; L. Rep. 2 Ch. Div. 278). As regards the counterfoil, it is impossible to say that it has in terms any application to particular goods. The only meaning of it is that "when you have accepted the bills you will have become purchasers of the goods I have ordered for you." In my opinion it is quite clear that a charge by the counterfoil upon the goods cannot be sustained, and is altogether contrary to established law. I much regret the decision at which I have to arrive in this case, for it is fair justice and honesty on the one side, and law on the other. What is the real nature of the case? Johnston and Co. of Pernambuco on the one side, and Johnston and Co. of Liverpool, the same Johnston, on the other; Johnston and Co. of Pernambuco received the proceeds of these goods, and thereout paid the debt due to them from Johnston and Co. of Liverpool, and ignored the plaintiffs' just claim altogether. A more unfair and unjust transaction could not be, but I feel bound by authority to hold that there is not sufficient in the case to amount either to an hypothecation of the



goods, or a charge on the goods, though I am very sorry so to decide. The action must therefore be dismissed.

*Marten, Q.C.*—With costs?

*BACON, V.C.*—Samuel Johnston has acted two parts, and the defendant has got the money in his pocket, and has succeeded in retaining it. I dismiss the action, but will make no order as to costs, for the whole transaction is a plain dishonesty, and I hope the example will not be followed; Samuel Johnston of Pernambuco, and Samuel Johnston of Liverpool, have received the plaintiffs' money, and kept it.

Solicitors: *Hollams, Son, and Coward; Field, Roscoe, and Co., for Bateson, Bright, and Warr, Liverpool,*

May 14, 19, and 23.

(Before *KAY, J.*)

*MACRETH v. WALMESLEY. (a)*

*Co-sureties—Agreement between debtor and one co-surety—Concealment from the other—Effect upon contract between the co-sureties.*

The plaintiff, defendant, and B. bound themselves jointly and severally in a bond conditioned for the repayment in six instalments of a sum of 500*l.* advanced to B. At that date B. owed the defendant 375*l.* An agreement was entered into between B. and the defendant, whereby B. was to pay the defendant 125*l.*, part of the 500*l.*, on which the defendant was to pay interest until it was repaid. When the 375*l.* was paid to the defendant he was to apply the 125*l.* towards the payment of the last two instalments of the 500*l.*, but so long as any part of the 375*l.* remained due he was to retain sufficient of the 125*l.* to indemnify him for that amount. The plaintiff knew nothing of this arrangement. B. paid off part of the 500*l.* to the obligees, and applied to them for a further loan, making, with the balance of the old loan, another 500*l.* The plaintiff joined as surety for the repayment of this new loan also, a new bond being given to the same effect as the former one. B. paid two instalments on this loan, and then became bankrupt, and absconded. The defendant paid two more instalments, and the obligees had taken proceedings against the plaintiff and defendant to obtain the remainder of the debt, and had recovered judgment.

The plaintiff brought this action for the purpose of getting a declaration that, as between them, the defendant was the principal debtor for the whole debt, or, at any rate, to the extent of 125*l.* He contended that the secret arrangement between B. and the defendant vitiated the contract between the defendant and himself, and alleged that if he had known of it he would not have entered into the suretyship.

Held, that the arrangement did not prejudicially affect the position of the plaintiff, and the non-disclosure of it did not relieve him from his liability under the bond.

This was an action by the plaintiff Mackreth as surety to a bond, against his co-surety, Walmesley, asking for a declaration that as between them the co-surety ought to be treated as the principal debtor for the whole amount secured

by the bond, or, at all events, to the extent of 125*l.*, which sum had been paid by the debtor, Brooks, out of the money advanced to him, to the defendant Walmesley, in respect of an antecedent debt due from Brooks to Walmesley.

The plaintiff's allegation was that he thought the money was being advanced to the debtor for the purposes of his business, and that if he had known that part of it was to go to the defendant, he would not have become a surety to the bond, and he contended that the non-disclosure of the fact vitiated the contract as between himself and his co-surety.

The facts are fully stated in the judgment.

*Robinson, Q.C.* and *Grosvenor Woods* for the plaintiff.—This arrangement between Brooks and Walmesley was one which should have been communicated to Mackreth. Non-communication of material facts would invalidate the obligation:

*Railton v. Matthews*, 10 Cl. & Fin. 934.

The fact that part of the loan was to be paid to the co-surety is a thing which would not naturally be expected, and it should, therefore, have been disclosed:

*Hamilton v. Watson*, 12 Cl. & Fin. 109.

A surety is released if there was any misrepresentation, at the time of his undertaking the obligation, as to the position he would be in when he had done so:

*Stone v. Compton*, 5 Bing. N. C. 142;

*Lee v. Jones*, 12 L. T. Rep. N. S. 122; 17 C. B. N. S. 483;

*North British Insurance Company v. Lloyd*, 10 Ex. 523;

*Evans v. Bromridge*, 8 De G. M. & G. 100.

A surety who has any private security from the debtor is bound to bring it into hotchpot for the benefit of his co-sureties:

*Steel v. Dizon*, 45 L. T. Rep. N. S. 142; 17 Ch. Div. 825;

*Re Arcedekne; Atkins v. Arcedekne*, 48 L. T. Rep. N. S. 725; 24 Ch. Div. 709.

*W. Pearson, Q.C.* and *Speed* for the defendant.—The plaintiff has made out no case for being released from his obligation. No doubt where the creditor conceals from the surety circumstances which materially affect his position there would be a ground for relief, but, in this case, the arrangement was not material to Mackreth, and in no way affected his position. They referred to

*Clarke v. Henty*, 3 Y. & C. Ex. Ca. 187.

*Grosvenor Woods* replied. [*KAY, J.* referred to *Stirling v. Forrester*, 3 Bli. 575.]

*Cur. adv. vult.*

May 23.—*KAY, J.*—From the evidence in this case it appears that in the year 1869 the plaintiff, who is a solicitor, was asked by William Brooks, an accountant, to become surety for him. Brooks was engaged in the winding-up of some company or companies, in which business the plaintiff had acted as solicitor. The suretyship was for a loan of 500*l.*, which Brooks was about to borrow from a life assurance company. Brooks told the plaintiff that the defendant Walmesley, who he said was a rich man, was to be a surety, but that the company required another, whereupon Mackreth agreed, as he says, to oblige him, and, on the 13th Aug. 1875, a bond was executed by the three. By such bond Brooks and the plaintiff and the defendant bound themselves jointly and severally

to three of the directors of the company in the penal sum of 1000*l.*, the bond being conditioned for the payment to the obligees of six sums of 97*l.* 10*s.* each, on the 5th April and the 5th Oct. in every year, the first of such payments to be made on the 5th April then next ensuing, and for payment of premiums on a policy on the life of Brooks, and for assigning such policy to the obligees upon trust for the better securing payment of the said sums, or such of them as might remain unpaid, and all costs and expenses to be incurred in enforcing payment thereof. Brooks paid three instalments and the premiums on the policy, and, in 1877, he applied to the company for a further loan, and told the plaintiff that the company were going to lend him what would make up with the balance of the old debt another 500*l.*, and, on the 13th Oct. 1877, the plaintiff joined as surety in a new bond which was to the same effect as the first. Brooks paid two instalments of 97*l.* 10*s.* each on this bond. On the 9th July 1879 he absconded, and was made bankrupt, and no dividend has been paid. The defendant Walmesley paid two instalments on the bond of 1877. In July 1883 the company brought an action against the plaintiff and defendant, and recovered judgment by default, under which the plaintiff has paid them about 61*l.*, and a balance of 30*l.* odd now remains due, the rest having been paid by Walmesley. Mackreth has brought this action against Walmesley alone, claiming that Walmesley, as between them, should be treated as principal debtor under the bond of 1877, either altogether, or at least to the extent of 125*l.*, and claiming the benefit of all securities given to Walmesley by Brooks. The ground of this claim is as follows: It seems that in 1874 an agreement in writing was made between Walmesley and Brooks, by which, in consideration of 375*l.* advanced by Walmesley, Brooks agreed to take a man named Smith as his clerk for three years at a salary of 100*l.* a year, and to repay the 375*l.* with interest at 10 per cent. on the 10th March 1877. By an agreement dated the 13th Aug. 1875, the same date as the first bond, and made between Brooks and Walmesley, reciting the agreement for suretyship of the first 500*l.*, and the obligation of Brooks to pay the 375*l.* on the 10th March 1877, Brooks agreed to pay to Walmesley, immediately on the receipt of the 500*l.*, 125*l.*, on which Walmesley was to pay interest at 5 per cent. until the whole was repaid, as follows: So soon as the 375*l.* was paid, Walmesley was to pay to the assurance company 27*l.* 10*s.*, part of the last instalment but one, and 97*l.* 10*s.*, the whole of the last instalment, of the 500*l.*, but, so long as any part of the 375*l.* and interest remained due, Walmesley was to retain sufficient of the 125*l.* to indemnify him for that amount. Walmesley, as I understand, has applied the 125*l.* in part payment of his debt of 375*l.*, according to the agreement. There is no suggestion that these agreements were known to the assurance company. There was no communication whatever between Walmesley and Mackreth in relation to their suretyship. There was not any misrepresentation in the matter. But it is contended that the concealment, or non-disclosure, by Walmesley of the agreement of the 13th Aug. 1875 entitled Mackreth to throw upon him the whole burden of the first suretyship, and that the bond given in

Oct. 1877 was, to some extent, a renewal of the old liability, and is subject to a like equity. It is said that the point is new, and certainly no case exactly like this has been cited. But the principle involved is very simple. The right of one surety against another is ordinarily for equal or proportioned contribution. It was a right acknowledged at law, and might be enforced by *assumpsit*, as upon an implied promise by each to pay his aliquot share of the debt: (*Cowell v. Edwards*, 2 B. & P. 268; *Batard v. Hawes*, 2 E. & B. 287.) In equity the relief was larger, being extended to a proportional division of the debt among the solvent sureties, in case of any being bankrupt. But if, as is well settled, a formal contract with the creditor might be avoided in certain cases of concealment by him of material facts from the surety, there can be no reason why the implied contract, or the equity for contribution, between the sureties should not, in like manner, be resisted. If there be a duty of disclosure between parties bound by an express contract in such cases, why should there not be a like duty where the contract is implied? However, it is very clear that the obligation of disclosure by the creditor to the surety is a limited one. There may be many things in the knowledge of the creditor which it may be material to the surety to know, but the non-disclosure of which would yet be no defence. In *Hamilton v. Watson*, which was a case of suretyship to bankers for a cash account, Lord Campbell said it would prevent such transactions with bankers "if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know." His Lordship points out that this would include how the account had been kept, whether the debtor had been in the habit of overdrawing, whether he was punctual in his dealings, and the like, and says that, though all these things are material for the surety to know, still, if he does not put questions, it is quite unnecessary for the creditor to volunteer such information, and he adds that the criterion whether the disclosure should be made voluntarily is "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction—that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect." The surety is certainly not under any larger obligation to his co-surety than the creditor is under to both of them. It would be extremely inexpedient to invent new equities to enable parties to mercantile contracts to escape from them, or to enlarge in any way the rules of law or equity on this subject. In order to enable a man to resist fulfilment of such an engagement as arises out of a contract like the present, a state of circumstances should be proved in which it would be fraudulent to insist upon the ordinary consequences of the contract. This was the principle of the decision in all the cases that have been relied on. In *Pidcock v. Bishop* (3 B. & C. 605) a guarantee of 200*l.* "value to be delivered" in iron was avoided by a secret agreement between the vendor and purchaser for payment of 10*s.* a ton beyond the market price, which was to be applied in payment of an old debt. This bargain, it was held, increased

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the responsibility of the guarantor, and therefore the concealment of it was a fraud upon him. The guaranteed contract was not performed. The value of the 200*l.* was not delivered in iron. In *Stone v. Compton* there was a direct misrepresentation of fact. In *Smith v. The Governor and Company of the Bank of Scotland* (1 Dow. 272) the House of Lords had to deal with the case of a cautioner to the bank for one of their agents, and they considered, as expressed in the remarks of Lord Eldon, that if the bank had held out the agent as a trustworthy person, by concealing facts which gave them ground to believe that he was not so, this might be a defence. The case was referred to in *Railton v. Matthews* as an authority for the proposition there established, that it is not necessary to prove that the concealment was wilful and intentional with a view to the advantage which the person so concealing was to receive. There may be a case of improper concealment, or non-communication, which may be a defence by a surety where there was not any motive of that kind. In *Lee v. Jones* the concealment by the creditor of a large debt due from the principal debtor beside the amount secured was held to be evidence for the jury in support of a plea of fraudulent concealment of a material fact. Attention is called in that case to the decision in the *North British Insurance Company v. Lloyd* that the rule which prevails in assurances upon marine and life risks, that the non-disclosure of material facts, although innocent, vitiates the contract, does not apply to contracts of guarantee. The nature of the agreement in this case which was not disclosed, may be shortly stated to be an engagement to make a provision to the amount of 125*l.* for a *bonâ fide* debt due, but not yet payable, from the principal debtor to the co-surety. But if that debt were otherwise paid, then the 125*l.* was to be applied to pay off so much of the principal debt. The latter application would be for the benefit of both sureties. I cannot see how the non-disclosure of this part of the arrangement can affect the rights of the parties. It is the former part of the agreement on which the plaintiff must rely. Was he so much injured by the concealment of this as to entitle him to relief? He now says that if he had known it he would not have become surety. But I confess I am not satisfied of this. Can the fact of the debt owing by the principal to his co-surety be material? If so, in every case where a debtor owes money to one surety the other surety may get rid of his liability if this fact is not disclosed. This, in my opinion, is not maintainable. Then it must be not the fact of the debt, but of the provision made for it, on which the plaintiff must rely. In short, his case is, where a debtor owing to one surety a sum of money, says to him, "If you will become surety I will pay your debt, or part of it, out of the money I borrow," and this is not disclosed to the co-surety, the latter may avoid his contract. But a fact, the non-disclosure of which enables a surety to obtain this relief, must be a fact which affects his position, so as to make it worse than he supposed. How does the payment of a debt to his co-surety out of the money borrowed injure him? Clearly in this case the object of borrowing would *primâ facie* be to provide for the debtor's liabilities. Paying the debt to the co-surety would better enable him to meet his liability as surety, and might be an advantage rather than any dis-

advantage to the other surety. On this point the case of *Hamilton v. Watson*, to which I have already referred, is of some authority. The suretyship was for an account of the principal debtor with a banker. He was at the time indebted to the bank for a sum which did not come into this account, and the credit guaranteed was applied by the bank to the payment of the old debt. It was held that the non-disclosure by the bank of the existence of the old debt, or of the application of the new credit to pay it, did not enable the surety to escape from his liability. Reliance is, however, placed on the language of the learned judges in that case to the effect that, if there had been a stipulation that the money was to be so applied, it might have affected the transaction, but the case is certainly not a decision that even if there had been such a stipulation the concealment of it would have avoided the contract. There is nothing in the language of the judges from which it can be inferred that they would have held in a case like this that one surety was bound to volunteer the disclosure to the other of this agreement with the debtor. I have considered the case thus far as though the liability under the first bond had been in question. It certainly does not strengthen the plaintiff's claim that he is raising this opposition to his liability to contribute as surety not on the first, but on the second, bond. He became surety the second time, as he had done before, without any inquiry, and with a readiness which convinces me that if he had known all the facts he now knows he would probably have made no objection. Only a portion of the former debt then remained, and this he knew was to be paid out of the fresh advance, and it would be, in my opinion, somewhat extravagant to hold, even if he might have escaped liability on the first bond as between himself and his co-surety, that this equity could be on that account extended to his liability under the new contract. Upon the whole I am of opinion that this action fails and must be dismissed with costs.

Solicitors for the plaintiff, *Mackreth, Bramall, and White.*

Solicitors for the defendant, *Minet, Smith, Harvie, and Smith.*

#### QUEEN'S BENCH DIVISION

Friday, May 31.

(Before HAWKINS and SMITH, JJ.)

REG. v. COOKE. (a)

*Gaming—Betting Houses Act 1853* (16 & 17 Vict. c. 119), s. 3.—"Person having the care or management of"—*Bicycle match.*

*The appellant, who was the manager of certain grounds belonging to a company, and which were used for trotting matches, bicycle races, and other sports, was convicted under sect. 3 (b) of 16 & 17*

(a) Reported by H. D. BONSRY, Esq., Barrister-at-Law.

(b) 16 & 17 Vict. c. 119, s. 3: Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of, any house, office, room, or place opened, kept, or used

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*Vict. c. 119, for unlawfully having the care and management of a certain place opened and kept for the purpose of persons betting upon certain events.*

*On the day named in the conviction a championship bicycle match took place at which there were twenty thousand persons present more than on any previous occasion, and a number of persons known to the police as betting men were in one part of the grounds offering to make bets upon the races. Held, that the conviction was wrong.*

CASE stated by the Recorder of Leicester on an appeal of John Seymour Cooke against a conviction by the justices for the borough of Leicester, "for that he unlawfully had the care and management of a certain place, to wit, the Belgrave-road cricket and bicycle grounds, situate, &c., then and there opened, kept, and used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race."

1. The appellant was the manager employed by the directors of a company to which the grounds belonged. Their extent is about ten acres; they contain a fenced oval track for trotting matches, inclosing a circular bicycle track (also fenced) within which is the cricket ground, thus leaving two crescent-shaped plots from which the spectators witness the sports. A charge is made for admission. On the day named in the conviction a championship bicycle race took place, at which there were twenty thousand persons present more than on any previous occasion.

2. The winning post was at the junction of the two tracks, on the left-hand side from the entrance, and in the acute angle nearest to it there was a great crowd collected.

3. At this spot stood also a number of persons known to the police as betting men. Some were accompanied by clerks, who took down bets as made, and the odds were called out in a loud voice. The appellant was acting as judge or umpire at the winning post, counting the times each bicyclist passed, and scoring them upon a board. This was about twenty yards from the spot where the bets were called out. A witness who assisted him was called to prove that no betting was heard, but he admitted that he had remarked to the appellant upon its being a tame affair, as he had expected to hear betting as on previous occasions; but it appeared that the result of this race was supposed to be a foregone conclusion for one of the competitors. Other witnesses were called to prove that no betting took place. I was, however, satisfied that there was betting, and that the appellant was aware that it would, and did, take place, although he may not have heard any particular wager made.

4. Upon this day he had asked for and obtained the services of twelve police constables, who were

for the purposes aforesaid, or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the non-payment of such penalty and costs, or in the first instance if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

paid by the company. These men received no instructions to interfere with betting either from him or from the police authorities. But six other constables in plain clothes were sent from the station to report upon what took place, and were called as witnesses for the prosecution. They did not, however, complain to the appellant nor to the directors, with some of whom one or two of them conversed, nor did they make any attempt to stop what was going on, except that the inspector spoke to one man, who thereupon desisted.

5. Placards, with the words "no betting allowed" were posted in the grounds by the appellant, but beyond this he did not interfere. After the race was over a large number of printed betting cards, bearing the names of men engaged in betting, were picked up by the police. These had been torn up and thrown on the turf. It was proved that money was received as deposit for the bets made, in return for which these tickets were given.

6. There were no chairs or stools used, and the persons making the bets had been admitted like others at the ordinary entrance.

7. An inspector of police proved that, some three or four years before, he had called the attention of the appellant to betting upon a trotting match, and that they went together to the offenders desiring them to desist, which they accordingly did. The crowd, however, on the day of the offence charged in the conviction, was, as above stated, very large, and particularly at the part of the ground where this betting took place, and I was satisfied that the appellant could not have wholly prevented betting, under the circumstances, although he might have repressed it to a certain extent, with the aid of the constables.

8. The counsel for the appellant submitted that there was no case upon these facts, and that the appellant had not knowingly and wilfully "permitted" the grounds to be opened, kept, or used for the purpose of betting.

9. The counsel for the respondents contended, that those words in the 3rd section did not apply to the person "having the care or management" but only to the case of an owner or occupier, and I was of that opinion. The cases relied upon were *Haigh v. The Town Council of Sheffield* (31 L. T. Rep. N. S. 536; L. Rep. 10 Q. B. 102; 44 L. J. 17, M. C.); and *Eastwood v. Miller* (30 L. T. Rep. N. S. 716; L. Rep. 9 Q. B. 440; 43 L. J. 149, M. C.), within which I thought the present conviction came. But for the judgments in those cases, I should have doubted whether, under the circumstances, the appellant could be held to have opened, kept, or used a house, office, or other place, for the purpose of persons using the same for betting with persons resorting thereto, having regard to the purpose of the Act, and the language of sect. 1; and I should have also doubted whether he could be said to so keep it, on the facts here, for a purpose not primarily contemplated, and which it was not practicable, in such a concourse of persons, effectually to suppress. But as both these points had been fully considered and dealt with in the decided cases, and the second especially by Lush, L.J. and Archibald, J., in *Eastwood v. Miller*, and also by Lord Blackburn in *Haigh v. The Town Council of Sheffield* (L. Rep. 10 Q. B. 107), I affirmed the conviction. On the application of Mr. Lawrence, counsel for the appellant, I granted a case to this honourable court.

10. The question for the opinion of the court is, whether, upon the above facts, the appellant was

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properly convicted of opening and keeping the grounds for the purpose of betting.

*Sills* for the appellant.—The conviction was wrong. There is nothing illegal in the business, and the mere fact that persons who went to the ground made bets is not sufficient to make the manager liable under the Act. The Act was passed for the prevention of betting-houses and places where the business of betting was carried on. This place was not kept for the purpose of betting. The cases of *Eastwood v. Miller* and *Haigh v. The Town Council of Sheffield*, by which the Recorder thought himself bound to uphold the conviction, do not support the contention that a person in the position of the appellant in this case is a person "having the care or management of, or in any manner assisting in conducting the business" within the meaning of the 3rd section of the Act. The conviction is bad on the face of it, because it does not state that the appellant was assisting in conducting the business.

*A. K. Loyd* for the respondents.—It is not necessary that the place should be kept primarily for the purpose of betting, and it is sufficient if it is kept under such circumstances that betting actually does take place as incident to the sport. The offence is completely made out on showing that the appellant had the care or management of a place where betting took place. The 3rd section applies to three classes of persons: (1) The owner or occupier, or persons using the premises for the purposes stated in the Act; (2) the owner or occupier who knowingly permits the premises to be used; and (3) the manager. It is not necessary to show that the manager knowingly permitted the betting, but, if it is, the facts show that he did know it. If he connived at it there is sufficient evidence to support the conviction:

*Redgate v. Haynes*, 33 L. T. 779; 1 Q. B. Div. 89.

*HAWKINS, J.*—The appellant was convicted under the statute 16 & 17 Vict. c. 119, "for that he unlawfully had the care and management of a certain place, to wit, the Belgrave-road cricket and bicycle grounds, situate, &c., then and there opened, kept, and used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race." The question for our opinion, as stated in the case, is whether, upon the facts, the appellant was properly convicted of opening and keeping the grounds for the purpose of betting. In my opinion the conviction ought to be quashed, and I will now proceed to state my reasons. In the first place, the conviction, on the face of it, discloses no such offence as is contemplated by the statute. It simply alleges that the place was used for the purpose of other persons betting therein upon certain events and contingencies of and relating to a certain bicycle race, and it would imply that it was used in a way that is not interfered with by the Legislature. I suppose it is common knowledge that, before the passing of this Act, there existed in London, and other populous places, houses and offices where the regular business of betting was carried on; sometimes carried on by the owners themselves, and sometimes by persons who were placed there to manage the business. The sort of business that was carried on in such places was this: a long list of the races about to take place, and the current odds for or against any horse, were placarded, and the persons who conducted the

business were in the habit of receiving ready money, and in return for the deposit they gave a ticket, which entitled the holder to the amount of the bet if he won, and if he lost the deposit was gone. That was the state of things in the year 1853, and it was confined chiefly to houses and offices. It was found that such places brought many people to ruin, especially clerks and apprentices, and this Act which we have now to consider was passed to prevent people from keeping houses of this description. The preamble states that, "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies; for the suppression thereof, be it enacted as follows." Then sect. 1 enacts that, "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, expressed or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying, or giving, by some other person of any money or valuable thing, on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." Then by sect. 2, "every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house, within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, to amend the law concerning games and wagers." But this section did not inflict any penalty on the owners who kept houses for those purposes. The 3rd section, which is the section under which this conviction was made, does impose a penalty, and the meaning of the section seems to me to be very clear when I come to read it: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of, any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them shall, on summary conviction hereof before any two jus-

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tices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable." Now, in the first place, the section provides against, and imposes penalties on all persons who, being owners or occupiers, keep houses for the purposes mentioned in the 1st section of the Act, and persons who use the houses for such purposes. It next imposes penalties on all persons who permit their houses to be used for unlawful betting, and then goes on to say that any person having "the care or management of, or in any manner assisting in conducting the business of any house" kept for any of the purposes mentioned in the 1st section shall be liable to certain penalties, and the question is, whether the present defendant is within this latter part of the section. What is there to fix liability or guilt upon him? No doubt he had the care and management of the business, and was assisting in conducting it, but the business was a perfectly lawful one, and the directors, who were the defendant's employers, did not contemplate an unlawful user of the ground. I confess I cannot imagine how it can be said, as stated in the conviction, that he "unlawfully had the care and management" of the place. It would be idle affectation to suggest that the directors did not suppose that betting would go on there, that is to say, ordinary betting; it is almost a matter of course in such places, and the law does not prohibit it. The law will not assist the winner of a bet to recover the money that he has won, and in such a case leaves each man to rely on the honour of the other, but there is nothing to prevent two persons making a bet. What is prohibited is, keeping houses or offices or other places as betting-houses. It has been argued that the proper meaning of the section is, that any person having the care or management of, or in any manner assisting in conducting a business which in itself is perfectly lawful, may be liable to a penalty imposed by the statute, if some portion of the place is used for betting. I do not think so, and I am fortified in my opinion by the language of the 1st section. I think it was intended to make the owner or occupier responsible, and even his servants, if they took any part in the management of such a business as is prohibited by the statute, but it was not intended to impose a penalty on a person who had the care and management of a perfectly lawful business, simply because betting happened to be carried on in some part of the house or place where the business was carried on. Although the manager, under the circumstances set forth in the case, is not responsible, and is not within the meaning of the statute, I think there is ample evidence that there were betting men there, using the ground for an unlawful purpose, and for the purpose of betting with all persons resorting thereto, and these men would be liable and within the operation of the statute, but the attention of the magistrates does not appear to have been called to that. I think the defendant is not liable, and that this conviction ought to be quashed.

SMITH, J.—I am of the same opinion. It seems to me that, when you look at the sections of this statute and read them carefully, this conviction is manifestly wrong. The defendant was the manager of a perfectly lawful business, and on the day

in question when there was a bicycle match, and when there were about twenty thousand persons present, some betting men were there also, offering to bet with all persons, and it is said therefore the manager of the ground is liable to be convicted under this statute. It is important to look at the 1st section, which provides that no place shall be kept or used for the purpose of the owner or occupier, or any person using the same, or of any person having the care or management, or in any manner conducting the business, betting with persons resorting thereto, and for other purposes mentioned in the section. If the place is kept open for any of those purposes, it would undoubtedly be a common gaming-house. Then the 3rd section provides that, any person being the owner or occupier, who opens, keeps, or uses a house for certain purposes, shall be liable to a penalty; secondly, any person who knowingly permits a house to be opened, kept, or used for such purposes shall be liable to a penalty; and thirdly, any person having the care or management of, or in any manner assisting in conducting the business of, any house kept for such purposes, shall also be liable to a penalty. Therefore the 3rd section is really identical with the first. Mr. Loyd argued that any person having the care or management of the business, although a lawful one, might be made liable if it was used for any purpose prohibited by the statute, by persons who happened to go there, but I do not think this is the true construction of the section. In order to fix the manager or servant of the owner with liability it must be an unlawful business, but in this case the business was perfectly lawful. I think, therefore, that this conviction should be quashed.

*Conviction quashed.*

Solicitors for the appellant, *Longcroft and Myers*, agents for *Fowler, Smith, and Warwick*, Leicester.

Solicitors for the respondent, *Field, Roscoe, and Co.*, agents for *R. B. Blackwell*, Leicester.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

March 10, 11, 18, and April 18.

(Before BUTT, J.)

THE VERA CRUZ. (a)

*Collision—Both ships to blame—Lord Campbell's Act (9 & 10 Vict. c. 93)—Board of Trade—Contributory negligence—Breach of Regulations for preventing collisions—Division of damages—The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 512—The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17.*

*Sect. 512 of the Merchant Shipping Act 1854, disentitling a party to bring an action to recover damages for loss of life or personal injury caused by a collision, unless the Board of Trade has completed or refused to institute an inquiry into the disaster, does not apply to foreign ships.*

*Sect. 17 of the Merchant Shipping Act 1873, providing that in cases of collision a ship which has infringed any of the Regulations for preventing collisions, contained in or made under the Merchant Shipping Act 1854 to 1873, shall be deemed to be in fault unless the circumstances of the case*

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.



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made departure from the regulations necessary, is applicable to the case of a master whose ship has infringed such regulations, so that in an action under Lord Campbell's Act to recover damages resulting from the death of the master, he will be deemed to be in fault for a breach of the regulations, and therefore guilty of contributory negligence, so as to affect the plaintiff's right of recovery.

The ships *A. and V. C.* came into collision, for which both were found to blame, the *A.* for breach of the statutory regulations for preventing collisions referred to in sect. 17 of the Merchant Shipping Act 1873, the *V. C.* for improper navigation. The master of the *A.* was drowned. His personal representatives brought an action in rem under Lord Campbell's Act against the owner of the *V. C.* to recover damages for his loss.

Held, that though the deceased was deemed to have been guilty of contributory negligence by reason of the breach of the regulations, the Admiralty Court rule as to the division of damages was applicable, and the plaintiff was entitled to recover half the damages sustained by the loss of the deceased.

THIS was an action in rem brought under the provisions of Lord Campbell's Act by Mary Seward, the widow and administratrix of William Seward, deceased, late master of the British schooner *Agnes*, against the owners of the Spanish steamship *Vera Cruz*, to recover compensation for the injury sustained by the plaintiff by reason of William Seward's death, which was occasioned by a collision between the *Agnes* and the *Vera Cruz* on waters within Her Majesty's dominions. The collision took place in the Crosby Channel near the entrance to the River Mersey between the Crosby and Formby Lightships on the night of the 12th Aug. 1882; and by reason of the collision the *Agnes* was sunk and her master and some of her crew and passengers were drowned.

Another action in rem had been brought against the *Vera Cruz* by the owners of the *Agnes* to recover damages for the loss of the *Agnes*. In this action the Court had found both ships to blame, the *Vera Cruz* for negligent and improper navigation, the *Agnes* (which was at anchor at the time of the collision) for a breach of 37 & 38 Vict. c. 52, s. 1, in not having the after light of her two anchor lights at double the height of the other. At the hearing of the last-mentioned action it was arranged that the evidence taken should be received as evidence in the life action.

The defendant had filed a petition on protest against the jurisdiction of the court to entertain the action. On the petition coming on for hearing, the learned judge being bound by the decision in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; 2 P. Div. 163) dismissed it. The plaintiff's solicitors had failed to give notice to the Board of Trade of her intention to bring her action as required by sect. 512 of the Merchant Shipping Act 1854, which is as follows:

In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of any such ship as aforesaid is or is alleged to be liable in damages, no person shall be entitled to bring any action, or institute any suit or other legal proceeding in the United Kingdom, until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall for the purpose of entitling any person to bring an action or institute a suit or other

legal proceeding be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice.

*Gainsford Bruce, Q.C.* and *French* for the plaintiff. — With regard to sect. 512 of the Merchant Shipping Act 1854, it is submitted that its application is confined to British ships, and that therefore it would not apply to the *Vera Cruz*, which is a Spanish ship. The section speaks of the inquiry being held in respect of "any such ship as aforesaid." To ascertain the meaning of these words, it is necessary to refer to sects. 503 and 504, which are repealed sections allowing shipowners to limit their liability. It has been decided that these sections only apply to British ships:

*The Wild Ranger, Lush. 558;*

*Cope v. Doherty, 4 K. & J. 367; 27 L. J. 600, Ch.*

Therefore "any such ship as aforesaid" is a British ship. True it is that the Merchant Shipping Act 1862 extends limitation of liability to foreign ships, and that it is thereby enacted that that Act "shall be construed with and as part of the Merchant Shipping Act 1854." But this does not prove that the Legislature in 1862 meant in extending limitation of liability to foreign ships to also extend the inquiry mentioned in sect. 512 to foreign ships, and therefore, in the absence of express words, the section should be construed as only applying to British ships. Moreover, having regard to the mode of procedure incidental to the inquiry, it is to be assumed that it was meant that the section should be confined in its application to British ships. Again, the right of proceeding in rem, as the plaintiff is here doing, was given in 1861 by sect. 7 of the Admiralty Court Act of that year. It was in 1854 that sect. 512 became law, at which time the only proceeding was in personam. Can it therefore be said that section 512 is to be applied to a proceeding which was not in existence when sect. 512 came into operation?

*The Mullingar, 1 Asp. Mar. Law Cas. 252.*

Though both these ships have been held to blame, it cannot be said that the deceased was guilty of contributory negligence so as to affect the rights of the plaintiff. By reason of sect. 17 of the Merchant Shipping Act 1873 the *Agnes* was held to blame because her lights did not comply with the regulations. But it has not been found that the infringement of the rule did in fact contribute to the collision. The section is in its nature penal, and therefore in the absence of express words it should be confined to the owners of the statutory wrong-doing ship, and not extended to the master:

*Thorogood v. Bryan, 8 C. B. 115;*

*Armstrong v. Lancashire and Yorkshire Railway Company, L. Rep. 10 Ex. 47; 33 L. T. Rep. N. S. 228;*

*The Milan, Lush. 388;*

*The Khedive, 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876.*

Even assuming that the deceased was guilty of negligence, yet, inasmuch as those on the *Vera Cruz* by the exercise of ordinary care and diligence might have avoided the collision, the defendants are not entitled to take advantage of the

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deceased's statutory negligence, so as to escape liability:

*Radley v. London and North-Western Railway Company*, L. Rep. 1 App. Cas. 754; 35 L. T. Rep. N. S. 637;

*Davies v. Mann*, 10 M. & W. 546;

*Tuff v. Warman*, 5 C. B. N. S. 573.

The Admiralty Court rule as to the division of damages does not apply in the present case. By sect. 25, sub-sect. 9 of the Judicature Act 1873, it is enacted that where both ships are found to blame, "the rules hitherto in force in the Court of Admiralty," if in conflict with the rules of common law, shall prevail. Inasmuch as at present there is no Admiralty rule in respect of a case of this kind, the court is invited to follow the common law rule and give full damages and not a moiety:

*The Chartered Mercantile Bank of India v. The Netherlands Indian Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521;

*The George and Richard*, L. Rep. 3 A. & E. 466; 1 Asp. Mar. Law Cas. 50; 24 L. T. Rep. N. S. 717;

*Hay v. Le Neve*, 2 Shaw's Scott. App. Cas. 595;

*Webster v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. Rep. W. N. Jan. 5, 1884;

*The Laconia*, 1 Mar. Law Cas. O. S. 378; 9 L. T. Rep. N. S. 84; B. & L. 146.

If, however, the court should think fit to apply the Admiralty Court rule, then the question of contributory negligence is immaterial, and the plaintiff recovers half the damage she has sustained:

*The Milan*, Lush. 388.

Dr. Phillimore and Bucknill for the defendants.

—The court has no jurisdiction to entertain this action:

*Smith v. Brown*, L. Rep. 6 Q. B. 729; 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808;

*The Guildfare*, L. Rep. 2 A. & E. 325; 3 Mar. Law Cas. O. S. 201; 19 L. T. Rep. N. S. 748;

*The Explorer*, L. Rep. 3 A. & E. 289; 3 Mar. Law Cas. O. S. 507; 23 L. T. Rep. N. S. 604;

*The Franconia*, 3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; L. Rep. 2 P. Div. 163.

It is true that, in order to ascertain the meaning of "any such ship" in sect. 512 of the Merchant Shipping Act 1854, one must look to sect. 504, which is the section as to limitation of liability. But it has been decided that Part IX. of the Merchant Shipping Act 1854, within which is sect. 512, is applicable to the case of damage done to a foreign ship by collision with a British ship within Her Majesty's dominions, as was the case here:

*The General Iron Screw Colliery Company v. Schurmanns*, 4 L. T. Rep. N. S. 158; 29 L. J. 876, Ch.

Moreover by reason of the Merchant Shipping Act 1862, which is to "be construed with and as part of the Merchant Shipping Act 1854" sect. 504 of the Act of 1854 is replaced by sect. 54 of the Act of 1862, which extends limitation of liability to foreign ships. Therefore the "any such ship" mentioned in sect. 512 covers both British and foreign ships, and if so, the plaintiff has not complied with the requirements of that section, and hence is debarred from prosecuting this action. With regard to the objection that the mode of procedure incidental to the inquiry could only be conveniently applied to British ships, the same objection applies to colonial vessels, and yet undoubtedly the section covers them. Although it was not until 1861 that the right of proceeding *in rem*

was given in a case like the present, and sect. 512 became law in 1854, yet the words used "no person shall be entitled to bring any action, or institute any suit or other legal proceeding" are sufficiently wide to cover a proceeding *in rem*, which it is to be noticed is not a new right of action, but merely a more effective means of enforcing a right of action already existing in 1854. By reason of sect. 17 of the Merchant Shipping Act 1873 the *Agnes* has been held to blame for infringement of a statutory regulation. In other words, her master was guilty of statutory negligence. Where a ship is found to blame for breach of a statutory regulation, the rights of owners of cargo are affected thereby. If so, it follows that a master who has been guilty of the breach is affected. Inasmuch as there is no Admiralty Court rule as to division of damages under circumstances like the present, the common law rule applies. If so, the plaintiff is debarred from recovering anything, inasmuch as the deceased has been found partly to blame for the collision in failing to obey the regulations:

*Thorogood v. Bryan* (ubi sup.);

*Butterfield v. Forrester* 11 East, 60;

*Bridge The Grand Junction Railway Company*, 3 M. & W. 244;

*Dowell v. General Steam Navigation Company*, 5 Ell. & B. 195;

*The George and Richard*, L. Rep. 3 A. & E. 466;

*The Milan*, Lush. 388.

The doctrine that the negligence of the plaintiff is immaterial, if the defendant by the exercise of reasonable care and caution might have avoided the accident, is but a dictum of Lord Truro in *Radley v. London and North-Western Railway Company*, and is not supported by authority.

G. Bruce, Q.C. in reply.—The case of *The General Iron Screw Colliery Company v. Schurmanns* is not in point, inasmuch as there the wrong-doing ship was a British ship, and the question was whether her owners could limit their liability, as against the owners of the foreign ship which had been damaged by the collision.

*Cur. adv. vult.*

April 18.—Burr, J.—On the night of the 11th Aug. 1882 the schooner *Agnes* was run into and sunk by the Spanish steamship *Vera Cruz* near the Crosby Lightship, outside the entrance of the river Mersey. William Seward, the master, and three others of the crew of the *Agnes* were drowned. Before and at the time of the collision the *Agnes* had two anchor lights burning, one on the forestay and one on the topping lift aft. These lights were good lights, but the one aft was some feet lower than it should have been pursuant to the regulations in force at the place of collision, one of which directs that the foremost of the two lights shall be carried at a height not exceeding 20 feet above the hull, and the light aft at double the height of the other. The 17th section of the Merchant Shipping Act 1873 provides: "If, in any case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made the departure from the regulation necessary." It is admitted that this section



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applied to the *Agnes*. Two actions *in rem* were brought against the *Vera Cruz*. In the first action the plaintiffs were the owners of the schooner in a suit for damages occasioned by the collision. In the second action the plaintiff is the administratrix of William Seward, the master of the *Agnes*. She claimed damages for the loss of her late husband and of her son, Thomas Seward, who was an apprentice on board, and who was also drowned; but at the trial of the action the claim for damages in respect of her son's death was abandoned. The first action came on for trial on the 7th March 1884, when it was arranged that the evidence taken in that action should be received as evidence in the second action also. The defendants, amongst other matters, relied on the plea of compulsory pilotage. The court decided that the collision was caused by the negligence of those on board the *Vera Cruz*, and that such negligence was not the negligence of the pilot alone. It also held both vessels to blame in conformity with the cases prescribing the effect to be given to sect. 17 of the Merchant Shipping Act 1873, namely, that, if the infringement of the regulation might by possibility have caused or contributed to the collision, the ship by which they are infringed shall be deemed to be in fault. The question now under consideration is whether the defendants are liable in the second action to any, and, if so, to what extent, for the damage occasioned by the loss of the said William Seward. I find, as a fact, that the death of the said William Seward was occasioned by the negligence of the defendants' servants. As a question of contributory negligence on the part of the said William Seward arises, it should be stated that he was on the deck of the *Agnes* when her riding lights were hoisted, and that he saw the position in which they were placed. The defendants contend, in the first place, that no action *in rem* will lie under Lord Campbell's Act. This question was not argued before me, it being admitted by the defendants' counsel that for the purposes of to-day this matter is concluded by authority, and that such authority is against them: (*The Franconia*, *The Guldflaze*, *The Explorer*.) Secondly, the defendants contend that this action cannot be maintained, because the Board of Trade has neither instituted nor refused to institute the inquiry mentioned in sect. 512 of the Merchant Shipping Act 1854. If this section applies to the present case it is clear that the action must fail. But I am of opinion that it has no application to cases of loss of life caused by a foreign ship. It seems clear that none of the sections of the Act of 1854, from sect. 502 to sect. 512 inclusive, had originally any application to foreign vessels. But it was contended on behalf of the defendants that the joint effect of sects. 1 and 54 of the Merchant Shipping Act 1862 makes sect. 512 applicable to such cases as the present. There is, no doubt, some foundation for this contention. But I am informed that the Board of Trade, almost from the outset, abandoned all notion of instituting the proceedings contemplated by the 507th and following sections of the Act of 1854, even in the case of British ships, and I do not believe that when the Act of 1862 was passed it was intended to make any such proceedings applicable to foreign ships. At all events I do not think there are words which

compel me to hold that this has been done, and I therefore decline to dismiss the suit on such grounds. The next question I have to consider is, whether a defence to the whole or any part of the plaintiff's claim on the ground of contributory negligence on the part of the deceased William Seward has been established. Both sides have argued that the old common law rule, as opposed to the Admiralty Court rule in cases of damage to ships, is applicable to this case, counsel for the defendant asserting that there was contributory negligence on the part of William Seward, which bars the plaintiff's right to recover at all, and counsel for the plaintiff maintaining that the facts of the case do not support such a defence, and that the plaintiff is therefore entitled to recover full damages. It is urged that, inasmuch as one of the statutory rules was infringed, I must, by virtue of sect. 17 of the Merchant Shipping Act 1873, hold contributory negligence to have been proved, and dismiss the suit. On the other hand, it is said that, even if negligence must by virtue of the statute be imputed to the husband of the present plaintiff, yet inasmuch as by the exercise of ordinary care the defendants' servants might have avoided the collision, the plaintiff is, by the old common law rule at all events entitled to recover full damages. The judgment of the House of Lords in *Radley v. The London and North-Western Railway Company* was cited as an authority for that proposition. No doubt there is a passage in Lord Penzance's judgment in that case which favours such a contention. The passage is as follows: "But there is another proposition equally well established, and it is a qualification upon the first, viz., that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I think this passage, if it is to be understood in the sense for which the plaintiff in the present case contends, which I doubt, went beyond what the House of Lords intended. A decision to that effect would have put an end to the doctrine of contributory negligence altogether. Defendants are not liable in an action of this nature unless they or their servants have been guilty of negligence, or, in other words, have failed to exercise "ordinary care and diligence." What becomes of the doctrine of contributory negligence on the part of a plaintiff if a mere want of "ordinary care and diligence" on the part of a defendant is an answer to it when in all cases, where the question of contributory negligence arises, there is *ex hypothesi* a want of such ordinary care and diligence on the part of the defendant? In the passage of the report immediately following that which I have quoted, Lord Penzance goes on to say: "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann*, supported in that of *Tuff v. Warman* and other cases, and has been universally applied in cases of this character without question." Now the case of *Davies v. Mann* certainly does not support such a proposition, neither, so far as I am aware, do any of the other cases, with the exception, perhaps, of *Tuff v. Warman*. The judgment of the court delivered by

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Wightman, J. in that case contains the following passage: "It appears to us that the proper question for the jury in this case, and, indeed, in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not, as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened, nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester* (11 East, 60); *Bridge v. The Grand Junction Railway Company* (3 M. & W. 246); *Davies v. Mann* (10 M. & W. 548); and *Dovell v. The General Steam Navigation Company* (5 Ell. & B. 206)." I have looked at the cases there cited, but they contain nothing to support the last part of the proposition. What those cases really decide is, that, although there may have been negligence on the part of the plaintiff, yet, unless he, the plaintiff, might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If, by ordinary care, he might have avoided them, he is the author of his wrong: (cf. the judgment of Parke, B. in *Davies v. Mann*.) This doctrine, it will be seen, is a different thing from that for which the plaintiff is here contending, and I think, therefore, that her contention on that head cannot be maintained. But then comes the question, am I bound to hold that there was, under the circumstances, contributory negligence on the part of the deceased, William Seward? Apart from the statute, contributory negligence would mean negligence actually conducing to the collision. Now, as a matter of fact, there is no evidence to show, neither is there reason to believe, that such an alteration of the relative position of the lights of the schooner as would have been a compliance with the rule would have avoided the collision. Unless, therefore, by force of the statute, I am bound to impute contributory negligence to the deceased, the plaintiff is entitled to recover the whole amount of damage she has sustained by the loss of her husband. Has sect. 17 such effect? I have already given that effect to it in the first of these actions—that between the owners of the *Agnes* and the present defendant. It is said that the enactment is in its nature penal and that I ought not to apply it unless its words are clear and distinct; that by its terms the ship, or at most the shipowner, is to be deemed to be in fault, and that, therefore, no similar inference is to be drawn against the captain. So to decide in the present case would be to hold the owner responsible for the negligent acts of their servant, the captain, and in the same breath to exempt him from the consequences of his negligence. This I

cannot do. I therefore decide that the loss of the life of William Seward was occasioned by the negligence of the defendants, and that there was contributory negligence on his part, contributory negligence conducing to the result. What consequences are to follow? Am I to apply the old common law rule and dismiss the suit, or am I, in conformity with another contention of counsel, to decree for the plaintiff half the damage sustained by her by the loss of her husband, to be paid by the defendants? In the judgment of the Privy Council in the case of *The Laconia* there is the following passage: "The judge found both parties to blame, and he ordered that the damage sustained by each should be added together, and each party pay one-half. The effect on the present occasion would be a loss to the *Laconia* of about 20,000*l.* But it is not to the effect we must look; we must direct our attention to other considerations. Had the rule prevailing at common law been adopted, each party would have had to bear his own loss. Opinions may differ, and indeed do differ, as to what course is most consonant to justice. This question we are not called upon to decide; but what we have to decide is, when the proceeding is *in rem*, what ought to be the rule—what was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction *in rem*. Could it be intended to constitute a jurisdiction *in rem* with a common law remedy? We think that no such anomaly could be intended, and therefore concur in the view of the Consular Court." The course there indicated is that which I shall take. True it is that the exact mode of assessing the damages contemplated in that case cannot be followed in the present action, because, as between the present plaintiff and the defendant, the damage is all on one side. But I think that the case of *The Milan* is in principle sufficiently analogous to allow of my following the judgment of Dr. Lushington in that suit, and decreeing that the plaintiff do recover a moiety of the damage she has sustained, and I refer it to the registrar and merchants to ascertain the amount.

Solicitors for the plaintiff, *Jackson and Evans*, agents for *Robert B. D. Bradshaw*, Barrow-in-Furness.

Solicitors for the defendant, *Gregory, Rowcliffes, and Co.*, agents for *Hill, Dickinson, Lightbound, and Dickinson*, Liverpool.

Monday, May 5.

(Before Sir JAMES HANNEN and FIELD, J., assisted by TRINITY MASTERS.)

THE RONA. (a)

*Damage to cargo—Stranding—Duty of master to repair—Negligence in not repairing—Caulking decks.*

*If a vessel after she has started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned, and to do that which a prudent master would do under the circumstances, whether it be to return to his port of loading and repair,*

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

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THE *RONA*.

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or repair at the nearest possible place before proceeding, or go on without repairing; but if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge it is his duty to repair before proceeding.

*The R.*, a wooden vessel under a charter-party from the port of New York to London with a cargo of grain and flour, left her moorings and was towed down the New York river, and on her way stranded on the Craven Shoal, which is about ten miles below New York.

A tug towed at her for an hour and three-quarters before she was got off, during that time her decks and waterways were much strained, and she was then found to be making five inches of water per hour; but the master did not examine her or cause any repairs or caulking to be done, but proceeded on her voyage and encountered very severe weather.

On her arrival in London the flour of the plaintiff, which was immediately beneath the deck, was found to have been damaged by the sea water making its way through the deck, the grain at the bottom of the ship being uninjured.

*Held*, that the master was negligent in not repairing; that is, in not caulking the deck before he proceeded on his voyage, that the ship was more liable thereby to sustain damage and to injure the cargo, and that the defendants were liable for the damage occasioned thereby.

*Cohn v. Davidson* (36 L. T. Rep. N. S. 244; 2 Q. B. Div. 455; 46 L. J. 305, Q. B.; 3 Asp. Mar. Law Cas. 374) distinguished.

THIS was an appeal from the City of London Court by the defendants, judgment having been given against them.

The action was originally brought by the plaintiffs, the holders of a bill of lading on a cargo of flour, against the *Rona* for damages to the said cargo alleged to have been caused by the negligence of the shipowner, and first came on for hearing in the City of London Court on the 28th April 1881.

After the examination of the plaintiffs' witnesses the defendants raised two objections: First, that the plaintiffs were not entitled to sue; and, secondly, that the court had no jurisdiction to try the action. The first objection was not then disposed of, the plaintiffs applying for leave to amend by adding a plaintiff, but on the second objection the learned judge decided that he had no jurisdiction to try the case, and therefore refused to proceed any further with it.

From this decision the plaintiffs appealed to the Admiralty Division of the High Court of Justice, and the appeal was allowed by deciding that the court below had jurisdiction to try the action, and the action was then remitted for trial: (see 4 Asp. Mar. Law. Cas. 520; 7 P. Div. 241.)

On the 15th May 1882 the action came on for hearing the second time in the City of London Court, and judgment was given for the plaintiffs with a reference to the registrar to assess the amount of damage, the consignee Strange having been added as a plaintiff with his consent.

From this judgment the defendants now appealed.

The facts of the case were shortly as follows: The *Rona*, a wooden vessel, shipped at New York for London a general cargo, partly consisting of

grain and flour, for which bills of lading (of which the plaintiffs were holders) were given, and thereby the goods were to be delivered to the shippers' order or assigns, "dangers by sea and fire only excepted." She left her moorings in New York on the 27th Dec. 1879, and was towed down the New York river by a tug, and proceeded in safety until she came to the Craven Shoal within the entrance to the river, and there she got aground and stuck fast. From the log of the *Rona* (kept by the mate) it appeared that, previous to the ship leaving New York she was making no water, even after she had shipped her cargo; that when she struck the shoal there was a considerable swell on; that the ship rolled about and strained; that the tug towed at her for one hour and three-quarters, during which time a nine-inch hawser was broken up; and that when the tide flowed, with the assistance of the tug, she was got off the shoal. She proceeded on her voyage, but on sounding the pumps it was found that the ship was making more water than before, that she was apparently strained about the waterways and decks, and at 7 p.m. she was found to be making five inches of water per hour. On the 29th she began to encounter heavy weather, which increased in violence, doing the vessel considerable damage, and shipping such quantities of water that the pumps had to be kept constantly going. This weather continued till the 12th Jan. 1880, when it somewhat abated, and she eventually arrived in safety at her destination. Upon her arrival it was found that the ship and cargo had sustained considerable damage. A survey was held on the ship by Lloyd's surveyor, and he found that a few sheets of metal had been torn off the bottom, and that the decks were strained and leaky throughout. A survey was also held on the flour cargo, and from the evidence of this surveyor, it appeared that he had found the decks and waterways much strained, and the decks saturated with sea water, and gave it as his opinion that the damage to the flour was occasioned by sea water coming through the deck where the caulking had become defective and opened the decks, and that such straining and defects could not have arisen from the bad weather alone. On the part of the defendants it was admitted that the goods were shipped in good order and condition, that on arrival at their destination they were found to have been damaged with sea water, but they maintained that the damage was caused by perils of the sea due to the violence of the weather encountered in crossing the Atlantic, and within the exceptions in the bill of lading.

The master stated that in his opinion the fact of her making five inches of water per hour was not of itself sufficient to necessitate his doing anything to the ship, because she had already been making three inches in harbour, and that he never saw that the decks and waterways were strained. The statement as to the water in harbour was contradictory to the entries in the ship's log, the master himself having signed the protest containing the same words as the log, as to straining.

Upon the close of the evidence three questions were put by the learned judge to the assessors, namely: (1) Was there negligence in going to sea without repairing? (2) Did it contribute to the damage sustained by the cargo? Both of

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these the assessors answered in the affirmative. And (3) Would the cargo have been equally damaged if the ship had not stranded in the river? To this they answered "Not so much." The learned Commissioner in giving judgment said that he differed from the assessors as to this last point, in that he considered that if she had gone on without touching on the Craven Shoal, she still would have done the damage. But the nautical assessors having more experience in such matters than himself, he should, on the finding of the facts by the assessors, give judgment in accordance therewith for the plaintiffs. From this the defendants now appealed.

*Myburgh, Q.C. and Kennedy* for the appellants. —Mr. Strange is not the proper person to sue; he became the consignee of the goods after they had been delivered. Under such circumstances he is not the "consignee" or "indorsee" within the meaning of these words in the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. Indorsement after delivery makes the bill of lading a mere *chose in action*. [FIELD, J.—I think the authorities are against you on that point. *Meyerstein v. Barber* (L. Rep. 2 C. P. 38, 661); *Burdick v. Sewell* (10 Q. B. Div. 363). Sir J. HANNEN.—It is obvious that the judge below intended to add the name of any plaintiff who was entitled to sue, and, if the right parties have not been added, we shall certainly add them. Is it worth while to press that point?] Then, on the other point, the damage sustained by the flour was caused by perils of the seas. This appears from the survey of Lloyd's surveyor. The bottom of the vessel was in reality not damaged at all. The vessel was making nearly as much water before she touched the shoal as she was making afterwards. If the master had honestly but unnecessarily put back for the purpose of repairing the damage, and there had been no actual danger, there would have been no general average. As to the question of seaworthiness, the warranty applies only to the time when the voyage commences, and as soon as the voyage has commenced the warranty is at an end:

*Cohn v. Davidson*, 2 Q. B. Div. 455; 36 L. T. Rep. N.S. 244; 3 Asp. Mar. Law Cas. 374; 46 L. J. 305, Q. B.;

*Steel State Line Steamship Company*, 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 576.

There is no case which decides that when a vessel has incurred damage at sea, and the master proceeds on his voyage acting honestly, that such action on his part amounts to negligence. [FIELD, J. cited *Worms v. Storey*, 25 L. J. 1, Ex.] That case was decided in demurrer. In *Cohn v. Davidson*, Lush, J., in summing up to the jury, told them that it was not the duty of a master to go back if he then honestly although erroneously believed that he could accomplish the voyage; and, that, if the master acted honestly, the ship-owners were not liable for negligence, and in the judgment of the court they appear distinctly to have approved that direction. Whatever might be the duty of a master, if he were close to his point of departure, he cannot be justified in putting back where he has several interests intrusted to his charge and such putting back would be detrimental to those interests as a whole, though possibly beneficial to one.

*J. P. Aspinall and Raikes* for the respondent.

—The ship not having left the port of New York, the voyage had not commenced and the warranty of seaworthiness was not complied with. [Sir J. HANNEN.—Can it be contended that the voyage does not commence when the ship first starts from her mooring berth? I shall certainly so hold until I am convinced to the contrary.] Secondly, even assuming that the master had only the alternative of proceeding on his voyage or of returning to port, and so incurring heavy general average charges, he has no right to proceed if he thereby incurs a risk of damage which will fall on even one portion of the cargo alone. He must do the best for each individual interest. By his bill of lading he undertakes to deliver unless prevented by perils of the sea. If he puts to sea in a damaged condition, whereby the cargo receives injury which it would not have sustained if his ship was sound, the injury is not occasioned by perils of the sea, but by the act or default of the master, provided that he had the opportunity of repairing. If he has such opportunity he is bound to repair:

*Worms v. Storey*, 25 L. J. 1, Ex.; 11 Exch. 430;

*Notara v. Henderson*, L. Rep. 7 Q. B. 225.

Here the master might have put back to New York, or even he could have remained at anchor where he was, and could have caulked his ship. *Cohn v. Davidson* was a *Nisi Prius* decision only on the point above mentioned, and it does not appear that it was approved by the court. A carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails to do so he is liable:

*Nugent v. Smith*, 1 C. P. Div. 423, 436; 3 Asp. Mar. Law Cas. 87, 198.

The shipowner cannot excuse himself from liability for damage caused by his negligence by showing that some damage could have happened through perils of the sea if no act of negligence had been committed:

*Nitro Phosphate, &c., Company v. London and St. Katherine's Dock Company*, 9 Ch. Div. 503.

*Myburgh, Q.C.* in reply.

Sir J. HANNEN.—It is obvious that it lies upon those who impeach the judgment of the learned commissioner to establish that it is wrong. Some observations have been made upon expressions that fell from him indicating that he did not entirely agree with the assessors who assisted him, but that cannot affect our judgment. We put ourselves in his position, and upon these facts, with the assistance we have derived from the Trinity Brethren who are with us, we have to say whether we can see that his judgment is wrong. A preliminary point was taken, but has apparently been abandoned, and I think very properly, by Mr. Myburgh, with regard to the title to sue. It is obvious that the learned commissioner intended to make any amendment that would be necessary in order to get the right parties on the record, and Mr. Strange (I think is the name) appears to have been mentioned as consignee, and no question was raised at the time and we do not consider that this is a point which is now open to the appellants to take. It has been passed by, and I see no reason to doubt that Mr. Strange is the right person to sue. Now, with regard to the facts of the case. We have already intimated our opinion that this voyage must be considered to have commenced from the time when the ship

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started from whatever were her moorings, with her cargo on board, for the purpose of proceeding down the New York harbour and out to sea, and that therefore the warranty of seaworthiness had been fulfilled. But, as to the facts which followed, the first question which arises is whether the vessel had been making any water before she struck on the shoal; and I must say, speaking for myself, that I greatly doubt the veracity of the captain's statement that she was making three inches of water before that time. I am very much inclined to think that that was stated by him to lead up to the five inches; but the reason why I reject his statement is that I find in the log a distinct statement that she was making no water; but however that may be, whether she was making three inches of water or none immediately after she struck on this shoal, she is recorded to have made five inches of water. Suggestions have been thrown out that the log had been tampered with and made up in a different ink, and so on, for which I really see no foundation whatever. It is quite certain that the master has never repudiated this log; he has adopted it. He has made statements in the protest upon the basis of it, and I, for my part, entertain no doubt that he did know perfectly well that the mate had recorded that the vessel was making five inches of water after she touched; and, more than that, the log shows that a certain damage done to the vessel was apparent, viz., that the waterways and decks were strained. This being the conditions of things, the first question which was put to the assessors in the court below and which we have thought it right to put to the Trinity Brethren who assist us is, whether that indicated such an amount of damage to the vessel, as made it necessary for the master to consider whether he should put back or what other steps he should take for the purpose of remedying the mischief that had been done, or mitigating its consequences, and I may say at once that the Trinity Brethren who assist us here, and who very properly have been appealed to so often in the course of this discussion as those who would give us advice and who would be able to correct the assessors below, entirely agree with the assessors below. The question then arises, What should be done under such circumstances? Now, I must say that I am not prepared to hold, according to the argument put forward by Mr. Aspinall, that the instant it becomes clear that by going on some mischief will be done to some portion of the cargo, that it becomes the duty of the captain to go back, and perhaps put all concerned to a very enormous expense; neither, on the other hand, can I assent to the proposition that the liability of the owner depends upon the honesty of the belief of the captain that what he proposes to do is the right thing, and so far as I know, and so far as the argument before us to-day has informed my mind, I am not aware of any authority for the proposition, except the supposed authority of *Cohn v. Davidson*. I think it perfectly clear from the context (my learned brother who will deliver judgment will probably know more than I of the facts), and I infer from the judgment, that so far from it not adopting the language of Lush, L.J., that what they were seeking to do was to show that the parties had not been prejudiced by a hasty expression of Lush, L.J., and to show that the facts corrected that,

and that the rest of his summing-up prevented the jury being under any misconception. But, passing from that, I must say that I am inclined to think that the argument which has been so forcibly put by Mr. Kennedy is correct, that the master is entitled to take into consideration the whole venture. He must not consider only the question of the ship, he must consider the question of the whole venture. Well, you can no doubt introduce a very large number of elements for his consideration, and the question what would be right for him to do would of course depend on the distance he has gone from the port. I put an extreme case by way of testing it. It seems to me, what it would be plainly a man's duty to do, if he was only half a mile or a mile from the port, would be something very different if the ship had gone twenty miles, or any other distance you might suppose; but the question in every case, in my judgment, which has to be considered is this, whether or not, taking all the circumstances into consideration the master has been guilty of negligence. Of course, that must be judged by the opinion of the tribunal which has to determine upon it. We cannot take the uncertainty of his mere judgment as a test; we have to consider whether a properly constituted captain in that position would have done what this captain has done. Upon this point we have taken the opinion of those who are with us, and they are of opinion that this captain did not do all he ought to have done, and he has been guilty of negligence in one manifest respect. Before mentioning what he might have done, I may say it appears to me in this case that the captain did not exercise any judgment at all. He did not take into account what he was to do, but he blindly and promptly went on his way without considering what should be done under the circumstances which had arisen, and his excuse now is one which I do not believe, namely, that he was not conscious that he was in any exceptional position; that he thought he might go on and might treat the result of getting on the shoal, and the fact that he was drawing five inches of water in an hour, as of no importance. We are advised that one obvious thing which he might have done was this, that when he saw, as I am assuming that he did, that the vessel had been so strained had received such a shock that her waterways and decks were strained, and that in some way or other she was making five inches of water per hour, that ought to have indicated that he should, at least, have taken the precaution of having the waterways and the decks caulked for the purpose of preventing the water getting through, as it was able to do, if she encountered any bad weather such as she did encounter at that season of the year. There is, therefore, in the judgment of those who assist us, one plain element of negligence which would, if it had not been committed, from the precaution which has been mentioned, have had a tendency to prevent the saturation of the deck with water and the penetration of water into the hold. "But," says Mr. Myburgh, "there being no danger shown to have been done to the bottom, therefore that shows that this damage cannot have resulted from the negligence that is imputed." I really have not been able to follow that. It is obvious that if she made more water after she touched on the shoal than she did before—if we draw the inference that the touching

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on the shoal was the cause of her making more water—then, if there was no damage to her bottom, it is plain that something was done which caused her to take in water, and which may have equally had the effect of rendering her waterways and her decks less capable of resisting the water which she shipped afterwards in the course of her voyage. There being some negligence established, it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him—that is, against the person who has been guilty of negligence; and, if it is a sufficient cause for the injury which has resulted, then it lies upon the person accused to show that it did not, in fact, arise from this sufficient cause, but arose from some other sufficient cause. We are of opinion that the negligence of not caulking has, in itself, contributed largely to the damage which has resulted, and that, therefore, there is sufficient basis upon which this judgment can be maintained.

FIELD, J.—I quite agree with the President in coming to the conclusion that the judgment of the court below ought not to be disturbed. This is a form of action I am not accustomed to, but still the principles are the same in this court as in those courts in which I have the honour to preside. I understand this to be an action for damage to cargo brought by the owner and consignee of goods received under a bill of lading, and by which it became the duty of the defendants to carry the goods to the port of discharge, and there deliver them “in the like good order” as when received, perils of the sea excepted. It submitted that the goods were put on board in good condition. It is admitted that they arrived at their port of discharge in bad condition and damaged. It is admitted that the damage was caused by sea water; that, therefore, the damage must have occurred some time or other whilst the goods were under the charge of the master. Then it is said that, although, no doubt, the proximate cause of the damage to the goods was sea water caused by shipping seas in very bad weather, that the deck of the ship, which ought to have protected the cargo against the shipping of the seas, was in such a defective condition as that it permitted the seas to pass through; and that that defective condition (although in itself originally also due to perils of the seas) was one which it was the duty of the master to have known of and ascertained, and that he ought not to have proceeded on his primary duty, of going to the port of discharge, without taking steps to ascertain whether his cargo would receive damage, or whether there was anything which could, and might, and ought to have been done to prevent that. That is the shape the case assumes. Now, then, it is certain, therefore, that the goods were received sea-damaged. It is clearly admitted also now that she started seaworthy, and, if anything had happened at all to her, Mr. Aspinall could not have been here supporting the judgment. But what did happen to her? When she was at a good distance from New York, from where she had started, she ran on a shoal, and she appears to have got on stem foremost, and, without going through it at length, it is obvious there was a great deal of tugging and pulling at her. A hawser was broken; they were an hour and three-quarters trying to

get her off; and no man who has been at sea will doubt that such an operation will have a tendency to strain a heavy ship with a heavy cargo of grain and flour on board. And not only would that have called the attention of a prudent master, but we find that the man on board next in charge of the ship—the mate—actually saw the deck. He describes how the ship was strained, and the master says so too in the protest—and a most careful master, because he takes uncommon care not to put anything into the protest which his owner would not like, because he writes to him and asks him whether it should be put into the protest or not. The mate is a most careful man; he saw the ship was strained, saw the waterways, and that was the place where the deck was strained and where it was injured, and where the water would be likely to get through. What does that show? Surely that, at least, it ought to put on the master the duty of ascertaining and considering and examining. He did nothing whatever. He says he did not notice the deck; but his mate did, and he must have seen the log, when he made up the log. Under these circumstances, what was it his duty to do? Mr. Myburgh says it was his duty to proceed; so it was, primarily, but also to proceed with care, and not to proceed if dangerous. He would not have to proceed if he knew that a hostile fleet were in front of him, and that there was danger of war. It was his duty to take care of his ship and cargo, and to see that his ship was never in such a position as would be likely to damage his cargo, and if she was, to see if anything might be done, so that he might safely proceed in the direction he required. What had he before him? A North Atlantic voyage in midwinter. I should like to know where the master is to be found who would not know what quantities of seas he would have to ship in the course of such a voyage as this. If so, what was it his duty to do? His first duty would have been to have called up the carpenter, and he might have said that they had no tow on board, and could not proceed in that weather. All that might have been done, but nothing of the kind was done, and it seems to me therefore that the captain does not come within the protection—if there is a protection—which there is said to be from the summing up of Lush, L.J. in the case of *Cohn v. Davidson*. For myself, I may say, I know of no authority for saying that the master of a ship, or anyone else who has a duty under contract to exercise due care and skill, may excuse himself by saying, “I did not exercise care and skill, but I honestly thought I did.” I know of no such case. There are, no doubt, many cases in which if a wrongdoer puts you into a position of danger, so that you are called upon hastily to take some steps, and you do happen then to take the wrong course, that there you are excused as against the wrongdoer. In the well-known case of the railway passenger, who being carried on, believing honestly and fairly that she was being carried on beyond her station, and thereupon got down hastily, and contributed probably by her mode of getting down to the injury, it was held that there the company were still responsible, though she might have done a wiser thing, namely, to have stopped in the carriage and gone on to the next station and come back again by the next train. But these are very different cases from



this. I myself do not believe that Lush, L.J. intended to lay down any such doctrine, that a passenger whose duty it is to use due care and skill, may be excused for a breach of that duty simply if he honestly exercises a judgment in doing it. That certainly was not the view which the court (of which I had the honour of being a member) took of that; but we considered in that case, although the question itself was made a strong point by the Solicitor-General, that it might possibly, taken by itself, have misled the jury; yet, when accompanied by the observations of the Lord Justice in summing-up to the jury, it showed that no such damage was sustained. That was the true effect of *Cohn v. Davidson* in my opinion. I cannot see that in the present case the master brings himself within that protection, because he took no means and exercised no judgment whatever. I agree with many of the arguments very ably put by Mr. Myburgh and Mr. Kennedy. I should not, perhaps, rely very much on the five inches per hour, because the damage did not arise from that, but it was an index of things to look at and consider. If she had made no water, or even three inches of water originally, and after such a shock as this made five, it is an element to be taken into consideration that she had received a strain. If the captain had known that, and looked at the waterways, he would have seen it. Did this damage arise from the waterways? Mr. Dent clearly establishes that it did (and there is no evidence to the contrary), because he says the damage was through the constant trickling of water down the ship's side, so that the timbers had become sodden with the water; that is not due to the water rushing through a ventilator hole or sweeping the deck-house down; it is due to the constant trickling day after day, for eleven days, of water going through the seams which a little caulking might unquestionably have stopped. I think, therefore, it is impossible to say that the judgment was wrong. We have the advantage of the learned assessors here, who concur fully with the judgment of the assessors below.

*Judgment affirmed, and a reference to the registrar and merchants ordered to assess the amount of the damage.*

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Thursday, Feb. 21.

(Before COTTON, BOWEN, and FRY, L.JJ.)

Re CHANCELLOR; CHANCELLOR v. BROWN. (a)

*Will—Power to trustees to postpone sale—Profits of business during postponement—Tenant for life.*

*The real and personal estates of a testator were given to trustees upon trust for sale, and to pay the income of the proceeds to his widow for life, and after his death to divide such proceeds among his children. The trustees were empowered to*

*postpone the sale, and were directed to pay the rents, profits, and income of the unconverted portion to the person to whom the income of the proceeds of sale would be payable. The business of the testator, which was the main part of his estate, but was not referred to in the will, was carried on by the executors for two years with a view to its sale as a going concern.*

*Held (reversing the decision of Chitty, J.), that the widow was entitled to the net profits of the business earned during the postponement.*

*Howe v. Earl of Dartmouth (7 Ves. 137); Kirkman v. Booth (13 L. T. Rep. O. S. 482; 11 Beav. 273), and Brown v. Gellatly (17 L. T. Rep. N. S. 131; L. Rep. 2 Ch. App. 751) distinguished.*

GEORGE CHANCELLOR, of Reading, by his will, dated the 15th Sept. 1876, gave, devised, and bequeathed all his real and personal estate to three persons therein named, upon trust to sell, call in, and convert into money the same or such part thereof as should not consist of money, and after payment of his debts, &c., to invest the residue of the proceeds, and to pay the income thereof to his wife Georgiana Sarah, during her widowhood, and subject thereto, upon certain trusts in favour of his children. And the testator declared that the trustees or trustee might postpone the sale and conversion of his real and personal estate, or any part thereof, so long as they or he might think fit, and that "the rents, profits, and income to accrue from and after my decease of and from such part of my real and personal estate as shall for the time being remain unsold and unconverted shall, after payment thereof of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner, to whom, and in which the income of the moneys produced by such sale and conversion would for the time being be payable or applicable under this my will if such sale and conversion had been actually made."

The testator died on the 2nd Feb. 1878, and after his death his executors and trustees continued to carry on his business, that of a wholesale provision merchant, down to the 31st Dec. 1879, when they sold it as a going concern.

This action was commenced in 1880 for the administration of the testator's estate, and on the 17th June 1880, Jessel, M.R., at chambers, expressed an opinion that, according to the true construction of the will, the profits accrued whilst the business had been carried on were within the rule established by *Howe v. Earl of Dartmouth* (7 Ves. 137), and were capital, and that the plaintiff, the widow of the testator, as tenant for life, was entitled to interest thereon at the rate of 4 per cent. per annum, and ordered that the costs of the plaintiff and defendants should be taxed and paid out of the estate, and that all further proceedings in the action should be stayed. A motion shortly afterwards made to discharge this order was ordered to stand over, and came before Chitty, J. on the 5th March 1883, when his Lordship, considering himself bound by the opinion expressed by Jessel, M.R., refused to make any order upon the motion, except that the costs of all parties should be costs in the action.

The plaintiff appealed.

*Ince, Q.C. and Willis Bund* for the appellant.—The testator intended his widow, as tenant for

life, to have the net profits of the business as income. Jessel, M.R. and Chitty, J. thought the case came within the principle of *Howe v. Earl of Dartmouth* (7 Ves. 137), but we submit that principle does not extend so far. The business comprised nearly the whole of the testator's estate, and the testator contemplated its being carried on by the executors, and declared that during the postponement of the sale the "profits and income" should be paid to the persons who would have been entitled to the income of the proceeds of sale. *Kirkman v. Booth* (13 L. T. Rep. O. S. 482; 11 Beav. 273) is said to support the decision below, but these executors could not have postponed the sale without carrying on the business. A direction to postpone the sale of a business has been held to justify executors in carrying it on:

*Lean v. Lean*, 32 L. T. Rep. N. S. 305; 23 W. R. 424.

A simple direction not to sell entitles a tenant for life to the rents until sale:

*Green v. Britten*, 1 De G. J. & S. 649.

In a very similar case the Court of Appeal expressed an opinion that the tenant for life was entitled to the profits:

*Es Norrington; Brindley v. Partridge*, 13 Ch. Div. 654.

*E. Thurstan Holland* for the infant children.—The principle of the cases is, that the profit of the business is to be treated, not as income, but as capital. Even if the postponement clause impliedly empowers the executors to carry on the business, the principle of *Howe v. Earl of Dartmouth* applies. The earnings of ships, not specifically mentioned in a will, were held to be capital:

*Brown v. Gellatly*, 17 L. T. Rep. N. S. 131; L. Rep. 2 Ch. App. 751.

A similar rule was applied to the profits of the testator's share in a business which he had not specifically mentioned in the will:

*Meyer v. Simonsen*, 19 L. T. Rep. O. S. 337; 5 De G. & Sm. 723.

[COTTON, L.J.—In those cases the will contained no direction that the profits, pending conversion, were to be paid to the tenant for life.] *Kirkman v. Booth* (*ubi sup.*) is more directly in point. [COTTON, L.J.—There the executors carried on the business for many years with a view to making profits, not with the intention of selling it within a reasonable time as a going concern. Is it suggested that this business has been carried on for an unreasonable time? No; but the testator has not shown an intention that these profits shall be taken *in specie* by the widow:

*Re Llewellyn's Trust*, 29 Beav. 171;  
*Caldecott v. Caldecott*, 1 Y. & C. Ch. Cas. 312;  
*Taylor v. Clark*, 1 Hare, 161.

*Romer, Q.C.* and *H. M. Williams* for the executors.

COTTON, L.J.—This is an appeal from a decision of Chitty, J., following an opinion expressed by Jessel, M.R., that the profits of the business were capital, and that the tenant for life was only entitled to 4 per cent. upon the profits of the business since the testator's death. This is the will of a wholesale provision merchant. The general rule is, that where property or a security is of diminishing value it is the duty of trustees to realise as speedily as possible, and that, if the property is not realised immediately, the tenant

for life is only entitled to interest on the value at which it may be realised. A testator can, however, say that the investment shall be continued or the sale postponed, and that the tenant for life shall have, not 4 per cent., but the whole profit. The testator is at liberty to so direct, and the question here is whether he has so directed. He gives his real and personal estate to trustees, upon trust to sell, convert, and invest, and to pay the income to his widow during widowhood. He afterwards gives power to the trustees to postpone the sale of his real and personal estate or any part thereof. [His Lordship read the power set out above.] In my opinion that clause must apply to his business, which was the greater part of his personal estate. The trustees had power to postpone the sale of the business, not, of course, for the purpose of continuing it with a view to making profits by carrying it on, but for the purpose of keeping it together and selling it as a going concern. There is an implied power to carry it on for the purpose of such a sale. It does not appear that the executors have carried on the business for an unreasonable time for such a purpose; that is not suggested by the respondents. The business having been carried on to that extent, the question then is, whether the tenant for life is to have the whole profits. The testator says that the rents, profits, and income accruing after his death from such part of his real or personal estate as shall for the time being remain unsold, shall, after payment thereof of all incidental expenses and outgoings, be paid to the person or persons to whom the income would for the time being be paid if such sale had actually been made. Now, although the discretionary powers exercised by trustees, are not to affect the rights of the *cestuis que trust* as declared by the will, yet when the testator has himself said what is to be done with the income accruing whilst the sale is postponed, the general rule does not apply, and we must give effect to his plainly expressed intention. If there had been no such direction in this will, the general rule would have applied, under which the tenant for life would only have been entitled to 4 per cent. as the income of the business; but, in my opinion, considering that the trustees have a duty to convert, and at the same time power to postpone the conversion, they have an implied authority to continue the business for the purpose of conversion, and the testator has distinctly said that in that case the tenant for life is to have the whole profits. In coming to that conclusion we do not infringe any of the rules laid down in the authorities referred to. The net profits arising from the business during the time that it was carried on are, in my opinion, income to be paid to the tenant for life.

BOWEN, L.J.—I am of the same opinion. The general rule is beyond controversy; but the question we have to decide is, whether the testator has not given directions in express language, as to what is to be done with the profits until sale. It seems to me that it is a simple matter of interpretation of the words of the will, and that it contains such directions.

FRY, L.J.—I am of the same opinion. The terms of this will seem to amount to a direction by the testator that in certain circumstances his business shall be continued, and that if it is continued the profits shall be paid to the tenant for life. The



general rule, in the absence of an express direction, is undoubted, and the only question is whether there is such a direction in this will. Power is given by the testator to his trustees to postpone the sale of the personal estate. The business, and the property or capital employed in it, were the main part of that personal estate. It would be a strong thing, therefore, to say that the power to postpone the sale did not apply to the business. To postpone the sale of the business involves continuing it in the meantime. Therefore, in my opinion, the will authorises the executors to carry the business on until sale, and expressly declares that in the event of postponement the profits shall be paid to the persons to whom the income would have been paid if the sale had actually taken place. My own belief is that the intention of the testator in inserting this clause was expressly to provide for the question we are now deciding.

*Appeal allowed.*

Solicitors for the appellant, *W. H. Withall and Co.*

Solicitors for the respondents, *Courtenay, Croome, and Son*, agents for *Beale and Martin*, Reading.

*Feb. 23, 27, March 1 and 5.*

(Before Lord SELBORNE, L.C., COTTON and FRY, L.JJ.)

LEONARD AND ELLIS v. WELLS AND CO. (a)

*Trade mark—Descriptive word—"Valvoline"—Five years' registration—Trade Marks Registration Act 1875 (38 & 39 Vict. c. 91), ss. 3, 5, 10.*

*A word which is simply descriptive of an article is not a trade mark, unless it has been so used before the passing of the Trade Marks Registration Act 1875, and the fact of its having been registered for five years as a trade mark will not prevent the registration being expunged, nor will exclusive user obtained by the protection of such improper registration give the holder any rights to restrain its use by other persons which he would not otherwise have possessed.*

*Quere, whether such a prior user will enable the person using such a descriptive word to register it as a trade mark, and if so, whether prior user in a foreign country is sufficient.*

*Such a descriptive word used alone is not a "heading" within sect. 10 of the Act, so as to entitle the person using it to register it, in the absence of user prior to the Act.*

*"Heading" in sect. 10, only applies to a word when it is used in combination with some device.*

*The judgment of Pearson, J. (50 L. T. Rep. N. S. 23) affirmed.*

On the 14th Aug. 1877 the plaintiffs, who were manufacturers in America of lubricating oils which they had sold in this country for many years, registered as a trade mark, in class 47, a device consisting of a white crescent-shaped shield with black spots, crossed by the word "valvoline" in large black capital letters. The mark appeared under the number 12,907 in the *Trade Marks Journal* of 26th Sept. 1877.

It had been previously registered in America in Oct. 1873.

In Jan. 1878 T. Horsburgh and Co. applied to register a trade mark consisting of a different

device containing the word "valvoleum" in respect also of lubricating oils made by them. Their trade mark had been registered in America in Oct. 1873.

The plaintiffs thereupon commenced an action against them, and on the 2nd Feb. 1878 a summons, adjourned into court, was heard before Jessel, M.R., asking that such application might be refused, and that the registrar might be ordered not to enter the proposed trade mark on the register. The summons was dismissed by the Master of the Rolls for the reasons given in his judgment in *Re Horsburgh* (50 L. T. Rep. N. S. 23, n.).

On the 22nd Feb. 1878 the plaintiffs applied to register, and ultimately did register, as a trade mark, the word "valvoline" plainly printed by itself. It so appeared as No. 14,297 in the *Trade Marks Journal* for the 3rd April 1878, and had been used by the plaintiffs ever since.

On the 2nd Nov., the defendants in the present action having begun to use the word "valvoline" in connection with their oils, the plaintiffs commenced the present action to restrain them from so doing; and on the 11th Jan. 1884 moved for an injunction in the following terms, viz.: that the defendants, their servants and agents, might be restrained "from infringing the plaintiffs' registered trade marks No. 12,917 and No. 14,297, class 47, or either of them, and from selling, offering for sale, or in any way representing as 'valvoline' any lubricating oil not made by the plaintiffs, or from issuing any circular, bill-head, ticket, show-card, invoice, advertisement, or other document representing, stating, or describing as 'valvoline' any lubricating oil not made by the plaintiffs."

On the same day the defendants moved that the register of trade marks might be rectified by removing therefrom the alleged trade mark No. 14,297, and entering thereon, against the registration of No. 12,917, a note disclaiming any exclusive right to the use of the word "valvoline," whether as part of the mark No. 12,917 or otherwise.

Pearson J. held that the word was merely descriptive of lubricating oil and equivalent to "valve oil;" that it had been used by the plaintiffs as mere description from 1873 to 1878, and that in the latter years the plaintiffs could not appropriate it as their exclusive property in connection with oil. His Lordship accordingly refused the motion of the plaintiffs, and ordered the registration to be expunged: (50 L. T. Rep. N. S. 23.)

The plaintiffs appealed from both orders.

On the 23rd Feb. 1884, when the appeals came on for hearing, the plaintiffs asked for leave, in the appeal as to expunging the registration, to put in fresh evidence as to the user of the mark prior to 1875. The Court decided to hear that appeal first on the original evidence, reserving the right to allow fresh evidence, if thought fit, after hearing the other appeal, and examining the new evidence to be adduced on that appeal. The court ultimately declined to allow any fresh evidence on the appeal as to registration, considering that it must, to be effectual, and in fact did, contradict the plaintiffs' evidence in *Re Horsburgh*, which showed that they had used the mark prior to 1875, but only in combination with other things. The effect of the fresh evidence used in the interlocutory appeal is stated in the judgments.

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LEONARD AND ELLIS v. WELLS AND CO.

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*Aston, Q. C. and Willis Bund* for the appellants.

*Cozens-Hardy, Q. C. and Harry Greenwood* for the respondents.

The following cases were cited:

*Re Horseburgh*, 50 L. T. Rep. N. S. 23, n.;  
*Re Palmer's Trade Mark*, 46 L. T. Rep. N. S. 787; 21 Ch. Div. 47; 48 L. T. Rep. N. S. 52; 24 Ch. Div. 504;  
*Linoleum Manufacturing Company v. Nairn*, 38 L. T. Rep. N. S. 448; 7 Ch. Div. 834;  
*Re Hyde and Co.'s Trade Mark*, 38 L. T. Rep. N. S. 777; 7 Ch. Div. 724;  
*Singer Manufacturing Company v. Loog*, 49 L. T. Rep. N. S. 484; 8 App. Cas. 15;  
*Es parte Stephens*, 3 Ch. Div. 659;  
*Orr-Ewing v. Johnston*, 7 App. Cas. 219;  
*Orr-Ewing v. Registrar of Trade Marks*, 41 L. T. Rep. N. S. 239; 4 App. Cas. 479.

The arguments sufficiently appear from the judgments.

LORD SELBORNE, L.C.—We think that sufficient grounds have not been shown to induce us to disturb the orders which have been made by the learned judge below. It will, I think, be convenient to deal first with the question of the right of Messrs. Leonard and Ellis to remain registered for the word “valvoline,” standing alone, as a trade mark; because, if they have that right, this circular is an infringement of it, but if they have not that right, then a different question arises upon the motion for the injunction. Now there are some points of law which appear to me to have been determined by this court in *Re Palmer's Trade Mark*, and which, at all events in this court, must be taken as settled law, and they are very material with respect to the application to remove this mark—the word “valvoline,” standing alone—from the register of trade marks. It was determined in that case, upon the construction of sects. 3 and 5 of the Act, that sect. 3, which makes the registry of a trade mark *prima facie* evidence of the right of the registered proprietor to the exclusive use of that trade mark, and makes the continuance of that registration for five years conclusive evidence of the same thing, subject to the provisions of the Act, does not control, and has no bearing upon, the right of anyone who holds himself aggrieved by any improper registration to apply under sect. 5 for the removal from the register of the alleged trade mark which he says has been improperly registered. That being so, it seems to me that sect. 3 is entirely out of the case. If the registration for five years which has taken place here is not conclusive evidence, it is for this purpose *per se* no evidence at all; because that which in the one case, in less than the five years, is *prima facie* evidence, becomes after five years conclusive, and if it were conclusive for this purpose, there would be an end of the question, and no application under the 5th section could be entertained. In *Re Palmer's Trade Mark* it was determined that that was not so. Consequently we have in this case nothing to do with sect. 3. The registration for this purpose is neither *prima facie* nor conclusive evidence; but of course anyone who makes an application to take a registered mark off the register under sect. 5 has upon him the ordinary burden of proving that it ought to be taken off, and if he takes the ground, which in this case is taken, that the mark registered as a trade mark is not authorised to be so registered under the Act, although the

words are not authorised to be registered, yet in my opinion some burden of proof lies upon him. The fact of its being registered prevents it from being assumed, as against the registered person, that it was not within any of the terms of the 10th section of the Act, which define what marks are authorised to be used, unless some grounds at all events are shown for putting on the party who has registered the burden of placing the court in possession of the grounds on which he asserts that he is entitled to register; at all events I am disposed to take that view, notwithstanding the general view that no man is bound to prove a negative. But in this case the matter has been fairly brought into controversy on both sides. Both sides have gone into evidence, and, when that is the case, we must look at the result of the evidence as a whole (the evidence on the one side, and the evidence upon the other); and in substance, the controversy so arising, it does appear to me that, if the man who is in possession and must be in possession of the proper means of showing, by affirmative evidence, how the facts stand as to the mark in question, goes into the merits, and tells you what he thinks it is material to tell you, you must see whether the proper inference from what he has said, and from what he has not said, is one way or the other. The portion of the 10th section which is material is this, “For the purpose of this Act, a trade mark consists of one or more of the following essential particulars”—I pass over the two first upon which no question has arisen. The third is “A distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures.” And by the same section, “Any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.” Mr. Aston suggested that the words in the sentence which I have last read—“before the passing of this Act”—were not applicable to a heading, but that that was at large without reference to time, and that the words in question might be used as a heading; and I suppose he meant to suggest that upon the evidence there was sufficient proof that it was. It is to me perfectly apparent that the opinion which was given in *Re Palmer's Trade Mark*, when it was heard upon the facts, is perfectly correct, namely, that these latter words, “Any special and distinctive word or words used as a trade mark before the passing of this Act,” referred to the words when used alone, not when used in combination with any other device. And to say that a word used alone, not in combination with any other device, if it was used as a heading, is by the prior portion of the section discharged from the condition of time that it must be used before the passing of this Act, is manifestly to strike those words—and I might add that clause—out of the Act entirely; because, whatever is said of a heading is said of any distinctive device, any distinctive mark, any distinctive label, or any distinctive ticket, which would therefore simply mean that, in every case whatever, the condition “before the passing of this Act” is to be got rid of as to a name, or a word, or anything else which has been used as a device, or as a mark, or as a label, or as a ticket. I entirely agree myself

with the opinion expressed in this court, that these words refer to and exclusively govern the case of the registry of a word or words without any other device accompanying it. Now we come to the question about this word "valvoline." For my part I am not disposed to doubt that, if that word had been used as a trade mark before the passing of the Act, in the United Kingdom at all events, it might have been registered under the Act. It is said that in *Re Horsburgh*, Jessel, M.R. spoke of the word as if it belonged to the ordinary English language, and was merely the equivalent of "valve oil." I suspect that his Lordship used the language so referred to on that subject, rather with reference to the word "valve," which was the common term of "valvoline" and "valvoleum," than for a purpose which would justify the argument founded upon it here, that the word was not a word capable of registration. To me, I confess, it seems that the inventor of that word, if he had used it as a trade mark, would have been at liberty to do so. But then the question is, whether, upon the evidence that was before the learned judge below, there was any proof of his having so used it. That evidence was not all which we have heard to-day upon the question of the interlocutory injunction. We declined in the first instance to authorise the introduction of new evidence upon what I may call the question of registration, that being a final appeal, the learned judge having been asked to allow it in so late a stage of the case before him as to make him think it unfit to do so, and we did not see our way to permit further evidence to be offered until we had heard the case. Having heard it we continued in the same mind, reserving, however, to ourselves the power, if we had seen cause to do it, to allow further evidence to be given after hearing the interlocutory appeal. We have now heard the interlocutory appeal, and I am of opinion that nothing has come out upon that appeal which makes it right for us to admit, upon the question of registration, any other evidence than that which was before the court below. The evidence before the court below altogether failed to establish to our satisfaction, certainly at least to mine, and I think to that of my learned brothers, any use whatever of the word "valvoline," standing alone, as a trade mark before the passing of the Act of 1875. Upon the evidence offered upon that occasion, and upon the former occasion, in opposition to Mr. Horsburgh's claim to register the word "valvoleum," which was all the evidence which at that time either party thought it necessary to go into, either upon the question of registration, or upon the question of injunction, it appeared to the court, and it appears to me, that the just conclusion was that there had been no use as a trade mark of the word "valvoline," in this country, before the passing of the Act of 1875. It has been suggested this morning by Mr. Aston, that the use of it, even in the United States, might be enough to satisfy the words of the Act. I do not feel obliged to express any conclusive opinion upon that point, because there was not in the court below, and even now upon the interlocutory application there is not, any evidence satisfactory to my mind that the word "valvoline" alone had before 1875 ever been used as a trade mark, even in the United States. The meaning of the

words "used as a trade mark" is not "used to describe an article." I do not at all mean to say that it is impossible that a word which is used to describe an article may also, if the proper means are taken at the proper time, be used as a trade mark. In that case the two things would require to be distinguished; but nothing is of more importance, when any such double use does take place, than to remember the difference between the use as a trade mark and the use as a descriptive term. If the article itself which is made is *publici juris*, and anybody may make it, then the maker is at liberty, provided he does so honestly, to describe it by the descriptive term by which it is properly known in the trade, and no right of monopoly to that descriptive term can be acquired otherwise than by using it as a trade mark. If it is used as a trade mark, then it is that use, and not the other use, which may be restrained. Now I think I may without impropriety, though referring to words used by myself, illustrate the distinction to which I am now alluding by the case in the House of Lords of *The Singer Manufacturing Company v. Loog*, which Mr. Aston mentioned in the argument the other day. There both questions arose. There was a label which was not an infringement of the plaintiffs' trade mark in any other way than that it introduced the word "Singer," which was upon the plaintiffs' trade mark. The context was different, but there was nothing which specially belonged to the plaintiffs, either in the form of the label, or in the article manufactured, although it resembled as nearly as possible what the plaintiffs manufactured. This court held that that use of the label, introducing the use of the word "Singer," which was the most distinctive word in the plaintiffs' label, was improper, and under some pressure, I believe, the defendants consented in this court to an injunction restraining them from the use of it; at all events there was such an injunction, and in the House of Lords entire concurrence in that part of the judgment of this court was expressed by all the Lords who delivered their opinions. But then the plaintiffs went on, in the same action, to seek to have restrained any use whatever by the defendants in connection with sewing machines of the word "Singer," saying that they had got (very much as is here said about the word "valvoline") an exclusive right to the use of the word *quocunque modo*, and not merely as part of their brand, or mark, or label. Both this court and the House of Lords declined to adopt that view, and, having before them certain circulars, price lists, advertisements, and other documents in which the defendants had largely used the word "Singer," but at the same time had used it in such a way that there was no tendency to represent the manufacture as the plaintiffs' manufacture unless they had an exclusive right to the use of the word "Singer," both this court and the House of Lords declined to interfere with the use by the defendants of the word "Singer." What I myself said (I believe with the concurrence of the Lords in the case) I may repeat here, because it appears to me accurately to express the principle on which the descriptive use of the word is to be distinguished from the piracy of a trade mark. "The counsel for the appellants lastly argued," I said, "that the plaintiffs, trading under Mr. Singer's name, and using his trade

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mark, had acquired such a right to property in that name as to entitle them to restrain any rival in trade from introducing it into any of his price lists, circulars, or advertisements, even in such a way as might exclude the possibility of its being understood to represent, directly or indirectly, that the goods sold by him were manufactured by the plaintiffs, or that his trade or business was identical or connected with the trade or business of the plaintiffs. For that argument no authority was cited; and it cannot, in my opinion, be maintained on any principle. The reputation acquired by machines of a particular form of construction is one thing; the reputation of the plaintiffs as manufacturers is another. If the defendant has no right, under colour of the former, to invade the latter, neither have the plaintiffs any right, under colour of the latter, to claim (in effect) a monopoly of the former. If the defendant has (and it is not denied that he has) a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct, and unequivocal way." Therefore, as it appears to me, it was necessary, in order to bring this term under the 10th section of the Act of Parliament, to show a use of it, not as a descriptive term, but as a trade mark, and no such use has been shown. The question therefore does not arise, whether, if it were used in both ways, the one would be prejudiced by the other. Now what is the effect of the evidence? It appears to me that the evidence, taken as a whole, comes to this point. I will refer first to what was before Jessel, M.R. in *Re Horsburgh*. Upon that occasion the plaintiffs, although they proceeded under the 6th section of the Act, yet had every possible opportunity for making out in every way they could that the use of the word "valvoleum" was either an infringement of their then registered mark, which was not a word only, but the word in combination, or an infringement of any right for which they could have maintained an injunction. And looking to what they did say, as well as to what they did not say, I am totally unable to accept the suggestion that they abstained from going into evidence as to the use of the word "valvoline" as a trade mark because they thought it sufficient to rely upon something else. What they did say, and what their witnesses said, was this, not merely that they had got the registered mark of which the word "valvoline" was part; but that the word was a name for this class of oil, and that it was known as describing the peculiar class of oil sold by the plaintiffs, and Mr. Ellis himself said in his affidavit upon that occasion: "The lubricating oil used by my said firm is well known in the trade, and is usually asked for by the name of 'valvoline,' that word being descriptive of a peculiar kind of oil made by us for the valves and cylinders of steam-engines." That was really in substance the whole evidence before Pearson, J. upon this question. Therefore Mr. Ellis relied upon it as a word descriptive of a peculiar class of oils, and his witnesses say the same thing. It appears to me that it is not enough to make it registerable under the 10th section; that does not show that it was used as a

trade mark at all, but shows something different. That clearly appears to me to be the whole case as it stood upon the evidence before Pearson, J. on the question of registration, and before him the evidence was the same upon the question of injunction, and upon that evidence I cannot help thinking that he was quite right. But now we have the question upon the injunction before us on new evidence, and I am sorry to say that some portions at least of that evidence look like a direct contradiction in terms of what was stated by Mr. Ellis and his witnesses, and particularly by Mr. Ellis himself in the former evidence, for whereas, in the passage to which I have just referred, he distinctly said it was descriptive of a peculiar class of oils, in the new affidavit he says it is not descriptive. But we must look, not only at what he says, but at the evidence as a whole. Mr. Buckley and Mr. Bedford, two of his other witnesses, even upon this occasion still adhere to the former language. Mr. Bedford says: "I know and have always known valvoline as a name of a special lubricating oil manufactured and invented by the plaintiffs;" and afterwards he says, "There is no other lubricant, or class of lubricant, known to the trade by the name of 'valvoline,' except that manufactured by the plaintiffs." That is not only saying that it is a descriptive name of a special oil, but suggesting that nobody but the plaintiffs manufactures that particular kind of oil, and the plaintiffs invented it. It does not say, I admit, that they had taken out a patent for it, but I apprehend that if the fact be (and it is not now disputed) that everybody has the right to manufacture that oil as well as the plaintiff, then this is a statement that the whole trade know the thing by this description, and not that they know it as a special mark of the manufacture by the plaintiffs of a thing which everybody may manufacture. So Mr. Buckley calls attention to the word as being descriptive of a particular kind of oil. Although it is clear that it has been registered in some sense since 1878, that has nothing to do with it, because, though it was registered, yet it may be that it was improperly registered, and ought not to remain on the register. The plaintiffs have put in a number of the documents which they circulate, and it appears to me that almost every one of these documents tends more and more distinctly to confirm the impression which is produced by the plaintiffs' affidavits. I have one which is headed "Superior lubricating oils, manufactured by the same patented process as the cylinder oil," for certain purposes which are mentioned. That goes a little further. It alleges that they have, or had, a patent, either in America or elsewhere, by which they manufacture this class of oils, which they describe as a "particular class," a "particular kind," "peculiar," and "special;" for all those words are used in different places, and manifestly mean something different from what anybody else manufactures. In the same document they say it is a different kind of oil from that which has ever been offered before, and by their patented process is refined without tarring, &c. In another document they say, "We call the attention of manufacturers to the fact that by our new process of refining we are making mineral oil," &c., &c. In another document they say: "Valvoline is for this purpose a hydro-carbon or mineral oil, which stands a very high temperature

of heat without generating acid or leaving a gummy deposit about the piston." And I might go into other documents all tending to the same end. The conclusion to which, in my mind, they irresistibly lead is not only that this has been used as a descriptive term, but as a descriptive term of a thing which the plaintiffs desire the public to suppose that nobody but themselves does make or can make. By "can make" I do not refer to a patent, but that they are in possession, and, as has been said in many cases, exclusively in possession—for the word "exclusively" occurs—of the articles manufactured, and not merely of the word. It is clear upon the evidence that that is not so. The articles which are manufactured are *publici juris*, and, so long as the word "valvoline" is not used in such a manner as to represent that the article sold under that name is manufactured by the plaintiffs, or by persons identified in business with the plaintiffs, it seems to me that it cannot be exclusively enjoyed. Now the embarrassment which I have felt during a portion of this case has been of this kind. The word "valvoline" is used in the trade mark, though in combination, and, if there were not this mass of evidence to show that it is a descriptive term, I should have had very little difficulty, upon the principle of well-known authorities, in holding that it could not have been taken out of that trade mark of which it is a prominent part, and used as a trade mark alone, without infringing the plaintiffs' right; but if it is used, not as a trade mark by somebody else, but in circulars, advertisements, and so on as a descriptive word, being found to be a descriptive word, and descriptive of a thing which anybody may make and which anybody may sell, then it appears to me that the burden is upon the plaintiffs to show that it is so used in those circulars and in those advertisements as in effect to represent, or to have a tendency to make people suppose, that the thing advertised or mentioned in the circulars is the manufacture of the plaintiffs. Here, again, a little embarrassment arises from the fact that since 1878 it has actually been registered as the plaintiffs' trade mark, and consequently has been, in a certain sense, *de facto* the plaintiffs' trade mark. But ought the plaintiffs to have any benefit from that, if they had no right to the registration? If the registration is to be annulled, can they have established substantially the same right by the degree of exclusiveness in the use of the word which they practically got by the unauthorised registration. According to the best judgment I can form on that point, after turning it over several times in my mind, I think they ought to have no benefit from it, and therefore that the question should be considered apart from the fact that they had, during that period of time, obtained an apparent monopoly by the unauthorised registration of it as a trade mark. That really brings one to the last point for consideration. Is this document issued by the defendants a document which, considered on those principles which are properly applicable to such cases, does so use the words "valvoline," which is a prominent part of the plaintiffs' trade mark, as to represent in effect, or to have a tendency to lead careless persons into whose hands the documents might come to suppose, that the article is the plaintiffs' manufacture, putting aside the enjoyment they have had of the name

by remaining on the register since 1878? I think not. The word "valvoline" is here used, clearly not as a trade mark, but as a sort of heading, or title, or label, or prominent word descriptive of the article, and the names "M. Wells and Co., Oil Refiners and Importers," with the proper address, are placed upon the document with as much prominence as the word "valvoline," so that anyone looking, even casually, at the document, and only attending to that which is most conspicuous in it, if he saw the name "valvoline," would see also the words M. Wells and Co.; and if you add to that that a person who would understand anything by the word "valvoline" must know something about the trade and its use in the trade, I am brought to the conclusion that there is not enough upon that label to show that anyone would be liable to be misled by it into supposing that the article was of the plaintiffs' manufacture. Therefore, upon the injunction also, I think the learned judge was right.

COTTON, L.J.—There are two appeals before us, and the first to be considered is the appeal from the decision of Pearson, J., that the mark which has been registered—"valvoline" alone—ought to be taken off the register. I will first consider that. I think it unnecessary to repeat what I said on the Act in *Re Palmer's Trade Mark*, showing my reasons for holding that, in order to enable a special or distinctive word to be registered as a trade mark, it must appear that it has been used as a trade mark before the passing of the Act, and that it is not sufficient to show that the word attempted to be registered as a trade mark under the Act was used as part, but part only, of a trade mark which was in use before the Act came into operation. What I said there is not qualified in any way, and I do not repeat it. But then comes the question, Is that shown to us? Now, my opinion is, that when anyone alleging himself to be aggrieved by a registration of a trade mark comes either before or after the five years, the burden of proof is on him for the purpose of showing, if the word was capable of being formerly used as a trade mark, that, in fact, it was not so used, and therefore I consider that the respondents on this appeal, who applied to Pearson, J. to remove the trade mark "valvoline," had a burden thrown upon them. Of course, there are two questions to be considered: Was the word "valvoline" of itself one which could be registered as a trade mark? Without any evidence I should have looked upon it as a mere fancy name, and therefore capable of being used before the Act as a trade mark; and here, having regard to what I think is the effect of the evidence, I do not intend in any way to bind myself by any opinion as to whether a word invented as this was could be used as a trade mark. I say so for this reason, that there is a good deal of evidence here to show that this word was invented, at the same time that the process of manufacturing this oil was invented, for the purpose of describing that special class of oil which was manufactured by the process invented in 1873, or a little before, by Messrs. Leonard and Ellis, and that it was introduced by them, as they say, as descriptive of the peculiar kind of oil made. And, in my opinion, when a man invents a new article, and invents a word as descriptive of that article, which all the world are at liberty to make, he undoubtedly stands in a very great

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difficulty as regards claiming to himself the exclusive use of the name which he has invented to describe the article which he has invented. But it is unnecessary to give an opinion upon that question, because, when one looks at the evidence as it was before Pearson, J., in my opinion, the proper conclusion to be drawn from it is that, even if "valvoline" alone was capable of being used as a trade mark, it was not so used. I have said that, in my opinion, the burden was upon the party applying to expunge the registration, that is, upon Messrs. Wells and Co., and it was said by Mr. Aston that there was nothing on their evidence which satisfied the court that, if this was capable of being used as a trade mark, it was not so used before the passing of the Act, that is to say, some time before 1875. That may be so. I rather think it is, but then there was the evidence put in by Messrs. Leonard and Ellis, and, as Messrs. Leonard and Ellis did not choose to rely on the absence of evidence on the part of the applicants, Messrs. Wells and Co., to have the trade mark removed, we must, when the case comes before us, have regard, not to the source whence the evidence came, but to what is the effect of the evidence which is before the court. And, on the evidence they adduced for a different purpose (and with a different object), in my opinion, the true construction (unless it can be satisfactorily explained by Messrs. Leonard and Ellis) was that this word "valvoline" was not used by itself, but was only used as part of that trade mark which they had registered and which they had used, because what is said by Mr. Ellis, and what is said by others of the plaintiffs' witnesses is, that the trade mark was duly registered in their name as the owners of a trade mark of which such word formed part. And then in other passages there is this: "That the word 'valvoleum' proposed to be registered by the said Thomas Horsburgh for and on behalf of the firm as part of their trade mark so nearly resembles the word 'valvoline,' which forms part of our trade mark, that I really believe it will be calculated to deceive purchasers of lubricating oil." Of course the latter is more easily explained than the former, but the general effect of what is stated in the affidavits filed by and on behalf of Messrs. Leonard and Ellis was that "valvoline" had been used before 1875, but only as part of that which we know they registered as their entire trade mark in the United States in the year 1873, being the very year in which they first invented this process of manufacture, and in which they invented the name to describe it. I think that one ought to deal with the case on the appeal as regards the registration only on the evidence that was before Pearson, J., because, in my opinion, it is most dangerous to allow parties, when they have once taken their stand on the trial of a particular question on certain evidence, relying either on the sufficiency of that evidence or the deficiency of their opponents' evidence, afterwards to come, when they find that they have miscalculated the effect of it, and ask to be allowed to produce evidence which they think will meet the point of the case. Therefore, I shall look at the case only on the evidence before Pearson, J., but I quite agree with the Lord Chancellor that, if we are to look at the evidence filed on this point, there is nothing to alter the opinion which

I had formed on the evidence which was alone before Pearson, J.; but there is enough to confirm me in the great dislike which I have to allow evidence to be adduced after there has been a trial, in order to meet a blot which has been pointed out by the result of that trial. I do not go through or point out the discrepancy between the former evidence and the evidence now filed, but all I say is that that evidence, if we are to look at it, in no way removes the effect of the conclusion which I had arrived at on the evidence which was before Pearson, J. In my opinion, then, the order made for removing this trade mark "valvoline" was right. Then we come to the motion for the injunction, and undoubtedly it must not be supposed at all, by the decision at which I arrive, that the use of part of a trade mark by a person may not be so decided as to enable the registered proprietor of a trade mark to get an injunction on the well-known principle that, although the actual trade mark itself is not used, yet part of it, and an important part of it, has been so used as to be the means of deceiving the public by representing that which is in fact not the plaintiff's goods as the plaintiff's goods. One must consider whether or no "valvoline" is here so used by the defendants in the action as to be calculated to mislead, so as to induce parties, buying their goods incautiously, to consider them as the goods of the plaintiffs. Now, in my opinion, on the evidence, that is not a proper conclusion. Here there is a great deal, not only in the affidavits, but more particularly in the printed documents put in by the plaintiffs (I fancy on the motion before us here for the first time), to show that "valvoline" was really a name used in order to describe, not the goods of the plaintiffs as distinguished from the same goods made by anyone else, but to distinguish oil prepared by a certain new process first introduced, or first used, in 1873, by the plaintiffs. In addition to that which the Lord Chancellor has referred to I find in other of these circulars that it is referred to as being made by a new process, and so as to get this product without mixing sperm or any other gummy oils, the particular benefit of the new process stated in these circulars to be produced being, as far as I can understand, that they get an oil which is not viscous, which is not tarred by consequence of having been subjected to heat in the preparation, and that it is a useful lubricating oil, without any mixture of sperm or any other gummy oil, either of vegetable oil, or of animal oil, or of fish oil, which, as they say, rusts machinery, and thus destroys and injures it. That is what the plaintiffs point out, and that is their evidence, that they have invented a new process and a new article which they call "valvoline." That being so, in my opinion the use by the defendants of this term "valvoline" on their circulars cannot properly be said to be calculated to deceive the public or purchasers into a belief that what they are selling under "valvoline" is a manufacture not of their own, but of the plaintiffs. One difficulty undoubtedly is that pointed out by the Lord Chancellor, viz., that during a certain period, beginning in 1878, when there was, improperly, registration of "valvoline" as a trade mark, it was the plaintiffs' trade mark, and in that sense it described their oil, and no one else could use it as describing this particular class of oil (which,



as I understand, it does really in the trade describe), because the plaintiffs had got a registered trade mark. If a man has a patent, and during the term of that patent is the only maker of an article to which he gives a particular name, he cannot, in my opinion, say that that name is his trade mark because it has during that period come to be merely a description of the article, but after his patent is gone the making of the article is free and open to all the world. So that, in my opinion, even if, since the registration of the trade mark "valvoline," or at the time when it was registered, no one else has for the same oil used this term "valvoline," that does not now, when a protection improperly obtained by them under the Act is removed and taken out of the way, enable them to say that the use of that word on a bill-head, or circular card which is not so framed as in any way to imitate or represent that of the plaintiffs, is to be restrained as deceiving the public. There was indeed a sort of attempt to say that this card did contain something calculated to mislead and to connect it with the plaintiffs, but the only similarity was in the instructions, which were to some extent like those of the plaintiffs. If the thing had been so framed as in general appearance or position, or anything else, to imitate unreasonably and unfairly any circular of the plaintiffs, there might have been something in it; but if the words have reference to something which is to be applied to the same machinery, of course there must be a certain amount of resemblance between the instructions (if they are correct in both cases) given on the one circular and those given on the other. There is only one other point to which I need refer. It was said that "valvoline" was made in many different classes, and no doubt it is so. One wants a different kind of lubricant for different classes of machinery, and it nowhere appears that anything sold under the name "valvoline" is anything other than what is prepared in the way pointed out which is common to all of them. Undoubtedly oil prepared for one particular class of fine machinery is more refined than oil prepared for a bolder and larger kind of machinery, such as for lubricating cylinders, but it is only a different specimen of the same class of oils; that is to say, it is the same class of oil subjected to a greater or less amount of refinement, in order to make it applicable to the different purposes for which that class of oil is especially appropriated. In my opinion, on the motion for injunction, the plaintiffs' motion fails; and both the appeals must be dismissed.

FRY, L.J.—The first question arose on the application of Messrs. Wells and Co. to remove the second trade mark of the appellants Messrs. Leonard and Ellis from the register. The question here turns upon those words of the 10th section which the Lord Chancellor has read, "Any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act." The applicants have in my judgment taken upon themselves to discharge the burden of showing that the word "valvoline" was not used as a trade mark before the passing of this Act, either in this country or in the United States. Taking that view, it is not necessary for me to express any opinion as to whether the user must have been in this country;

but I am by no means satisfied that a user abroad would be sufficient. A second point has arisen upon the words which I have read, which also requires consideration. Was the word "valvoline" a special and distinctive word within the meaning of that section? Now when a new material is invented, and at the same time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section I have read. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker. I am inclined to think, though it is not necessary to express any final opinion, that the words "special and distinctive" import specialising the make and manufacture of a particular maker from that of all other manufacturers, and distinguishing the manufacture of one person from the manufacture of all the others. I repeat that that is the inclination of my opinion, but, considering as I do the meaning of the other words of the clause, it is unnecessary for me to express anything as to the inclination of my judgment upon that. I think, therefore, that the applicant succeeds by showing that the word in question was not used in the manner required by the Act. I may observe that an argument was addressed on this word "heading," and it was suggested that that single word "heading" might be a "heading" within the meaning of the earlier part of the clause. I adopt entirely the view of the Lord Chancellor that the argument would neutralise the words which are referred to as being used before the passing of the Act. Then upon the other application, namely, that for an injunction by Messrs. Wells and Co., the real question is this, Are the defendants selling their manufacture as and for the manufacture of Messrs. Leonard and Ellis, the plaintiffs? Now there might have been a difficulty if the word "valvoline" had really, in fact, come to mean a particular manufacture of the plaintiffs—and, no doubt, the fact that from 1878 downwards the plaintiffs had the word "valvoline" registered as a trade mark would tend in that direction—but then it must be borne in mind that, concurrently with their registration mark, they were issuing papers which were before us, and those papers, in my judgment, distinctly represent "valvoline" as meaning, not the thing necessarily made by the plaintiffs, but the thing itself. Now there is one description of the word "valvoline" in a book issued in the year 1879, and printed, apparently, not only in America, but in this country, because it bears on the outside the trade mark of Leonard and Ellis, of King William-street, London, which appears to me to be very material. [His Lordship read an extract describing the preparation of "valvoline."] That seems to me to be a description of the thing, and, if that is a true description of "valvoline," and the defendants are at liberty to make that thing, I think they are equally at liberty to call it by the name the thing has got on the market, namely, "valvoline."

*Appeals dismissed with costs.*

Solicitors: For the appellants, *Paddison, Son, and Co.*; for the respondents, *H. B. Clarke and Son*, for *Horner and Son*, Manchester.

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GREEN v. HUMPHREYS.

[Ct. of App.]

March 24 and 31.

(Before COTTON, BOWEN, and FRY, L.JJ.)

GREEN v. HUMPHREYS. (a)

*Statute of Limitations—Acknowledgment of debt—*  
9 Geo. 4, c. 14, s. 1.

An acknowledgment, in order to be sufficient to take a debt out of the Statute of Limitations, must be absolute and unconditional—not controlled by any other language in the document—and must contain words of such a character that there may reasonably be inferred therefrom a promise to pay the debt.

The acknowledgment must not only be clear in itself in order to raise the implication of a promise, but must be unaccompanied with words which prevent the possibility of the implication; though an expression of less than a promise will not necessarily put an end to the implication.

It is not enough for the writer of an acknowledgment to refer to a debt as being due from somebody, but the letter, on its fair construction as read by the light of surrounding circumstances, must be an admission that the writer himself owes the debt.

A debtor wrote to his creditor, "I thank you for your very kind intentions to give up the rent of Tyn-y-bwrwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." When this letter was written a property called Tyn-y-bwrwydd belonged to the debtor's wife for her separate use, and for some time the rents of the property had been retained by the creditor in part satisfaction of his debt.

Held (reversing the decision of Pollock, B., 48 L. T. Rep. N. S. 479; 23 Ch. Div. 207), that the letter was not a sufficient acknowledgment to take the debt out of the Statute of Limitations.

Observations on Morgan v. Rowlands (26 L. T. Rep. N. S. 855; L. Rep. 7 Q. B. 493).

THIS action was brought by the executors of J. Humphreys against E. Humphreys to recover a sum of 328l. 1s. 2d. The defence set up was that the debt was barred by the Statute of Limitations. The plaintiffs contended, however, that the following letter, written by the defendant to the plaintiff's testator, was an acknowledgment of the debt sufficient to take the case out of the statute:

I thank you for your very kind intentions to give up the rent of Tyn-y-bwrwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full.

It appeared that when this letter was written a property called Tyn-y-bwrwydd was settled upon the defendant's wife for her separate use, and that for some considerable time (under what circumstances did not exactly appear) the rent of the property had been retained by the testator of the plaintiffs in part satisfaction of what was due on the account between him and the defendant.

On the 9th April Pollock, B., sitting in the Chancery Division for Pearson, J., held that the letter was a sufficient acknowledgment from which to imply an unconditional promise to pay: (48 L. T. Rep. N. S. 479; 23 Ch. Div. 207.)

The defendant appealed.

Crossley, Q.C. and Northmore Lawrence for the appellant.—The letter is not a sufficient acknowledgment to take the case out of the statute. Where

the defendant, by a deed reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff in trust to pay all such creditors as should sign the schedule annexed, and there was a proviso that if all did not sign the deed should be void, and the plaintiff never signed, nor was the amount of the debt stated, although it was admitted the plaintiff had only one debt, the deed was held not to be a sufficient acknowledgment:

Kennett v. Milbank, 8 Bing. 38.

Enough must be said by way of acknowledgment to allow an inference of fact that a promise was intended, to be drawn:

Morgan v. Rowlands, 26 L. T. Rep. N. S. 855; L. Rep. 7 Q. B. 493.

There must, in order to enable the court to imply a promise to pay, be an absolute unconditional acknowledgment:

Chasemore v. Turner, 33 L. T. Rep. N. S. 323; L. Rep. 10 Q. B. 500;

Re River Steamer Company; Mitchell's Claim, 25 L. T. Rep. N. S. 319; L. Rep. 6 Ch. App. 822.

"The acknowledgment," says Parke, B., "must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some conditions which have been fulfilled":

Smith v. Thorne, 18 Q. B. 134, 139.

A letter, containing the passage, "I have sent you a note for the money due to you, which your mother left you," was held insufficient without referring to the note to see what was the provision intended to be made, when that could not be done for want of a proper stamp:

Parmiter v. Parmiter, 3 L. T. Rep. N. S. 80; 1 J. & H. 135; 3 L. T. Rep. N. S. 799; 3 De G. F. & J. 461.

There is here a mere reference to some debt, but nothing by which any particular debt could be identified. The reference is in substance to the property. It is for the plaintiffs to show that the balance of principal and interest was to be applied in payment of the debt, and this burden has not been discharged. All the cases point to its being necessary for the acknowledgment to refer to some debt and to some specific purpose in connection with it. They also cited

Philips v. Philips, 3 Hare, 281;

Buckmaster v. Russell, 4 L. T. Rep. N. S. 552; 10 C. B. N. S. 745; 2 F. & F. 389.

G. Henderson for the plaintiff.—It is not necessary to find in the document a statement that the amount is due to A. or B. [COTTON, L.J.—There must be an acknowledgment of a debt due. FRY, L.J.—When there is a simple acknowledgment you may infer a promise; but can you infer it when the document says, "By reason of somebody else paying you I shall never pay you?"] "It is sufficient if there is an acknowledgment unaccompanied by expressions which control its effect," says Bramwell, B. "The bill is due, I hope to be able to pay, is an acknowledgment":

Sidwell v. Mason, 29 L. T. Rep. O. S. 213; 2 H. & N. 306.

[BOWEN, L.J.—He refers to Tanner v. Smart (6 B. & C. 603) as an authority that it was not the law that an acknowledgment accompanied by a refusal to pay was sufficient.] A mere hope that everything will be arranged agreeably to wishes,



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though there was no reference to any debt, was held sufficient:

*Edmunds v. Goater*, 15 Beav. 415.

*Crossley*, in reply, referred to

*Whippy v. Hillary*, 3 B. & Ad. 399;

*Hart v. Prendergast*, 6 L. T. Rep. O. S. 173; 14 M. & W. 741.

*Cur. adv. vult.*

March 31.—COTTON, L.J.—This case came before us on appeal from a judgment of Pollock, B., sitting for Pearson, J. The action was brought by the executors of Mr. John Humphreys against the brother of their testator, to recover a sum due from the defendant, and the defence was the Statute of Limitations. The only question to be determined is, whether a certain letter which was relied upon by the plaintiffs is sufficient to prevent the Statute of Limitations from operating, and to take the case out of the bar of the statute. The letter was part of a larger correspondence; but I think that the rest of the correspondence does not really materially influence the matter, because it appears, either from the evidence or from the admissions, that at this time the rents of the property called Tyn-y-bwrwydd, which was settled upon the defendant's wife for her separate use, had for some considerable time been retained by the testator of the plaintiffs in part satisfaction of what was due on the account between him and the defendants. That is, I think, material, because one of the arguments addressed to us was, that this letter did not refer to the particular debt due on this account. If the case depended upon that, in my opinion, that contention is erroneous, because we do find in the letter these words: [His Lordship read the words above stated, and continued:] We know, from the evidence and the admissions of the parties, that the facts were at that time as I have stated, and, of course, we are entitled to put ourselves in the position of the parties—the writer of that letter and the receiver of it—to know what that refers to. As it was the fact that the rent of this property was retained on account of the debt claimed in this action, I come to the conclusion that that letter in fact does refer to this debt. But even that will not settle the question. We have first to look at the Act to see what obligation is thereby imposed. The Act provides that there must be “an acknowledgment or promise contained in or by some writing to be signed by the party chargeable.” Has that provision been complied with? Is there in this letter any promise—by which I understand a present promise, a promise in terms, to be meant—to pay this debt, or is there such an acknowledgment as will be sufficient within the statute? I do not think it would be useful in this case, or probably in any case, to go through a number of former cases in which different words have been held either to be sufficient or insufficient to take the case out of the statute on the ground of acknowledgment. It seems to me that it is settled that there must be such an acknowledgment as will lead the court to infer (I use the word “infer” intentionally) a promise by the writer to pay the debt. The rule seems to be, that, if there is an absolute, unconditional acknowledgment, not controlled by any other language in the letter, then the court does come to the conclusion that, by that acknowledgment, the party intends a promise to pay that which he

acknowledges to be due. One may put it in this way: If a man acknowledges by his letter that a debt is due, the fair inference is, without anything more, that he intends to pay, and expresses by that writing his intention to pay, the debt. Therefore it is necessary that there should be an absolute acknowledgment, uncontrolled by anything else, or an acknowledgment of such a character that the court may properly infer from the expressions in it an intention by the writer to pay the debt. A great deal was said in argument about an expression used by Blackburn, J., in *Morgan v. Rowlands*, that there must be an inference in fact, and not an implication of law. There was a great deal of discussion as to what that meant. In my opinion, it is really not necessary for the present purpose to decide that. What I think the learned judge must have meant was, that an implication of law is not sufficient in the sense in which many contracts are implied by law. When it is said that there is an implied contract, it very often means, not that it is to refer to something which the party has said or written, but that there is a duty which imposes upon him the obligation to pay. For instance, if goods are supplied to a man without any express contract on his behalf—if they are sent at his request—the court implies an obligation on his part to pay for them. What I think one must find from a writing, in order to hold that it takes a case out of the statute, is not an acknowledgment of such a state of circumstances as will throw a duty upon the man to pay, or an implied obligation in this sense—an obligation implied by law—but one must find words of such a character that there may be reasonably inferred from such words a promise to pay. In other words, there must, either in the language or on a fair construction of it, be an acknowledgment of the claim as one of debt from the person. The words must not necessarily in terms acknowledge it as his debt, but must be such as, when fairly construed, recognise it as his debt—that is, as something to be paid by him. Let me look again at the words of this letter. It is quite clear to me that there is really no express acknowledgment in them of any debt as a debt. What the words refer to is, to my mind, not very clear. Whether it is that at Christmas the rent, in the mind of the writer, would probably have paid it off (which would not be such an acknowledgment as would leave you at liberty to infer a promise to pay), or whether it is with reference to something else, I do not know. If the first meaning is to be attached to the words, as there is no positive acknowledgment, in my opinion the letter is not sufficient to take the case out of the statute. Where there is an express acknowledgment of debt, it may be that the subsequent expression of the writer of that acknowledgment is not sufficient to prevent the writing from taking the case out of the statute. But here it is different. There is no acknowledgment of debt *quâ* debt. The only part of the letter which is to be looked at with reference to that, is that part which says that both principal and interest will have been paid in full. If the writer had referred in terms to “my debt, which I am sorry I cannot pay,” probably the words would have been sufficient to constitute an express acknowledgment, but here we have no express acknowledgment. Reading the whole sentence, to my mind, it can-

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not in terms be taken as an uncontrolled admission of debt, and therefore, in my opinion, there is not here a promise—in terms there is clearly not—or such an acknowledgment, uncontrolled, as would lead the court to the inference that the writer of this letter promised to pay a debt. In my opinion, this letter did not take the case out of the statute, and therefore the judgment of Pollock, B. must be reversed.

BOWEN, L.J.—I am of the same opinion. I regret that we have to add one more decision to the cloud of cases already collected around this particular point. The law has been clear for fifty years. All the cases that have been reported since that time are really illustrations of the way in which the court approaches the application of the principle. I do not propose to say very much more. I will simply restate what I imagine clear law, lest it should become imbrangled by all the decisions that take place upon it. There must be an acknowledgment or promise to pay in order to take the case out of the statute, and it has been long settled that, where there is a clear acknowledgment of the debt from the person acknowledging, the promise to pay will be inferred. That follows from the language of Lord Tenterden in *Tanner v. Smart*, which Kelly, C.B. said in *Quincey v. Sharpe* (34 L. T. Rep. N. S. 495; 1 Ex. Div. 72) has never been disputed; and it has been re-stated over and over again, both in this court and in other courts, that, where there is a clear acknowledgment of debt from the person acknowledging, a promise to pay must be inferred. Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is so qualified as not to raise that inference will not come within the definition. Secondly, supposing there is an acknowledgment, in itself clear enough, of a debt, still, if words are found combined with it, which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words something which expresses less than a promise to pay—and, as Lord Bramwell pointed out, an expression of less than a promise to pay will not necessarily put an end to the implication of the promise to pay—but the words express the lesser in such a way as to exclude the greater. Let me apply those two tests, which I think are established, to this case. It seems to me that, although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in any such sense as to raise the implication of a promise to pay, but, on the contrary, only in such a way as excludes the idea of a promise to pay. It is rather difficult to draw the line sharply between the acknowledgment itself, as qualified by the words which accompany it, and the words which accompany the acknowledgment treated as destroying the implication of the promise. Whichever way you treat it here, it seems to me that the substance is, that this gentleman never did acknowledge that the debt was owing from him in such a sense as that the person who read his words would think that he could promise to pay; but, on the contrary, his words implied that he did not undertake to pay. On that ground it seems to me that the judgment of Pollock, B. ought to be reversed. I say

this with a considerable amount of hesitation, because I believe that various minds might take various views of this letter. The difficulty that so often happens lies not in the law, but in the facts to which the law has to be applied.

FRY, L.J.—I am of the same opinion. In the present case no question arises with regard to a promise in writing. The only question is with regard to an acknowledgment in writing. Now, the passage which is relied upon presents to my mind this difficulty. In the first place, it refers to certain intentions which have been communicated by the receiver of the letter to the writer of the letter, and those intentions, if we knew them, might throw light upon the true construction of the passage which refers to them. But of the nature of those intentions we have no evidence. It appears to me that he who relies upon a letter as a written acknowledgment ought to give us some information as to what the communicated intentions were in order that, by the light of that information, we may construe the writing. But passing from that difficulty, and looking at the letter with such evidence as we have of the surrounding circumstances, the question arises whether there is a good acknowledgment of the debt. Now, what is an acknowledgment? In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received. It is not enough that he refers to a debt as existing due from somebody. It must, upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt. Now, in the present case, the only reference to the debt is a statement that it will be satisfied, and a reference to it also as being the ground upon which certain rents which did not belong to the writer have been stopped. It appears to me, therefore, that that debt is referred to, not for the purpose of admitting the debt of the writer, but for the purpose of referring to its contemplated satisfaction, which will release the rents of his wife which have been stopped. I think that the words of the letter which have been referred to may be fairly paraphrased in this way: "I thank you for your very kind intention to let my wife receive the rents of her estate after next Christmas; but your kindness is apparent, and not real, for by next Christmas the debt to satisfy which you have been stopping her rents will then have been fully satisfied in some manner or another." That appears to me to be the best paraphrase which I can give to the sentence in question, when I regard the surrounding circumstances of the case, and in that I find no acknowledgment that a debt is due from the writer. I think, therefore, that the case fails, and that the judgment of Pollock, B. must be reversed.

*Appeal allowed.*

Solicitors for the appellants, *Davidson and Morris*.

Solicitors for the plaintiffs, *Hunters, Gwatkin, and Haynes*.

Saturday, March 29.

(Before COTTON, BOWEN, and FRY, L.JJ.)

Re COMBS. (a)

*Trustee—Alleged lunacy of—Petition for appointment of new trustee—Denial of lunacy—Jurisdiction—Trustee Act 1850 (13 & 14 Vict. c. 60), ss. 3, 32, 52—Trustee Extension Act 1852 (15 & 16 Vict. c. 55), s. 10.*

*The court will not, on a petition under the Trustee Act 1850, remove a trustee against his wish.*

*Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, and the insanity is denied by him, the court will not try the question whether the trustee is of sound mind, nor will it (under sect. 52) direct a commission in the nature of a writ de lunatico inquirendo to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the High Court to remove the trustee.*

THIS was a petition by some of the *cestuis que trust* under the will of one Combs for the appointment of a new trustee in the place of one of the trustees thereof on the ground that he was of unsound mind.

The petition was originally presented before Chitty, J., who ordered it to stand over, being of opinion that he had no jurisdiction. The petitioners then applied *ex parte* to the Lords Justices, asking that the petition might be placed in their Lordships' paper for the 29th March. This was accordingly done, but the petition was never presented to the Lord Chancellor, or intitled in lunacy or otherwise amended, but remained, on the face of it, a petition to the High Court of Justice. This omission was not, however, known to the court until after the judgment had been given.

*Ince, Q.C. and W. C. Fooks, jun., for the petitioners.*—The Lord Chancellor or Lords Justices sitting in Lunacy have, by sect. 10 of the Trustee Extension Act 1852, power to appoint new trustees in all cases in which they can make a vesting order; that is to say, when any lunatic or person of unsound mind is seised or possessed of any lands upon any trust: (Trustee Act 1850, s. 3.) By sect. 32 a new trustee may be appointed whenever it is "expedient" to do so, and inexpedient, difficult, or impracticable to appoint one without the assistance of the court. In this case the testator was a solicitor, who speculated in land, and there are several deeds awaiting execution by one of the respondents, who is, we say, a person of unsound mind. The other respondent is the other trustee of the will. [COTTON, L.J.—It has been decided that the jurisdiction does not apply where the fact of the lunacy is contested: (*Re Walker*, Cr. & Ph. 147.) Why do you not petition for an inquiry in the ordinary way?] We wish to avoid expense. The case referred to was decided under the Act 11 Geo. 4 & 1 Will. 4, c. 60—not under the Trustee Act 1850. [COTTON, L.J.—You are asking us to remove the trustee, against his will, on petition. Suppose you had some evidence that a trustee was dishonest, could the court try that issue on a petition?] The case of a lunatic trustee is different; he has no will. Moreover, there is an express provision in sect. 52 of the Act of 1850 enabling the court,

on a petition like this being presented, to direct a commission in the nature of a writ *de lunatico inquirendo* to issue, and to postpone making any order on the petition until a return has been made to the commission. We ask the court, if it will not make an order at once, to direct such a commission to issue. They also referred to

*Re Hadley*, 5 De G. & Sm. 67;

*Re Hodson*, 9 Hare, 118.

*Romer, Q.C. and S. B. L. Druce*, for the respondent, were not called upon.

COTTON, L.J.—This is a petition of a somewhat unusual character. It is presented under the Trustee Act of 1850, as amended by the Trustee Act of 1852, and prays for the appointment of a new trustee, on the ground that one of the present trustees is of unsound mind. But, so far from that being unopposed, that gentleman appears here and contends there is no ground for removing him, and that he is not of unsound mind. The only question we have to consider is, whether, under those circumstances, this is a petition under which an order ought to be now made under the Trustee Act of 1850. Of course, if these petitioners are in a position to present a petition for inquiry into the state of mind of the trustee, they can do so, and if they wish to get an order declaring him to be a lunatic in the ordinary way, they may, if they desire it, bring an action in the High Court, relying in that action on any grounds that may be sufficient for inducing the court to make an order removing the trustee from his position of trustee, whether his incapacity arises from unsoundness of mind, or any act of wilful misconduct or otherwise committed by the trustee. But they now insist on having the order for removing him made under the Trustee Act 1850. In my opinion that is wrong. I do not go into the question as to whether there is jurisdiction under this Act to do so or not, but it has been the constant course of practice since this Act came into operation to decline to decide litigiously against a trustee whose removal is sought that he ought to be removed from his office of trustee. I certainly will not introduce a new practice as regards this Act, because, if that practice were introduced, a trustee might be put into this position, under this statutory jurisdiction, that he might be forced to enter into a contest as to whether he was of unsound mind. No case has been referred to in which this court has ever adversely removed a trustee under the Trustee Act. If it could be done on the ground that he was of unsound mind, it might be done as a matter of principle on any other ground that would justify the court in ordering his removal in an action. An action can be brought in the High Court, and that is done at the ordinary peril; or an inquiry may be asked for, and that is done at the ordinary peril. In *Re Walker*, partly referred to by Mr. Ince, undoubtedly the facts were somewhat different; but, in Lord Cottenham's judgment, after an expression of opinion that it might be different if he were a bare trustee, he says this: "My present impression, however, is, that even if the fact of unsoundness of mind were much more clearly made out than it is here, it would not be a proper exercise of my discretion, in applying the powers of this

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Act of Parliament, to treat a person as incompetent to manage his affairs, so long as he himself, or his family for him, insist that he is competent; because I am of opinion that the Act was only intended to enable parties entitled to the benefit of a legal estate to obtain it from a person in whom it is vested, and who is admitted to be incompetent to convey it, and not to involve his family in a controversy in which they have no sort of interest, as to whether he is a lunatic or not, merely for the accommodation of third persons." And that is my opinion in this case. Then it is said that is inconsistent with the Act, and what was relied upon was principally this: It was said that there might be an inquiry before the master where the parties could enter into matters of contested fact. In cases where such an inquiry was allowed it was held, not before a master in Lunacy, but before a master in Chancery. Instead of asking the court in the first instance to consider the evidence under the petition, the parties might go before the master in the first instance to satisfy him (not in contested cases, but in uncontested ones) that they were in a position to ask for an order; that is to say, that facts necessary to enable them to get an order were established by the evidence. Then the 52nd section of the Trustee Act 1850 does give the Lord Chancellor power to direct a commission to issue, but that power has not been exercised in a case where a person alleged to be a lunatic has said, "I contend there is no ground for removing me." It might well be intended to apply to a case where the court is not satisfied, there being no contest. The court might then direct an inquiry; but, in my opinion, the object of this Trustee Act is not to substitute a different process from that of the ordinary tribunals for the purpose of deciding hostilely against the trustee whether he ought to be removed, but only to give a summary and easy remedy for his removal, where he is either willing to be removed, or there is no contest as to the facts existing and rendering it necessary to remove him in consequence of his state of mind. If these parties wish to bring an action they can do so, and the petition will then be dismissed. If they desire to take proceedings in lunacy the petition may stand over. Subject to what Mr. Romer may say, I see no reason why it should not, leaving the petitioners to take such steps as they think fit.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I am of the same opinion. It appears that shortly after the passing of the Act of 1850 it became clear to the court that the jurisdiction of that Act could not be exercised by the removal of a trustee. I find in *Re Hodgson* the Vice-Chancellor said: "I think that this statute was not intended to give the court jurisdiction to remove a trustee where he states that he is desirous of continuing in the trust. The Act empowers the court, whenever it is expedient, to appoint new trustees; but that provision is, I think, confined to the appointment, and does not extend to the discharge of a trustee who is willing to remain." Now, without inquiring whether lunacy, supposing it to exist, is a ground for discharging or removing a trustee, or itself creates a vacancy, it is obvious that the conflict in the two cases, whether a trustee shall be removed or whether there is a vacancy in the trusteeship, is

of so closely similar a kind that the principle which induces the court to stay its hand in one case will induce it to stay its hand in the other. It has been pressed upon us that the 52nd section imports that the court has jurisdiction in the case of a contested unsoundness of mind. It appears to me there is no such inference to be drawn from the 52nd section. I think it is a power given to the court where the court feels anxious to be better informed with regard to the trustee in a case in which there was no contest. I think, therefore, that we should be departing from the course of procedure that has been well established if we were to allow this controversy as to the lunacy of the trustee to be gone into now. I therefore agree with Cotton, L.J.

ROMER.—I object to the petition standing over. It has been irregularly brought before this court, and put into the paper on an *ex parte* application. I ask for the respondent's costs. Chitty, J. ordered the petition to stand over, and it is still before him.

INCE.—The petition ought to stand over until we have presented a petition as to the respondent's state of mind, and that we may have leave to amend it.

COTTON, L.J.—I said, when the application was made to us, that the petition must be amended, and made a petition to the Lord Chancellor. That has not been done, so that this is altogether irregular. In my opinion the petition is not before us, and we cannot dismiss it. It is before Chitty, J., and he must deal with it; but the petitioner must pay the costs of coming here.

FRY and BOWEN, L.J.J. concurred.

Solicitors for the petitioners, *Schultz and Son*.

Solicitors for the respondents, *Combs, Bayly, and Henley*.

Friday, Jan. 25.

(Before BRETT, M.R. and BOWEN, L.J.)

REG. v. THE COMMISSIONERS OF INLAND REVENUE;  
*Re* NATHAN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Mandamus—Servants of the Crown—Commissioners of Inland Revenue—Return of probate duty—Specific legal remedy—Petition of right—5 & 6 Vict. c. 79, s. 23.*

By 5 & 6 Vict. c. 79, s. 23, "Where it shall be proved, by oath and proper vouchers, to the satisfaction of the said Commissioners of Stamps and Taxes, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or movable estate, to such an amount as, being deducted from the amount or value of the estate and effects of the deceased for or in respect of which a probate or letters of administration shall have been granted . . . shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate or effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration . . . than shall have been actually paid thereon, it shall be lawful for the said Commissioners of Stamps and Taxes, and they are hereby required to return the difference, &c."

(a) Reported by HENRY LEIGH and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

By 12 & 13 Vict. c. 1, the Boards of Commissioners of Excise, Stamps, and Taxes, are consolidated into the Commissioners of Inland Revenue.

A return of duty under 5 & 6 Vict. c. 79, s. 23 having been refused by the Commissioners of Inland Revenue, a mandamus was applied for to compel the commissioners to return the duty, and the Divisional Court made the rule absolute for a mandamus.

Held, on appeal (reversing the decision of Day and Smith, JJ.), that the duty having been received by the commissioners as servants of the Crown, the proper mode of seeking to obtain a return of duty was by petition of right, and therefore, as there was another specific legal remedy, by which the applicant could obtain a return of the duty if he was entitled to it, a mandamus ought not to be granted, and the rule must be discharged.

*Rex v. The Lords Commissioners of the Treasury* (4 A. & E. 286) overruled.

THIS was a rule nisi calling upon the Commissioners of Inland Revenue to show cause why a writ of mandamus should not issue commanding them to return to the applicant, the administrator of the estate of one Edward Nathan, deceased, the sum of 1650*l.*, part of the stamp duty charged to and paid by the applicant on the grant to him of letters of administration with the will annexed of the said Edward Nathan.

The facts of the case are, so far as it is material for the purposes of this report, as follows:—

The deceased testator, Edward Nathan, was a German, who for many years previously to and at the time of his death, in Paris, in Nov. 1882, carried on, in partnership with his two brothers (the applicant and another), the business of commission merchants, at Manchester. In 1861 he married at Hamburg a lady, an inhabitant of that city, and by the German marriage settlement executed at Hamburg on that occasion he covenanted that upon the dissolution of the marriage by his death in his wife's lifetime (which event has happened) the sum of 55,000*l.* should be paid to her out of his estate, and that for that sum she was to be deemed a creditor of her husband's estate. It was also provided by the said marriage settlement that he, the husband, should be domiciled himself at, and that his wife should follow him to, Manchester and be domiciled there also.

Previously to his death, the testator retired from Manchester and went to live at Paris, where at the date of his death in Nov. 1882, he was domiciled; but he left assets in England amounting to over 118,000*l.*, and personal estate situated abroad of the value of upwards of 41,000*l.*

On the grant of probate, stamp duty was paid upon the full amount of the English assets, no debts being deducted, because the testator's domicile was stated to be French, the provisions of the Customs and Inland Revenue Act 1881 (44 Vict. c. 12), s. 28, for deduction of debts, applying, in the opinion of the Inland Revenue authorities, only in cases where the deceased dies domiciled in the United Kingdom.

Subsequently, however, in March 1883, the administrator of the deceased, his brother Louis Nathan, applied to the Commissioners of Inland Revenue in the ordinary manner, under the 5 & 6 Vict. c. 79, s. 23, for the return of 1650*l.*, the stamp duty on 55,000*l.*, part of the above-mentioned 118,000*l.*, on the ground that this 55,000*l.*

was a debt due from the estate of the late Edward Nathan to his wife created by the marriage contract, according to the laws of Hamburg, entered into upon their marriage in 1861 at Hamburg, of which city the wife was an inhabitant, and which sum of 55,000*l.*, he the administrator had, in virtue of a discretionary power conferred on the executors and administrators of the deceased, by a declaration in the deed of partnership between the deceased and his two brothers, paid over to the widow out of the English partnership assets of the deceased.

The commissioners, not being satisfied that this sum was a debt, or, if a debt, that it fell within the description contained in the statute under which the administrator claimed the return (5 & 6 Vict. c. 79, s. 23), declined to return the duty, and suggested to the applicant that the proper mode of obtaining a decision upon the question was by petition of right.

Subsequently, however, the above-mentioned rule was applied for and obtained by the applicant in July 1883, and now,

Dec. 7 and 10, 1883.—The Attorney-General (Sir H. James, Q.C.) and A. V. Dicey (with them was the Solicitor-General, Sir F. Herschell, Q.C.) showed cause on behalf of the defendants.—Apart from the merits there are two preliminary objections to this rule: first, that this court has no power or jurisdiction in the matter, inasmuch as mandamus cannot lie or go against the Crown itself or against its officers or servants, which the defendants, the Commissioners of Inland Revenue, are; and secondly, that, even if mandamus would lie, yet that where there is another specific legal remedy, as there is here by a petition of right, that remedy must be adopted, and mandamus being a discretionary writ, the court will not permit such writ to issue. The applicant relies here on three cases, in which, and for the present purpose it may be admitted under similar circumstances, mandamus has been issued, viz.:

*Reg. v. The Commissioners of Stamps and Taxes; Ostell's case*, 18 L. J. 201, Q. B.;

*Reg. v. The Commissioners of Stamps and Taxes; Stracey's case*, 6 Q. B. Rep. 657;

*Reg. v. Commissioners of Stamps; Wallace's case*, 9 Q. B. Rep. 637; 16 L. J. 75, Q. B.

But in the first two of those cases no objection appears to have been taken to the writ going; whilst in the other (*Wallace's case*) the Attorney-General (Sir F. Thesiger) waived the point, and Lord Denman, C.J. said the waiver was not to be made a precedent. The Crown here, however, relies in support of their first objection upon the following authorities: *Rex v. The Commissioners of Customs* (5 A. & E. 380; 6 L. J. N. S. 65, M.C.), in which the court, declining to listen to the argument that there was no other remedy, refused a mandamus to compel the officers of customs to deliver up a quantity of tobacco in their hands, as being equivalent to a mandamus against the Crown itself. Again, in *Reg. v. Powell* (1 Q. B. Rep. 852), where mandamus against the steward of a manor of which the Queen was the lady was refused because it ought to go against the lord and the steward jointly, and it could not go against the Queen. The case of *Reg. v. The Lords of the Treasury; Ex parte Justices of Lancashire* (26 L. T. Rep. N. S. 64; L. Rep. 7 Q. B. 383; 41 L. J. 178, Q. B.) is a decisive authority against the present claim for a mandamus. As to the

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second objection. That petition of right is the proper remedy is shown by the following cases:

*Reg. v. Powell* (*ubi sup.*);  
*Perceval's Executors v. The Queen*, 3 H. & C. 217; 33 L. J. 289, Ex.;  
*The Executors of Perry v. The Queen*, L. Rep. 4 Ex. 27; 38 L. J. 5, Ex.; s. o. nom. *Bacon and others* (*Executors, &c.*) *v. The Queen*, 19 L. T. Rep. N. S. 250;  
*De Lancey v. The Queen* (in the Ex. Chamber), 26 L. T. Rep. N. S. 400; L. Rep. 7 Ex. 140; 41 L. J. 64, Ex.

In *Reg. v. The Bishop of Chester* (1 T. R. 396) a *mandamus* to a bishop to license a curate was refused because *Quare impedit* was another specific remedy, Buller, J. (at p. 404) saying that Lord Mansfield had always taken great pains to state particularly the grounds on which the court would either grant or refuse a *mandamus*, and had always said the court would not interfere by granting it unless the applicant had no other specific legal remedy. To the same effect is the case of *Reg. v. The Marquis of Stafford and another* (3 East, 641). They cited also *Reg. v. The Bank of England* (2 Dougl. 524), and referred to Tapping on *Mandamus* (pp. 9 to 12), and Bovill's Act (23 & 24 Vict. c. 3).

*Cookson, Q.C.* and *W. H. Clay*, for the applicant, supported their rule.—The authorities relied on by the Attorney-General do not apply; and his strongest one, *Reg. v. The Lords of the Treasury*, in L. Rep. 7 Q. B. (*ubi sup.*), is by no means conclusive, as he contended it was, in favour of the defendants. There was no duty on or required of the defendants there; and, indeed, it was conceded by Sir G. Jessel, then Solicitor-General, in arguing that case for the Crown, that, if the Legislature had constituted the Lords of the Treasury agents to do a particular act, *mandamus* might lie against them as individuals designated to do the act. That is precisely the present case, in which there is a clear, plain, statutory duty on the Commissioners of Inland Revenue, who, by the express words of the Act, "are required to return" the overpaid duty. In *Reg. v. The Lords of the Treasury* (4 A. & E. 286; 5 L. J. N. S. 20, K. B.) it was held that, as the Lords of the Treasury were depositaries of certain money in their hands for an individual who had a legal right to it, a *mandamus* would lie to compel payment of it to him. That is a clear authority in favour of the present applicant. So also are the cases of

*Reg. v. The Commissioners of Woods and Forests*, 15 Q. B. Rep. 761; 19 L. J. 497, Q. B.; and  
*Reg. v. The Lords of the Treasury*, 16 Q. B. Rep. 359; 20 L. J. 305, Q. B.

Injunctions against Crown servants have been granted by the Court of Chancery:

*Rankin v. Huskisson*, 4 Sim. 13;  
*Ellis v. Lord Grey*, 6 Sim. 214; s. o. nom. *Ellis v. Walmsley*, 2 L. J. N. S. 181, Ch.;  
*Priddy v. Rose*, 8 Mer. 86, per Sir Wm. Grant, M.R., at p. 102.

The cases cited by the Attorney-General against the rule are distinguishable. In *Reg. v. Powell* (*ubi sup.*) the application was against the Queen *quâ* Queen, and, of course, could not succeed. In *Reg. v. Commissioners of Customs*, the Tobacco case (*ubi sup.*), the officers of customs had no duty to perform with respect to the tobacco in their possession. In *Perceval's Executors v. The Queen* (*ubi sup.*) the case was stated by consent,

and is not, therefore, an authority against the *mandamus* in the present case; and, as to the two other cases, that of *Perry's Executors* (*ubi sup.*) was not under this particular section, and *De Lancey's case* (*ubi sup.*) was under the Legacy Duty Acts; and in neither case was there any duty or power in the commissioners to repay the money claimed, and therefore a petition of right was the only and proper remedy. As to proceeding by petition of right, that is not a specific legal remedy. It depends upon the Attorney-General's fiat and the grace and favour of the Crown. *Mandamus* is not asked for here against the Crown, nor against the commissioners as its mere servants, but against them as persons filling an official capacity, with a statutory power and duty which they are bound to execute by paying over money held by them in the character, as it were, of stakeholders liable to return the overpaid portion of it. They are not mere delegates of the Crown under its sign manual, but are the creatures of Parliament for the very purpose of receiving and accounting for these moneys for which they are invested by Parliament with separate powers, and are thus severed from, and cannot be identified with, the Crown in the sense that their hands are those of the Crown. The question is one of authority, and is not to be argued on first principles; and it is submitted that the authorities are strongly in favour of the applicant. They cited and referred also to

*Reg. v. The Archbishop of Canterbury*, 8 East, 213, per Lord Ellenborough, C.J., at p. 219;  
*Re Smyth*, 4 A. & E. 976;  
*Re Hand*, 1b. 984;  
*Ex parte Ricketts*, 1b. 999;  
*Reg. v. The Bank of England* (*ubi sup.*);  
*Tapping on Mandamus* (*ubi sup.*).

The Attorney-General in reply.—The Commissioners of Inland Revenue are in no way "stakeholders." As servants of the Crown they received this money as part of the Crown revenues, and it was at once paid over by them to the account of Her Majesty's Exchequer. It cannot therefore belong to the applicant in the sense that he can obtain repayment of it by *mandamus*. To the Crown alone are the defendants amenable or owe any duty with respect to this money, except it may be a moral duty to the public. It is a condition precedent to repayment that the commissioners should be satisfied that there has been an over-payment. There is no specific, definite, or ear-marked sum in their hands for the benefit of the applicant, as was the case in *Reg. v. The Lords of the Treasury*, in 4 A. & E. (*ubi sup.*), and the authority of that case has been greatly lessened, if not destroyed, by the judgment of the Court of Queen's Bench, and particularly by the comments on it of Cockburn, C.J. and Blackburn, J., in the subsequent case of *Reg. v. The Lords of the Treasury*, in L. Rep. 7 Q. B. (*ubi sup.*). The petition of right is the constitutional right of the subject, who has a *bonâ fide* claim, and in such a case the Attorney-General's fiat would not be withheld. It is a more convenient and suitable mode of proceeding than *mandamus*, as under it the suppliant has only to prove his claim to be a just one, whereas by *mandamus* the proof would lie on the defendants, who know nothing of the facts, which are all within the knowledge of the applicant.

DAY, J.—I am of opinion that this rule should



be made absolute, and that a writ of *mandamus* should issue. The test, as it seems to me, whether or not the writ of *mandamus* is to issue is, as was said, *arguendo*, by Sir Frederick Thesiger, in the case of *Reg. The Commissioners of Woods and Forests (ubi sup.)*: "Whenever a person, whether filling an office under the Crown or not, has a statutory duty towards another person a *mandamus* will lie to compel him to perform it." Now, the rule is there expressed with the precision and neatness characteristic of Sir Frederick Thesiger's utterances, whether at the bar or on the bench, and it is substantially the language that was afterwards used by the late Sir A. Cockburn, C.J., and by Blackburn and Lush, JJ., in the case of *Reg. v. The Lords Commissioners of the Treasury*, in L. Rep. 7 Q. B. (*ubi sup.*), so strongly relied upon by the Attorney-General in the present case. Those learned judges all most clearly distinguished that case from cases in which a statutory duty to pay or apply particular moneys to a particular purpose has been imposed upon a servant of the Crown, and held that in that case there was no statutory duty imposed by an Act of Parliament upon the Commissioners of the Treasury to apply the particular moneys in any particular way or to any particular purpose. The court there took and acted upon that distinction, and that is really the only point practically decided in that case. Cockburn, C.J., in his judgment there, with reference to the statute upon which the application in that case was based (the Act for regulating the costs of prosecutions), said: "I cannot see anything in that statute which imposes a duty at law upon the Lords Commissioners of the Treasury; it is not a duty at law which, by any legal proceedings, or by the exercise of their prerogative jurisdiction, the court could enforce." Blackburn, J. again, in effect, uses the same words, and finds no duty, nor even anything which approaches a duty, in the case under consideration, and goes on to say: "Is there any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by *mandamus*, namely, to issue a minute to pay that money? because it seems to me clear that we ought to grant a *mandamus* if there is such a statutory obligation, particularly where the application is made on behalf of persons who have a direct interest in the matter." Similar passages are found in the judgment of Lush, J., who commences his judgment by saying: "I think that the applicants have failed to make out that which is essential to entitle them to a writ of *mandamus*, namely, that there is a legal duty imposed upon the Lords Commissioners of the Treasury—a duty as between them and the applicants to pay over this sum of money." Now, all that merely confirms—if I may say so—that which had been stated, *arguendo*, in the case by the then Solicitor-General, the late Master of the Rolls, Sir George Jessel. In the opening of his argument he expressly admitted that, when the Legislature has constituted the Lords of the Treasury to do a particular act, a *mandamus* in that case might lie against them, as individuals merely, to compel them to do that act. The question then which arises for our determination here is, whether under the statute to which our attention has been directed in this case any such duty has been imposed upon the defendants. By that statute it is pro-

vided that, where it shall be proved to the satisfaction of the Commissioners of Stamps and Taxes (now the Commissioners of Inland Revenue) that an executor or administrator has paid debts due and owing from the deceased, and so on, it shall be lawful for the commissioners, and they are thereby required, to return the difference. Now is that a statutable duty imposed upon the commissioners to pay this money, to return the difference? The applicant says that he has proved by proper vouchers that he has paid money in excess of that which he was called upon to pay, and that he now claims the fulfilment and performance of the statutable duty which is cast upon the commissioners to return to him the overpaid difference. In answer to this it is contended, on behalf of the commissioners, that they are under no statutable obligation absolutely to pay this money, but are only required to repay it if they should be satisfied. In my opinion, however, those words must receive the same construction as, if I may say so, they would receive in any ordinary contracts made between private persons; and there is a statutable obligation upon them to pay which they are bound to observe as soon as such evidence by affidavits and vouchers as ought to satisfy any reasonable person has been laid before them. If that is not the true construction of the statute, and the commissioners are not to pay unless they say they are satisfied, it might be that they need never pay at all, and there would be no legal remedy whatever; for they would have the same answer to a petition of right as to a *mandamus*, namely, that they are not satisfied, and so they would avoid payment altogether. If there be a remedy it must be based upon the fact that satisfactory evidence has been given. In my opinion a duty is imposed upon the commissioners by the statute to repay the overpaid probate duty the moment that the fact of such overpayment is proved and shown to them by evidence which ought to be satisfactory to them. From that moment there is a specific right in the claimant to have the money repaid to him, and there is a specific duty on the part of the Commissioners of Inland Revenue to repay it to him. It is a duty that is clearly imposed upon the latter by the statute, not as representing the Crown, but as persons intrusted for the time being with the moneys paid by the applicant, which may be, and if they are overpayments, the commissioners are bound by statute to repay, as being moneys which they have received, and which are under their control, and with the duty of repaying which to the applicant they are under the circumstances charged. In my judgment, therefore, this is not a case in which we are directing a *mandamus* to issue against the Crown, or to the commissioners *quâ* servants of the Crown, but to the commissioners because, though no doubt for the time servants of the Crown, they are nevertheless under a statutable obligation to the applicant which they have failed to discharge. But then it is said that we are not at liberty to direct the issue of a writ of *mandamus* in this case, even if we have jurisdiction and authority to do so, because by the recognised invariable practice of the court, that writ never issues in a case where there is another specific legal remedy. At the moment I felt somewhat pressed by the case of *Reg. v. Powell (ubi sup.)*, cited by the Attorney-General, but Mr. Cookson, I think, well



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distinguished that case, and pointed out, as I think clearly, that the court there refused the writ not on the ground of there being another specific legal remedy, but on the ground that the application was against the Crown itself, being against the Queen as lady of the manor, against whom they could not grant a writ of *mandamus*; but at the same time they pointed out that there are other remedies available, and amongst them a petition of right. I must say, however, that I entertain great doubt whether a petition of right is a *specific legal* remedy, and certainly it is not an absolute legal remedy which the applicant or suitor has under his own control, for it can only issue on the fiat of the officer of the Crown for the time being; and though it is true it is prosecuted in courts of law, it is not what I understand by a legal remedy, for it is an appeal to the justice of the Crown, more or less *ex gratia*, to be dealt with as, upon an inquiry into the suppliant's claim, may seem to be right, rather than an enforcement of a strict legal right. Another objection might, I think, be raised to a petition of right, namely, that if a *mandamus* would go against the Commissioners of Inland Revenue in this case, it would go against them, not *quâ* servants of the Crown and because they are not doing something under the authority of the Crown, but because they are violating a statutable duty imposed on them by the Legislature, as in one sense individuals, and therefore in that point of view a petition of right would not lie against them. It is, it seems to me, essentially a question of discretion for the court whether it will withhold the writ of *mandamus* because there is another specific legal remedy; and, as I am of opinion, if it be necessary to express it, that a petition of right is not a *specific legal* remedy, I think that the writ of *mandamus* should go, and that this rule should therefore be made absolute.

SMITH, J.—In showing cause against the rule *nisi* for a *mandamus* to the defendants, the Commissioners of Inland Revenue, obtained on behalf of the applicant, Mr. Nathan, the Attorney-General, on behalf of the Commissioners, takes in the first place the broad ground that, inasmuch as the commissioners are servants of the Crown and officers of the Crown, therefore a *mandamus* will not lie against them. Now I think that that proposition is too large; at any rate it is too large when applied to the facts of this case. Beyond all doubt, unless there is any statutory duty imposed by statute upon one who is an officer or servant of the Crown, *mandamus* will not go against him, and that is the decision in the case of *Reg. v. The Lords Commissioners of the Treasury* (*ubi sup.*) to which we have been referred. One cannot read that case without seeing how the court there struggled from first to last to find out, in the Appropriation Act and in the other Acts which were referred to in that case, a legal duty upon the Lords Commissioners of the Treasury to make the payment for the costs of the prosecution which had taken place. They were, however, unable to do so, and upon that ground it was that they came, though very reluctantly, to the conclusion that a *mandamus* would not lie. It was conceded in that case by the learned Solicitor-General, Sir George Jessel, that, if there had been a statutory duty imposed upon the Lords Commissioners of the Treasury towards a third

person, the *mandamus* would lie; but he strenuously argued and convinced the court at last, that there was no such legal duty imposed by statute in that case. It seems to me that Sir Frederick Thesiger in his argument in the case of *Reg. v. The Commissioners of Woods and Forests* (*ubi sup.*) well stated what I conceive to be the law in this case. He said that "if a person though holding an office under the Crown, and, if you like, a servant of the Crown, has a statutory duty towards another person, a *mandamus* will lie to compel him to perform that duty." Now, I beg leave to adopt that language on the present occasion. The question, and the only question here, as it seems to me, turns entirely upon the construction to be put upon the 23rd section of the 5 & 6 Vict. c. 79, and it is upon that that the case has been argued. Mr. Cookson insists that that Act creates a statutory legal duty upon the Commissioners of Inland Revenue, upon satisfactory proof being given (which I think means, as my brother Day has said, upon proof which ought to satisfy reasonable men) that over payment has been made, to return the money to the applicants. Upon that ground it is that I think the first point taken by the Attorney-General in this case fails, and that upon the true construction of sect. 23 this duty is imposed upon the Commissioners of Inland Revenue. If we are wrong upon this point, the case can go to an appeal without a return being made, as was done in the case of the Gill Cemetery (*Reg. v. The Burial Board of Bishops Wearmouth*, 5 Q. B. Div. 67), which went to the Court of Appeal from an order made in this court without any return being made; or, if the parties think it better, a return can be made, and upon that return this point can be argued and taken, if necessary, to the highest tribunal in this country. The next point taken by the Attorney-General is a matter of discretion for the court, namely, whether we should or not allow the writ to go. Whether our decision can be questioned as an appeal from this order I express no opinion; but at any rate it cannot be on the return to a *mandamus*, where the only course is to traverse the facts stated in the return, or to demur on the ground of insufficiency; and therefore the question of letting the writ go because there is or is not a specific legal remedy is, it seems to me, decided finally by this judgment. Now I do not think that a petition of right falls within the definition in the cases cited, of a specific legal right or remedy. It seems to me, and indeed it is a well-known matter of history, that, with regard to petitions of right, Bovill's Act did nothing but formulate the course of procedure in petitions of right which had hitherto been in vogue for a long series of years. It gave no new right at all. The petition of right to Her Majesty was simply a petition to the clemency of the Crown, and the Queen, through her Attorney-General, who, if he thought there was a case, granted his fiat in the first instance, said, "Let right be done." It is not a specific right at all which the subject has. He appeals to the clemency of the Crown to be allowed to prove his case, or to satisfy the Crown that a debt is due to him from the Crown, and he is then allowed by the Crown to enter into the courts of law in order that it may be there determined whether the debt which he is petitioning for is owing or not. But it does not seem to me that

this comes within the definition of a legal right or remedy; and what is more, supposing judgment to be given to the applicant on the petition of right, how is he to get execution against the Crown? Of course, as is well known, if, on inquiry, money is found to be due to the applicant, that money is always paid; but, assuming for the moment that it were not paid, I am at present unaware how the applicant would, by any right which is existing in him, obtain the money so found to be due. Here, therefore, where we are called upon to exercise our discretion as to withholding or issuing this *mandamus*, I do not think that the learned counsel for the Crown have brought the case within the definition of a *specific legal right or remedy* by merely saying that the applicant has a right to approach Her Majesty by a petition of right. The Attorney-General very truly stated that in three cases which he cited petitions of right had been allowed. The case of *Perceval's Executors v. The Queen* (*ubi sup.*) was a case upon a very similar statute, though not identically the same as that in the present case, and the section there discussed is on all-fours with sect. 23 of the present statute. In that case no point as to whether a petition of right would or would not lie was taken or raised in argument. The other two cases are not so much in point, and are distinguishable; but in neither of those three cases was the point argued whether a petition of right was or was not the proper way of proceeding. Being therefore of opinion that the applicant has the right under sect. 23 of 5 & 6 Vict. c. 79 to come to this court for a *mandamus*, so as to put the Inland Revenue to a return to that *mandamus*, either by stating matters of law or matters of facts, I concur with my learned brother that the rule must be made absolute.

*Rule absolute for a mandamus.*

*The defendants appealed.*

Jan. 25, 1884.—The Attorney-General (Sir Henry James, Q.C.) and A. V. Dicey, for the defendants, in support of the appeal.—This is not a case in which a *mandamus* can or ought to be granted. In the first place, the commissioners are not bound to return the duty, for it has not been proved to their satisfaction within the meaning of 5 & 6 Vict. c. 79, s. 23, that a debt of the deceased has been paid under such circumstances that the duty ought to be returned. The statute makes the commissioners the sole judges as to this question. Secondly, a *mandamus* will not lie to compel the commissioners to pay over the money claimed, for they are the servants of the Crown, and the money which they have received was received by them as such servants, and was the money of the Crown, and in the ordinary course of their duty the commissioners will have paid over to the Crown the money which they have received, and can have no money in their hands which would be payable to the claimant: (see 29 & 30 Vict. c. 39, s. 10.) In *Re Baron De Bode* (6 Dowl. P. C., at page 792) Coleridge, J. said: "In the second place, in what capacity do the Lords of the Treasury hold this fund? Most clearly, as the mere servants of the Crown. By the exercise of the royal functions the money was first obtained. The present claim has been properly admitted to be beside the parliamentary appropriation of any part of it; and the residue has now reverted to the Crown

and is in the hands of the Crown by its servants. But against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a *mandamus* will not lie. I call this an established rule, and I believe it has never been broken in upon." He then proceeds to comment on and distinguish the case of *Reg. v. The Lords Commissioners of the Treasury* (4 A. & E. 286). The decision in *Reg. v. The Lords Commissioners of the Treasury* (26 L. T. Rep. N. S. 64; L. Rep. 7 Q. B. 387) is also a strong authority that *mandamus* will not lie. There Cockburn, C.J., after expressing a strong opinion against the course adopted by the commissioners, proceeded as follows: "It is another thing, however, whether we have jurisdiction to interfere in such a matter. And it does not follow that because there is no remedy for the county or borough who have paid all the costs as originally taxed except that of applying by petition to the Crown, or by petition to Parliament, it is not because there is no other remedy but that which may be a fruitless and abortive one that this court has jurisdiction to issue a writ of *mandamus*. I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this court cannot claim, even in appearance, to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction:" (L. Rep. 7 Q. B., at page 394.) These authorities show that *mandamus* will not lie in the present case, but even if it can lie, the general rule is that the court will not grant a *mandamus* where there is any other specific legal remedy. This rule is clearly stated by Buller, J. in *Reg. v. The Bishop of Chester* (1 T. R., at page 404): "In ancient cases the grounds on which this court has granted or refused a *mandamus* are not explicitly stated; but during the time Lord Mansfield has presided here he has taken great pains to state particularly the grounds on which this court will either grant or refuse such writs. He has always said this court will not interpose by granting a *mandamus*, unless the party making the application has no other specific legal remedy. It must be a legal and a specific remedy." This means a remedy in due course of law, and in the present case there is such a remedy by petition of right: (*Percival v. The Queen*, 3 H. & C. 217, which was decided on the same section under which the present case arises). The sufficiency of the remedy by petition of right is clearly shown by the following passage: "The King of England cannot be sued in a court of law; but if anyone has a demand upon him in point of property, the plaintiff has only to petition him for redress in his Courts of Chancery or Exchequer, and on having the Attorney-General's fiat, which ought to be given as a matter of course, he will have justice administered to him with as much certainty and despatch as if he had brought an action against a subject. The plaintiff indeed will be told that he receives justice from the King as a matter of grace and not on compulsion, and he must pray for it and accept it on these terms. But while

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the favour he receives is one that cannot be withheld from him, it is to all essential purposes a right." (Allen on the Royal Prerogative, edition of 1840, p. 94.) The remedy by petition of right is more convenient than that by *mandamus*:

23 &amp; 24 Vict. c. 34;

44 &amp; 45 Vict. c. 59, s. 6;

*Thomas v. The Queen*, 31 L. T. Rep. N. S. 438; L. Rep. 10 Q. B. 44.

*Cookson, Q.C. and W. H. Clay* for the respondent.—The court below has exercised a discretion in this case, which ought not to be overruled, and therefore, unless it can be shown that there is no remedy by *mandamus*, the appeal ought to fail. It can never have been intended to make the commissioners the sole and absolute judges of the question whether duty was to be returned or not. "Where it shall be proved to the satisfaction" of the commissioners, in 5 & 6 Vict. c. 79, s. 23, must mean to their reasonable satisfaction:

*Braunstein v. The Accidental Death Insurance Company*, 5 L. T. Rep. N. S. 550; 1 B. & S. 732; 31 L. J. 17, Q. B.

The statute contains the words "it shall be lawful . . . and they are hereby required to return the difference," and where a positive obligation is imposed by statute *mandamus* will lie:

*Reg. v. The Lords Commissioners of the Treasury*, 4 A. & E. 286.

In *Reg. v. The Lords Commissioners of the Treasury; Re Smyth* (4 A. & E. 976) Lord Denman, C.J. said (at p. 981): "There is not the smallest foundation for this motion. The party applying should have shown some words in one of the statutes requiring the Lords of the Treasury to do the particular acts insisted upon. But he has failed to point out any such words;" and at page 983, Patteson, J. said: "There is nothing to show that the Lords Commissioners have not done all that is required of them by statute (3 Geo. 4, c. 113, s. 6): and there is no pretence for calling upon them to make the proposed application to Parliament." These expressions of opinion show that, if the court had thought a statutory duty was imposed, they would have granted a *mandamus*, and the judgments in *Reg. v. The Lords Commissioners of the Treasury; Re Hand* (4 A. & E. 984) are to the same effect. It is clear that if there is no jurisdiction to grant a *mandamus* it cannot be granted by consent, and therefore every case where a *mandamus* to servants of the Crown was in fact granted is an authority for the respondent's contention:

*Reg. v. The Commissioners of Stamps and Taxes; Stracey's case*, 6 Q. B. 657;

*Reg. v. The Commissioners of Stamps and Taxes; case of the Executors of Lord Wallace*, 9 Q. B. 637; 16 L. J. 75, Q. B.;

*Reg. v. The Commissioners of Stamps and Taxes; Ostell's case*, 18 L. J. 201, Q. B.

Lord Denman's dictum in *Reg. v. The Commissioners of Woods and Forests* (15 Q. B., at page 770), and the case of *Reg. v. The Lords Commissioners of the Treasury; Queen Dowager's Annuity* (16 Q. B. 357), are further authorities in favour of the respondent on this point. In order to oust the remedy by *mandamus* it must be shown that there is a legal remedy:

*Reg. v. The Bank of England*, 2 Douglas, 524, per Lord Mansfield, C.J.;

*Reg. v. The Bishop of Chester*, 1 T. B., at page 404, per Buller, J.;

*Reg. v. The Archbishop of Canterbury*, 8 East, 219, per Lord Ellenborough, C.J.;

*Tapping on Mandamus*, 19.

A constitutional remedy, such as petition of right, is not sufficient. The issuing of the Attorney-General's fiat is discretionary, and if it were refused the suppliant would be absolutely without remedy. Bovill's Act (23 & 24 Vict. c. 34) only regulates the procedure, but does not alter the law, and therefore the old decisions still apply. If the commissioners suggest that they have no money which they can pay over, this should be stated in the return to the writ:

*Reg. v. The Commissioners of Woods and Forests*, 17 L. J. 341, Q. B.

*Dicey* in reply.—In *Stracey's case* (6 Q. B. 657) the point, whether *mandamus* would lie or not, was not discussed, and the rule was not made absolute. In *Lord Wallace's case* (9 Q. B. 637) Lord Denman, C.J. expressly said (at p. 643) that the objection that *mandamus* would not lie being waived for the present, the case was not to be a precedent in this respect, and the judgment was for the defendants. In *Ostell's case* (18 L. J. 201, Q. B.) the question was not discussed. In the case of *The Queen Dowager's Annuity* (16 Q. B. 357) the rule was discharged. In none of these cases was there a decision in favour of the present respondent's contention. The strongest ground against it is that the respondent has a remedy by petition of right, and therefore a *mandamus* ought not to be granted. He also referred to

*Perry's Executors v. The Queen*, L. Rep. 4 Ex. 27;

*De Lancey v. The Queen*, 26 L. T. Rep. N. S. 400; L. Rep. 7 Ex. 140.

BRETT, M.R.—In this case money was paid, and was paid rightly, to the Commissioners of Inland Revenue. It is admitted that, by the Act of Parliament, the money was properly paid in the first instance, but it is alleged that, although the money was properly paid, yet, on certain proof being furnished to the commissioners, the claimant is entitled to have a portion of it repaid to him. The commissioners declined to repay it on the ground that they were not satisfied that the claim was made out under the Act of Parliament. The claimant then applied for a *mandamus* to compel the commissioners to repay the money. The Divisional Court made the rule absolute for a *mandamus*, and now an appeal is brought to this court by the Attorney-General. That appeal is supported on several grounds. It is suggested that the commissioners are the sole and absolute judges as to whether they ought to repay the duty or not, and that there is no appeal against their decision, but that they have exercised a jurisdiction which cannot be reviewed. Then it was urged that, as the money was paid to the commissioners as the servants of the Crown and for the Crown, the Divisional Court had no jurisdiction to issue a *mandamus*. It was further urged that, assuming there is jurisdiction to issue a *mandamus*, a governing rule has always been laid down and acted on by the courts, and that this rule governed the discretion of the court and applied to this case, and that a *mandamus* ought not to issue, because, if any right exists, there is another sufficient and reasonable remedy, namely, by petition of right. For the claimant it is said that the writ ought to go, because, it is urged, a duty is imposed by the Act of Parliament to pay

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back the money, and wherever a duty is imposed by statute there must be a remedy to enforce it, and if there is no other legal remedy a *mandamus* ought to issue, and it is contended that no other legal remedy exists in the present case. As to the first point raised, namely, that the sole right of decision is vested in the commissioners, it is urged on behalf of the claimant that the meaning of the statute is that the commissioners must repay the money if the circumstances are such that they ought to be satisfied that it is due. The Divisional Court has decided three points. In the first place, they held that a duty was imposed on the commissioners to repay the money, or at least that *prima facie* there is a duty, so that as to this point a sufficient case is made out for granting a *mandamus*. Secondly, they held that it was a duty towards the claimant, which the claimant was entitled to say he had a right to insist on, and therefore on that ground also they said that a *mandamus* ought to issue. They agreed that, according to the true meaning of the statute, the question was not merely, were the commissioners satisfied, but ought they to be satisfied? Thirdly, as to the governing rule that the court ought not to grant a writ of *mandamus* if any other available remedy exists, they construed it to mean that there ought to be a *mandamus* if there is no other legal remedy, and they said that a petition of right is not such a legal remedy, because it depends on the fiat of the Attorney-General. The question is, can we agree with the view which the Divisional Court has taken? In the first place, their decision is that not only is there a duty to repay the money, but it is a duty towards the claimant. If they mean to say that the statute raises a relation between the commissioners and the claimant by means of which the duty to repay exists, it seems to me to follow that an action on the statute would lie, in which the plaintiff would allege that the statute had laid on the commissioners a duty in his favour, that is, a duty to pay him; but if that were so it is admitted that *mandamus* would not lie. It is admitted therefore that no action lies, because no relation exists between the commissioners and the claimant, which could give a right of action. The duty then must be a duty to someone else, and we must consider to whom. By the Act of 55 Geo. 3, c. 184, the money is to be paid not to the commissioners, but to the Crown. It is paid to the commissioners merely as the servants and agents of the Crown, and they have no right to hold it or deal with it against the orders of the Crown. By the Acts of Parliament the commissioners are directed not to keep the money, but to pay it over daily. By the Act of 55 Geo. 3, c. 184, the money is to be paid to the commissioners as servants of the Crown, and is therefore paid into the hands of the Crown. If this is so, the meaning of the Act which says that the commissioners are to pay back the money (5 & 6 Vict. c. 79, s. 23), is that they are to pay back the money of the Crown which is in the possession of the Crown, and therefore the duty is imposed on them as servants of the Crown, and they have a duty to the Crown, and therefore the right of the claimant, if he has any right, is a right against the Crown, in respect of the money of the Crown, which is in the hand of the Crown, and therefore no action lies. There can be no

action against the commissioners, because the claim is against the Crown, and no action will lie against the Crown, but the only mode of obtaining redress is by petition of right. It seems to follow that if the claimant has any remedy it must be by petition of right. If the true construction of the statute is that the commissioners are the sole judges as to whether the money ought to be repaid or not, then not even a petition of right would lie. It is not necessary to decide whether this startling power is placed in the hands of the servants of the Government, but I myself should be loth to say that there was no remedy. I think no action at law or suit in equity could be brought, because no relation exists which gives any legal or equitable right against the commissioners, and if there is any remedy, that is, if the commissioners are not made the sole judges, I can see no reason why there should not be a petition of right, because the money is in the hands of the Crown and should be paid to the claimant. If a petition of right is brought it will still be open to the Crown, by demurrer or otherwise, to raise the point that the commissioners are the sole judges. Then, assuming that a petition of right could be brought, can we agree with the view taken by the Divisional Court that because no action will lie therefore a *mandamus* ought to issue? Both the learned judges in the court below said that, although a petition of right could be brought, yet because it is not an absolute legal remedy, that is, because it is not known to the common law, and is not commenced by any legal writ, and requires the fiat of the Attorney-General, therefore it is not within the rule which governs the discretion of the courts, and although the Attorney-General may and would grant his fiat, yet a *mandamus* ought to issue. That depends on what the true rule is. It seems to me that it is clearly laid down by Lord Mansfield in *R. v. The Bank of England* (2 Doug. 524), where he says: "When there is no specific remedy the court will grant a *mandamus* that justice may be done." That is equivalent to saying that where there is no specific remedy, and by reason thereof justice cannot be done, the court will grant a *mandamus* to supply the defect. If, then, a petition of right is not a specific remedy, its existence is no answer to an application for a *mandamus*. It is not an absolute legal remedy, and it is not even an absolute legal or equitable remedy. Then is it a specific remedy by which justice will be done? Assuming that there is a valid claim, the only remedy, if *mandamus* does not lie, is by petition of right; then is it within Lord Mansfield's proposition? It is said that it is not, because the fiat of the Attorney-General is required; but the Attorney-General is a high judicial officer, and has duties to perform involving grave responsibility, and we must assume that he would exercise his discretion properly. The known rule of conduct in such cases is, that if there is any reasonable doubt, and the claim is not palpably frivolous, the Attorney-General will grant his fiat, and he has said that he is willing to do so in the present case. Therefore to say that a petition of right is not a specific remedy within the meaning of the rule to which I have referred, because the fiat of the Attorney-General is required, seems to me to be unfounded. It might possibly have been said formerly (I do not say for certain

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that it could) that a petition of right was not a remedy by which justice could be obtained within the meaning of the rule, for there were difficulties in obtaining redress, owing to the cumbrous nature of the procedure. But, after the passing of Sir William Bovill's Act (23 & 24 Vict. c. 34), it seems to me that no one can say that justice cannot be obtained satisfactorily by means of a petition of right. It seems to me to give a more satisfactory remedy than is given by a *mandamus* and the return to it, because many powers exist in proceedings by petition of right which do not exist in proceedings by *mandamus*. If this is true, I think it is a specific remedy within the meaning of the rule laid down by Lord Mansfield in *R. v. The Bank of England* (*ubi sup.*). Then is it within the rule of conduct followed by the courts, or is that rule what Day, J. in the court below stringently laid down, that it is only where there is another absolute legal remedy that *mandamus* will not lie? Or is not the case where a petition of right can be brought as much within the rule as where there is any other remedy? It seems to me that it is, and that the true proposition is that laid down by Lord Mansfield, and is not subject to the restriction imposed upon it by Day, J. I think that, where there is a specific legal remedy, that is, where a remedy can be obtained by judicial decision, the case comes within the reason of the rule, and therefore within the rule, and a *mandamus* ought not to issue. I am of opinion that a petition of right can give satisfaction by judicial decision, and therefore is within the rule, and, where there is a remedy by petition of right, *mandamus* will not lie. For these reasons I do not agree with the judgment of the Divisional Court, but I think that, as a petition of right could be obtained to try the claim, a *mandamus* ought not to be granted, but the proper remedy is by petition of right. The Attorney-General has offered here to treat these proceedings as if they were by petition of right, and I suppose the Attorney-General would still make the same offer, so that, if the respondent were to elect to treat the proceedings as a petition of right, and a special case were stated, a decision could be obtained as to the validity of his claim; but it follows that because he declined the offer before, and insisted on his right to a *mandamus*, therefore he must pay the costs of this appeal. The three cases which have been cited as authorities for the respondent's contention (although it is true that in those cases a *mandamus* did go) have been sufficiently explained, for either the attention of the court was not called to the point, or, where it was called to it, the court gave an opinion because the point had been argued, but did not ground their decision on the point. As to the case of *Rez v. The Lords Commissioners of the Treasury* (4 A. & E. 286), I cannot agree with the decision. It is put on the ground that there was a relation of depositor and depositary between the commissioners and the claimant; that is, that although the money had been paid by the Crown to the officers of the Treasury, yet they had attorned to the claimant so as to hold it for him. If this is correct it shows that an action would lie, and if so of course no *mandamus* ought to issue. I think therefore that the decision in that case cannot be supported on the grounds put by the court; but it is clear that the case can be no authority for the proposition that where such a

relation is not raised a *mandamus* ought to issue. I must say, however, sitting here in the Court of Appeal, that I am of opinion that the decision in the case of *Rez v. The Lords Commissioners of the Treasury* (4 A. & E. 286) cannot be maintained on any ground.

BOWEN, L.J.—I also think the decision of the court below ought to be reversed. The claim is for a return of duty on the ground that the claimant has paid debts out of the personal estate of the deceased so as to entitle him as executor to a return of duty under 5 & 6 Vict. c. 79, s. 3. It comes to this, that the estate of the deceased has money in the hands of the commissioners which they ought to pay over to the executor. The first difficulty in the case arises on the words of the statute, and it is whether the executor is bound by the conclusion at which the commissioners have arrived, or whether he has any remedy if they choose not to be satisfied that he has paid debts as mentioned in the statute. I think this is not by any means an easy point. Many bodies are constituted by statute the sole judges of the questions with which they have to deal, but we must remember that this is not merely a claim to public money, but the executor says that it is his own money, and it is desirable if possible to put such a construction on the statute as would not conclude him in asserting his rights. There may be a mode of reviewing the conclusion at which the commissioners arrive, but I will not decide the point, for it is unnecessary. Assuming then that the claimant is not bound by the decision of the commissioners, what is his remedy? The duty was paid to the commissioners, but was not retained by them. The practice is that it is paid to the Crown, though the statute requires the commissioners to make the return of duty to those who are entitled to it. There are two ways of construing that provision. It may be said that it is the duty of the commissioners to get back the money from the Crown and return it to the claimant, which I think is not an unreasonable construction; or, as Mr. Cookson says, there may be an immediate duty to pay back the money. There are many difficulties as to the construction. If it were said that the commissioners have a duty to pay over the money to the person entitled there is this objection to such a construction, that it would place them at the mercy of a jury, who would have to say how their executive duties ought to be carried out. Then it is said that the commissioners have paid over the money to the Crown, and have no funds in their hands out of which to return this duty. In substance, the duty was paid not to the commissioners but to the Crown, and I doubt whether under any circumstances a *mandamus* would lie. Then is there any other remedy? I think it is clear that there is, by petition of right. The claimant's case is, that he is entitled to money which is in the hands of the Crown, and the constitutional way of getting the return of money which is in the hands of the Crown, and to which a subject is entitled, is by petition of right. If that is the true view, it follows that this appeal must succeed on the ground that a *mandamus* has been issued to the wrong persons; a *mandamus* cannot issue as against the Crown, and the commissioners have no money which they are bound to pay over. Assume that there is a double remedy, that a petition of right can be obtained, and that a duty

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is imposed on the commissioners by statute, ought the *mandamus* to go? What is the origin of the right to *mandamus*? It is a high prerogative writ invented for the purpose of supplying defects in the administration of justice. *Magna Charta* says that the Crown will not deny or delay justice, and if no other means exist of granting justice *mandamus* can be used. But it is a cumbrous and expensive remedy, and therefore from time immemorial the rule has been that where any other remedy existed no *mandamus* should be granted. In such a case it was not for the interest of the party seeking a remedy to grant it, and the reason for granting it ceased. A petition of right is as good a means of getting justice from the Crown as an action is as against a subject. There is no distinction as a means of getting payment of a debt between a petition of right and an action, except this, that the fiat of the Attorney-General is required; but everyone knows that the fiat is granted wherever the shadow of a claim is shown; the duty of the Attorney-General is not to refuse his fiat unless the claim is frivolous. Therefore in the present case, where there is a *bonâ fide* claim, there can be no doubt that it would be as easy to obtain the fiat as it would be to issue a writ in an ordinary action. The truth of this may be seen in two ways. The Attorney-General, when the case was in the court below, said that a petition of right was the proper remedy, and in this court he not merely stated that he would grant his fiat if it were asked for, but he made an offer of favourable terms to the claimant, for he proposed not only to substitute proceedings by petition of right for the more cumbrous proceedings by *mandamus*, but he offered to relieve the claimant from his main difficulty, which is that raised by the question whether the opinion of the commissioners is binding. In my opinion we ought not to issue a *mandamus* when the question can be tried in a manner which is better for the claimant by petition of right. I cannot say that a *mandamus* is wanted in order to supply a defect in the administration of justice; on the contrary, I think it would produce a defect. I hope the Attorney-General will do what the Master of the Rolls has suggested, but in any case I think the costs of this appeal ought to follow the event. I agree with what the Master of the Rolls has said as to the decision in *Rez v. The Lords Commissioners of the Treasury* (4 Ad. & E. 286). *Judgment reversed.*

Solicitors for the prosecutor, *Denton, Hall, and Fox.*

Solicitor for the defendants, *The Solicitor to the Inland Revenue.*

May 8 and 30.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

READ v. ANDERSON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Gaming—Betting—Agent employed to bet in his own name—Implied authority to pay bet—Irrevocability of authority—8 & 9 Vict. c. 109, s. 18. Where a person authorises another to bet for him in the agent's own name, an implied request to*

*pay if the bet be lost is involved in that authority; and the moment the bet is made, and the obligation to pay it if lost incurred, the authority to pay becomes irrevocable in law, and it is immaterial that such obligation is not enforceable by process of law, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent.*

*So held by Bowen and Fry, L.JJ. (affirming judgment of Hawkins, J., reported 48 L. T. Rep. N. S. 74), Brett, M.R. dissenting.*

THIS action was brought to recover 175*l.*, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners thereof.

The plaintiff was a turf commission agent and a member of Tattersall's Subscription Room. The defendant was a licensed victualler at South Shields.

According to well-established usage, known to the defendant, a turf commission agent instructed by an employer to back a horse backs it in his own name, and becomes himself alone responsible to the layer of the odds, or the person with whom the bet is made; and, on the settling day after the event, he receives or pays, as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost.

For some time before the Ascot Meeting 1881 the plaintiff had, according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balances thereof.

On Friday, the 17th June 1881, the defendant telegraphed from South Shields to the plaintiff at Ascot, instructing him to make certain bets for him, including three of 100*l.*, 50*l.*, and 25*l.* on the Wokingham Stakes.

The plaintiff made these three bets as instructed, and none of the horses backed won the Wokingham Stakes. In consequence of not having received a telegram from the plaintiff with reference to these bets until after he had ascertained the result of the race from another source, the defendant, on the evening of the same day, wrote to the plaintiff repudiating the three bets, and all liability in respect of them, and two days later he again wrote inclosing a cheque for the amount of certain other bets, but refusing to pay the 175*l.* Afterwards, on the settling day, the plaintiff paid the three bets in question to the winners of them. Had he not done so he would have been a "defaulter" within the meaning of the 3rd rule of Tattersall's new subscription room; and if upon complaint made to the committee of the room the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it, and by the 50th of the Rules of Racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets, he would, until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the Rules of Racing as to entering and running horses. The consequences of becoming a defaulter would therefore have been very serious to the plaintiff.

The case was tried before Hawkins, J., without a jury, and was reserved for further considera-

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.



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tion. On Nov. 16, 1882, judgment was given for the plaintiff. The facts are stated more in detail in this judgment, which is reported 48 L. T. Rep. N. S. 74; 10 Q. B. Div. 100.

The defendant appealed.

May 8.—*Petheram, Q.C.* and *C. M. Dale*, for the defendant, in support of the appeal.

*Finlay, Q.C.* and *E. A. McCall* for the plaintiff.

The following authorities were referred to in argument:

*Hampden v. Waleh*, 33 L. T. Rep. N. S. 852; 1 Q. B. Div. 189;

*Diggle v. Higgs*, 37 L. T. Rep. N. S. 27; 2 Ex. Div. 422;

*Thacker v. Hardy*, 39 L. T. Rep. N. S. 595; 4 Q. B. Div. 685;

*Rosewarne v. Billing*, 9 L. T. Rep. N. S. 441; 15 C. B. N. S. 316;

8 & 9 Vict. c. 109, s. 18. (a)

*Cur. adv. vult.*

May 30.—The following judgments were delivered:—

BRETT, M.R.—In this case, which was tried before Hawkins, J. without a jury, the plaintiff is a turf commission agent, and he sues the defendant to recover 175*l.*, the amount of three bets made by the plaintiff in his own name at the request of and for the defendant, and paid by the plaintiff to the winners. Now the learned judge has found as to certain questions of fact, and if it is alleged that we are bound by these findings, I must say that I object to being considered bound, for when an appeal is brought from the judgment of a judge who has tried a case without a jury, the Court of Appeal has a right to disagree with the findings as to matters of fact. I think, therefore, we need not act on these findings unless we agree with them. It seems to me, however, that in the present case the transaction is clear on the evidence. The defendant speculates on races, and he hires the plaintiff as a commission agent to bet in his (the plaintiff's) own name, and gives him authority to pay and receive the amount of bets won and lost. That is the contract; it is a contract of principal and agent, not of purchase and sale, and the relation of principal and agent is constituted by the terms on which the parties deal. Those terms are, that the agent is to make bets, and the principal is to pay him commission; that commission is paid for making, not for paying, the bets. Now one ordinary power of a principal (unless he takes away the power from himself) is, that he can always revoke the authority he has given at any time before that authority has been fulfilled. Therefore, unless something can be shown to the contrary, there was power on the part of the defendant to revoke the authority which he had given to the plaintiff to make and pay bets. Here the defendant revoked the authority before the bets were paid, and the plaintiff sues to recover the amount of the bets which he has paid, notwithstanding such revocation. The question is, whether the plaintiff could revoke this authority. There is

nothing express in the contract to take away his power to do so. Then is there anything to be implied which has that effect? Hawkins, J. found, and the evidence proves, that where an agent bets in his own name on behalf of a principal, and does not pay the bets which he loses, he is turned out of the ring, and cannot carry on his business as he has been in the habit of carrying it on before, and suffers loss and inconvenience. The question is, whether in such a case the law will imply an undertaking on the part of the principal that he will not revoke the agent's authority to pay the bets. Where authority is given to an agent to do a thing in his own name on behalf of his principal, under such circumstances that if the authority were withdrawn the agent would be bound in law, there it has been held that the principal is not entitled to revoke the authority which he has given to the agent. But in the present case, suppose the agent had declined to pay the bets which he had made and lost, the winners of those bets could not have enforced payment against him, nor could they have enforced it against the principal. If the bets had been decided the other way, the agent could not have enforced payment against the losers, nor could the principal, for the law will not assist any person to recover money won by betting. But if the contention on behalf of the plaintiff is well founded, the law gives him power to enforce payment, for his contention is, that he is entitled to enforce payment of the amount of these bets from the defendant—that is, to do what the law says shall not be done. That is a strong proposition. It is said on behalf of the plaintiff that otherwise he would suffer personal inconvenience and loss in business. But what is his business? It is true it is not illegal, but it is a business to which the law has an objection, and the law will not allow contracts made in such a business to be enforced. It seems to me that it is a business of which the law should not take notice, and therefore that the law should disregard the inconvenience to which the plaintiff would be put if he did not pay and were turned out of the betting-ring. For these reasons I am strongly of opinion that the exception to the rule that the principal has the power of revocation must be confined to cases where if the principal were to revoke his authority the agent would be left in such a position that the party with whom he had contracted could enforce the contract against him. I therefore entertain a clear opinion that the judgment appealed from is wrong.

BOWEN, L.J.—I am unable to agree with the judgment of the Master of the Rolls. The plaintiff here is a turf commission agent, and has made certain bets on behalf of the defendant, which were lost, and the plaintiff has paid them; he now seeks to recover the amount so paid from the defendant. The bets were made, not in the name of the defendant, but, according to custom, in the plaintiff's own name. The defendant purported to revoke the plaintiff's authority to pay the bets, and denied that he was liable to repay to the plaintiff the amount which the plaintiff had paid to the winners. The question is, whether the defendant had a right, after the plaintiff had incurred liability, to retract the commission. What is the nature of the transaction? It is a contract between principal and agent, and may be

(a) By 8 & 9 Vict. c. 109, s. 18: All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.



looked at from two points of view: first, as to the delegation of authority, the general rule is that, unless he is precluded by his conduct or by the terms of the contract, the principal may revoke the authority which he has given; secondly, what is the bargain? If by the terms of the bargain the plaintiff precludes himself, he cannot revoke the authority, but is bound to indemnify the agent. What was the contract here? That is a pure question of fact. Was it to the effect that the plaintiff was to be at liberty to bet in his own name, but that the defendant was entitled to deny him liberty to pay the bets after they had been lost; or was it that the defendant authorised the plaintiff to make the bets and would indemnify him against losses incurred thereby? Which is the true view? It is an inference of fact. In general, if a principal employs an agent, and involves him in liability, the principal cannot cry off; but this case is somewhat different, for here there is no legal liability on the part of the agent, because payment of a bet cannot be enforced by law. But there was a usage, known to both parties, that a turf commission agent, instructed by an employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds or the person with whom the bet is made. I agree that we could reopen the finding; but I am of opinion that the learned judge, in finding that this custom existed, has found according to the evidence. Therefore the matter stands thus: The defendant in effect says to the plaintiff, "On my behalf, and on the faith of being recouped in the event of loss, assume the position of being liable to pay bets if lost, or of being turned out of the ring." What is the true inference? Did the plaintiff undertake such a liability, and was he not to be remunerated in the event of loss? Who that was not a lunatic would enter into such an agreement? The only inference which I can draw is, that it was a well-understood part of the bargain that if the agent became involved in the difficulty which would result from his losing bets, and paid, the principal would recoup him. I feel the force of the point that the obligation on the part of the agent to pay the amount of the bet is not an obligation recognised by law. But the root of the principal's liability is not the obligation on the part of the agent, but the fact that the agent has placed himself in a difficulty. I therefore draw the inference that it was understood that the defendant was to indemnify the plaintiff. Take the case where a merchant in this country employs an agent abroad to insure for him by foreign honour policies, which could not be sued on in our courts; could the English principal repudiate his liability on such a contract? I can hardly believe that the contract would not be that the principal should guarantee the agent against what the agent was bound to pay in honour and did pay. A difficulty is put, which is, that according to this view it would be in the power of the agent to enforce a payment as against the principal, which the other party, the winner of the bet, could not have enforced as against the agent. But suppose the agent was directed to pay, and has paid; in that case he would recover, not because payment could be compelled, but because he would have altered his condition. It seems to me that, if my view as to the inference of fact to be drawn is right, that is the same as the

present case. It is true that there is a difficulty arising from the fact that the plaintiff's business is wagering, and the law does not sanction such a business. But the law does not make the business illegal; the law only says that a contract made in the course of such a business shall not be enforced. The contract in the present case is not a wager; it is not because the horses which he backed for the defendant lost that the plaintiff sues, but because he was put in the position of having to pay the bets or being liable to be turned out of the ring and to suffer loss and inconvenience. I have had some hesitation in arriving at this conclusion, because the view of the Master of the Rolls is the other way; but I feel that the judgment of Hawkins, J. is right, and am of opinion that the plaintiff is entitled to recover, and this appeal ought to be dismissed.

FRY, L.J.—Although I have felt some doubt in consequence of the opposite view taken by the Master of the Rolls, I have come to the conclusion that I concur with the opinion of Bowen, L.J., and he has so fully and exactly expressed my view, that I confine myself to expressing my concurrence.

*Judgment affirmed.*

Solicitor for plaintiff, *T. B. Apps.*

Solicitors for defendant, *J. and C. Scott*, for *T. T. Dale*, South Shields.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

March 7 and 14.

(Before CHITTY, J.)

ALLHUSEN v. BROOKING. (a)

*Injunction—Agreement for a lease—Subsequent agreement—Vested rights—Saving clause in Act—Shooting hares and rabbits—Ground Game Act 1880 (43 & 44 Vict. c. 47), s. 5.*

*In a case where there was a good equitable agreement for a lease of land in existence before the passing of the Ground Game Act 1880, containing stipulations giving the landlord the exclusive right of shooting over the land and prohibiting the tenant from killing and taking ground game by a gun, which were at variance with the Act: the question came before the court, on a motion for an injunction, whether the saving clause of the Ground Game Act 1880 (sect. 5) was applicable to an agreement for a lease for years made previously to the date of the passing of the Act, but for a term to come into operation after that date (7th Sept. 1880).*

*Held, that the agreement in question was within the saving clause, as the Legislature did not interfere with vested rights without providing compensation: also that sect. 3 of the same Act was not retrospective.*

By an agreement dated the 7th Aug. 1875, the plaintiff agreed to let to one Hales a farm in the county of Buckingham, at a yearly rent of 540l., for a term of three years commencing from the 29th Sept. 1875, and determinable as therein mentioned, and amongst other provisions it was agreed that Hales should preserve all game, and should not use a gun, or allow anyone to sport,

(a) Reported by A. COYSEBARN SM, Esq., Barrister-at-Law.

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without the plaintiff's permission, and that the plaintiff should have the exclusive right of shooting, and that Hales should be allowed to kill rabbits otherwise than by the use of a gun, and that he should not assign, underlet, or part with the possession of the farm, or any part thereof, without the consent of the plaintiff, and the plaintiff thereby reserved to himself, out of that letting, all game (except rabbits, as thereinbefore mentioned), including hares.

Hales was in possession of the farm at the date of the agreement, and continued in possession thereof on the terms of the agreement.

Shortly before the 29th Sept. 1879 Hales gave the plaintiff notice to determine the tenancy on the 29th Sept. 1881, but during the currency of the notice Hales applied to the plaintiff to grant him a lease of the farm for fourteen years, and an agreement, dated the 13th Feb. 1880, was entered into between the plaintiff and Hales. By this agreement it was agreed that the existing contract of the 7th Aug. 1875 should be altered in certain particulars, certain additional land being included, and certain clauses respecting repairs being expunged, and subject to the rent (which was reduced to 500*l.*) being paid quarterly with regularity, the plaintiff thereby agreed to Hales keeping possession of the premises then held by him and agreed to be held under this agreement for a period of fourteen years, to commence on the 29th Sept. 1881.

By an agreement dated the 31st Dec. 1880 Hales, with the plaintiff's consent, transferred the two agreements to the defendant, Mrs. Brooking, who entered into and continued in possession of the farm upon the terms of the agreements. Mrs. Brooking contended that she was not bound by the provisions of the agreement of 7th Aug. 1875 as regarded ground game, and asserted a right to cause the hares and rabbits on the farm to be killed with guns. She had authorised Mr. A. W. Brooking to shoot at and kill hares and rabbits on the farm, and he had on several occasions availed himself of that authorisation. He had also frequently shot and killed pheasants on the farm. The present motion was made on behalf of the plaintiff that the defendant might be restrained from using or authorising any person to use a gun or firearms for the purpose of killing game on the Vicarage farm, and from killing or taking, or authorising or permitting to be killed or taken, hares on the farm, and from killing or authorising or permitting to be killed with guns or firearms rabbits on the farm, and from interfering with the plaintiff's exclusive right of shooting over the farm.

*Merevether*, Q.C. and *B. Eyre* for the applicant.—Our case is covered by the saving clause of the Ground Game Act 1880, which came into operation on the 7th Sept. 1880. That saving clause is embodied in the 5th section of that Act, which enacts that, "Where at the date of the passing of the Act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land." The only question to be decided in this case is, is there anything in the agreement of 13th Feb. 1880 to take it out of the saving clause of the Act?

*Ince*, Q.C. and *Moulton* for the respondent.—It is necessary to investigate the exact position of the parties under the lease, and be able to discover in what manner the Ground Game Act applies to it. It is necessary to determine the exact position of Hales. The agreement of 15th Feb. 1880 is not a contract, of which specific performance could be granted, compelling the tenant to take a lease of fourteen years. It only binds the landlord not to disturb the tenant for that period if the tenant gives no notice to quit and pays the rent. Hales, according to the proper construction of the agreement of 1875, was in the position (subject to the provisos and covenants contained in the lease) of a tenant holding over after the expiration of the term; he was a yearly tenant. If that is so, there can be nothing which can preclude the defendant from the benefits conferred on the occupier by the Act. [*CHITTY*, J.—It was really a tenancy for three years certain, and after that continuable from year to year.] Assuming that the agreement of Feb. 1880 constitutes a valid equitable lease for fourteen years, it is an agreement creating a term subsequent to the date of the Act in contravention of the right of the occupier to destroy game, and therefore void under sect. 3. The intention of the Act is plainly to permit no contract which is future to the date of the Act to take away the protection of the Act from the occupier. This is especially clear from the words in the saving clause "is vested," for it cannot be held that a right to arise under a future agreement not enforceable until a date subsequent to the passing of the Act is a right in existence before the passing of the Act. If the plaintiff succeed in the present case, it will follow that every person who has had the foresight, before the date of the Act, to enter into an agreement with the occupier to grant a lease from time to time renewable reserving the right to shoot ground game will have successfully evaded the Act.

*Merevether*, Q.C., in reply, cited

*Cowen v. Phillips*, 8 L. T. Rep. N. S. 622; 33 Beav. 18;

*Martin v. Smith*, 30 L. T. Rep. N. S. 268; L. Rep. 9 Exch. 50;

*Adams v. Clutterbuck*, 48 L. T. Rep. N. S. 614; 10 Q. B. Div. 406.

*CHITTY*, J.—This case, although on motion only, has been argued at some length, and it appears to me that the only real difficulty arises from the informal character of the documents. As at present advised, I do not find any difficulty in the construction to be put upon the Act of Parliament. The case stands upon two agreements, both of which came into operation before the date of the passing of the Ground Game Act 1880. It is admitted that the defendant, who is the assignee of Hales, is for all purposes in the same position as Hales himself would have been, and no distinction has been attempted to be taken between the position of Hales and his assignee. However, before examining the agreements I will state it as my opinion that, if there had been an agreement for a lease—say, for ten, fourteen, or any other number of years—which was in existence at the date of the passing of the Ground Game Act, and contained such a stipulation as that in the agreement of 1875, I should entertain no doubt whatever that the court, in decreeing specific performance of the agreement after the

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Act was passed, and clothing that which was a mere equitable right with the legal title, would direct the lease to be so drawn as to embody the stipulation. I think this is the only fair construction to be put upon the saving clause. The Act commences by conferring the right at once on the occupier to kill and take the ground game, and then sect. 3 contains a provision which renders void every agreement purporting to "divert or alienate" the occupier's right. Now, *prima facie*, sect. 3 would be prospective only, for, by the general rules of the construction of statutes, an enactment is not to be interpreted as conferring new rights unless express words to such an effect are found in the enactment. Therefore, sect. 3 is by itself quite sufficient to cover a case like the present. But the case does not stand there, for the Act goes further, and contains, in sect. 5, an express saving clause, and it is on this section that the question remains to be decided. [His Lordship read the section and continued:] In my opinion, in the case I have assumed, namely, of there being a good equitable agreement for a lease existing at the date of the Act, and the tenant being in possession under it, and there being a reservation of the ground game to the landlord, and some reservation in favour of the landlord in relation to the ground game, sect. 5 would have applied, and the landlord's right to kill, which would have been vested equitably if not legally in the landlord, would have been preserved to him and protected by sect. 5. [After commenting on the language of the agreement, his Lordship continued as follows:] The position of the parties at the date of the agreement of Feb. 1880 was, that there was a legal reversion in the landlord in respect of the tenancy then current, which would not expire until the 29th Sept. 1881; but in addition to that there was vested in him the reversion on the equitable lease commencing from the expiration of the legal tenancy. In regard to the operation of the equitable lease, the Court of Appeal has expressed its judgment in *Walsh v. Lonsdale* (46 L. T. Rep. N. S. 858; 21 Ch. Div. 9). Referring to the changes effected by the Judicature Acts, Jessel, M.R. says: "There is an agreement for a lease under which possession has been given. Now, since the Judicature Acts, the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted." That being so, ought I, for the purpose of applying sect. 5, to split the landlord's right in this case into two parts, and say that the right to kill ground game was reserved to him legally in respect of his reversion to the tenancy which was then current being a legal tenancy, and that he has split that from the equitable reversion which he had in respect of the agreement to grant the fourteen years' lease? And having split it, ought I then to say that sect. 5, which speaks of the right to kill being "vested"—the language being, "where at the date of the passing of this Act the right to kill and take ground game on any land is vested"—does not apply to this case so far as relates to the

reversion which was vested in him on the equitable lease? It appears to me that the words "is vested" include the landlord's rights in the present case. "Is vested" does not mean merely vested in possession, or else that would have been the language of the section. Any right of possession depending upon an equitable title is comprised by the words used. To take the language of the Act, I would say that at the time of the passing of the Act the right to kill and take ground game was equitably vested by a lease, and it is immaterial whether the lease was legal or equitable. But, assuming for the moment that the term "lease," as used in sect. 5, means legal lease, it is nevertheless clear that an equitable lease is within the larger words which follow; namely, "contract of tenancy or other contract *bonâ fide* made for valuable consideration in some person other than the occupier." It appears to me that the saving clause does apply to the present case, and that the tenant is not entitled to kill the game contrary to the stipulations contained in the agreements. To come to a different conclusion would be not only straining the language of the Act, but also infringing the principle that the Legislature does not interfere with and take away vested rights without providing adequate compensation. In the present case the reservation of the game was piece and parcel of the whole consideration in the agreement, and was to be regarded as the payment of rent, or as any other stipulation between the parties. The object of the Act was to prevent contracts being made contrary to the terms of the Act, which in the future vested the inalienable right to kill the ground game in the occupier. The case, however, which I am dealing with is not a case future to the date of the passing of the Act, but one in which there was a present right existing before that date, and vested in the landlord at that time by an agreement *bonâ fide* made for valuable consideration. The plaintiff is entitled to the injunction as prayed.

Solicitors for the applicant, *G. L. P. Eyre and Co.*, for Long, Durnford, and Lovegrove, Windsor.

Solicitors for the respondent, *Drake, Son, and Parton*.

Tuesday, May 27.

(Before NORTH, J.)

LEWIN v. JONES. (a)

*Foreclosure action—Disclaimer by one defendant—Notice of motion for foreclosure—Costs of defendant's appearance.*

*A first mortgagee brought an action for foreclosure against the mortgagor and a number of subsequent incumbrancers of whom G. was one. G. put in a defence disclaiming all interest and consenting to be dismissed without costs. It was admitted that G. had had an interest, and was properly made a party to the action. The plaintiff, instead of obtaining the common order to dismiss, served G. with notice of motion for judgment for a foreclosure decree against him. G. appeared at the hearing. Held, that it was unnecessary for him to appear, and he was not entitled to his costs.*

*Clarke v. Tolman* (27 L. T. Rep. N. S. 599; 42 L. J. 23, Ch.) followed.

THIS was an action by a first mortgagee against

(a) Reported by J. R. BROOKS, Esq., Barrister-at-Law.

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the mortgagor and several subsequent incumbancers. At the trial none of the defendants appeared except Wilton and Giffard, two subsequent mortgagees, who had both disclaimed and appeared to ask for their costs subsequent to disclaimer.

Wilton had disclaimed by a letter, upon the construction of which the judge held that it was only an offer to have the action dismissed against him with costs, and that he was therefore not entitled to his costs.

Giffard had put in a formal disclaimer by way of statement of defence, and thereupon the plaintiff served him with a notice of motion at the hearing, for the ordinary foreclosure decree against him.

*F. A. Lewin* for the plaintiff.—The rule is clearly laid down in

*Ford v. Earl of Chesterfield*, 20 L. T. Rep. N. S. 288; 16 Beav. 520; and

*Clarke v. Tolman*, 27 L. T. Rep. N. S. 579; 42 L. J. 28, Ch.

The disclaiming defendant is not entitled to any costs subsequent to the disclaimer, except what may be caused by the plaintiff's retaining him unnecessarily or for his own purposes. Here no costs have been occasioned, for the defendant need not have appeared. In *Greene v. Foster* (48 L. T. Rep. N. S. 411; 22 Ch. Div. 566) there was a contest between the plaintiff and the disclaiming defendant which was decided in favour of the latter. In *Davies v. Whitmore* (28 B. 717) Lord Romilly ordered the plaintiff to pay the subsequent costs, because he thought it was there unnecessary to carry the case to a hearing, but in *Clarke v. Tolman* (*ubi sup.*) he expressly stated that he never followed that decision.

*Williamson* for the defendant Wilton.

*Heath* for the defendant Giffard.—This defendant has been served with notice of motion at the hearing, and brought here for the plaintiff's convenience instead of being dismissed at once; he is therefore entitled to his costs:

*Day v. Gudgen*, 2 Ch. Div. 209;

*Greene v. Foster* (*ubi sup.*);

*Seton*, p. 1064.

He was compelled to appear, because at the hearing some further order might have been made against him.

*F. A. Lewin* in reply.

*NORTH, J.*—The case of *Clarke v. Tolman* (*ubi sup.*) appears to me to be the nearest authority to this case, and I must follow it. Here the defendant had an interest, and it is admitted that he was properly made a party to the suit, but he disclaimed all interest by his statement of defence. The plaintiff did not adopt the course of taking the common order to dismiss the action as against him, but served him with notice of motion for the ordinary foreclosure decree, which would have the effect of getting rid of this defendant's interest. That seems to come exactly within the case of *Clarke v. Tolman* (*ubi sup.*), where Lord Romilly says: "The plaintiff was entitled to a decree against all subsequent incumbancers without paying them any costs. The defendant need not have appeared." So here there was no reason for this defendant to appear, and if he chose to do so he must bear the costs. It is suggested that some other order might have been made against him, but I do not think that any such order could

have been asked for, certainly none would have been made in his absence, so it was not necessary for him to appear to defend his interest. With regard to the later cases they do not appear to govern the present one. In *Day v. Gudgen* (*ubi sup.*) the defendant had no interest, and Hall, V.C. said: "The plaintiff's contention has been that this defendant had in the property which he now seeks to perfect his title by foreclosure, an interest which he could only get rid of either by a disclaimer or a conveyance, . . . and as according to the plaintiff's view it was necessary to make this defendant a party to the suit he must be paid the costs of it." *Greene v. Foster* was a different case; there the plaintiff retained the disclaiming defendant until the hearing for a different purpose altogether, to get into his possession certain deeds to which he claimed to be entitled, and the point for the decision of which he retained the disclaiming defendant was decided against him. Of course he had to pay the costs.

Solicitor for the plaintiffs, *Joseph Fox*.

Solicitors for defendant Giffard, *Phelps, Sidgwick, and Biddle*.

Solicitors for defendant Wilton, *Woulfe and Son*.

Saturday, Feb. 2.

(Before PEARSON, J.)

ESSERY v. COWLAND. (a)

*Marriage settlement—Setting aside marriage settlement—Failure of consideration.*

*By a settlement executed in England: April 1877, in consideration of an intended marriage between F. and J., a sum of consols belonging to the latter was settled upon her, her intended husband, and the issue of the marriage, in the usual way, with the usual remainders in her favour in default of issue; but there was no provision that, in the event of the marriage not taking place within a certain period, the deed should be void.*

*The settlement contained the usual trust for her, as settlor, absolutely until the marriage, and also the usual covenant for the settlement of property to be acquired during the coverture. The marriage was never solemnised, but the parties went together to South Africa, and cohabited in Natal, where they had three children.*

*Held, in an action by F. and J. against the trustees of the settlement, that the consideration for the original contract had failed, and the contract being therefore definitively and absolutely at an end, J. was absolutely entitled to the fund.*

*By a settlement made on the 28th April 1877, in contemplation of a marriage between F. Thorne and Jane Essery, it was, in consideration of such marriage, declared that a sum of consols belonging to the intended wife, which she had transferred into the names of two persons named in the settlement as trustees, should be held by such trustees upon the usual trusts; i.e., upon trust for her until the marriage, and after the solemnisation thereof upon trust for her for her life for her separate use without power of anticipation, and after her death for the intended husband for his life, and after the death of the survivor for the issue of the then intended marriage, as therein mentioned, with remainder, in default of issue, "in case the said Jane Essery should survive her*

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then intended coverture, in trust for her, her executors, administrators, and assigns, but if she should die during her then intended coverture, upon such trusts as she should by will appoint, and, subject to such appointment, in trust for her next of kin according to the Statute of Distributions, as if she had died intestate, and without having been married."

There was also the usual covenant for the settlement of any property not included in the deed, to which the intended wife or the husband in her right should, at the time of the marriage, or at any time during the coverture, be or become entitled. There was no provision that in the event of the marriage not taking place within a certain period the deed should be void.

The settlement was duly executed, but the marriage was never solemnised. The intended husband and wife, however, cohabited, and in course of time went to live in Natal. Three children were born to them, all of whom were living.

In the course of 1883 the present action was commenced by Jane Essery and F. Thorne against the trustees, claiming a declaration that the plaintiff, Jane Essery, was entitled to the consols and the future income thereof, and all other (if any) the property comprised in or subject to or under the covenant for the settlement of after-acquired property or otherwise to become subject to the settlement, either under the first trust therein contained or by reason of the failure of the consideration for the execution of the deed or otherwise, and that the defendants might be ordered to transfer and pay the consols and the income thereof, less costs, to the plaintiff, Jane Essery.

The statement of claim alleged that soon after the date of the settlement the agreement for the marriage was rescinded and abandoned by the intended husband, and that there was no subsisting agreement between the plaintiffs to intermarry with each other.

There was no statement of defence. The plaintiffs now moved for judgment.

*Everitt, Q.C.* and *Solomon* for the plaintiffs.—The consideration has failed, and the court can break the settlement. [PEARSON, J.—If the plaintiffs married now the settlement would be binding: *Bill v. Cureton*, 2 My. & K. 503.] That was really a voluntary settlement, not having been made in contemplation of a particular marriage. They referred to

*Thomas v. Brennan*, 15 L. J. N. S. 420, Ch.;

*Page v. Horne*, 11 Beav. 227;

*M'Donnell v. Henlidge*, 16 Beav. 346.

*Morsehead* for the defendants.

PEARSON, J.—I think that on this occasion the contract was entered into in respect of the marriage which was then contemplated, and that the settlement was intended to provide for the benefit of the husband and wife and the issue of that marriage. Under it all the issue of that marriage would have been entitled. Unfortunately, instead of marrying, the parties have lived together as husband and wife without marrying, and there have been illegitimate children born. The consequence is, that if they were to marry now, and this deed were to be taken as their marriage settlement, their intention to provide for all their issue would be defeated. Under the circumstances, I think that the contract to marry has

been definitively and absolutely put an end to. I am therefore at liberty to hold that the trusts are at an end, and that the plaintiffs are entitled to the relief which they claim.

Minute of order:—Declare that the settlement was executed in contemplation of the intended marriage, that the contract for marriage has been rescinded, and that the trusts declared by the settlement after the solemnisation of the then intended marriage have become inoperative. Costs of plaintiffs, and costs, charges, and expenses of trustees, as between solicitor and client, to be taxed and paid out of the fund. Balance to be paid or transferred to the female plaintiff.

Solicitor for plaintiffs, *W. F. Tarn*.

Solicitors for the defendants, *Cowland and Chowne*.

Friday, Feb. 22.

(Before PEARSON, J.)

TOTTENHAM v. SWANSEA ZINC ORE COMPANY LIMITED. (a)

*Company—Winding-up—Receiver—Official liquidator—Debenture-holders—Debenture trust deed.*

*Where a company is being wound-up, the principle of the court is, not to sanction the continuance both of a receiver and a liquidator unless it is absolutely necessary, the latter being, except in special cases, the proper and sufficient officer of the court.*

*Where a company has mortgaged property to trustees for debenture-holders by a deed as to which it is possible that questions may arise with regard to its nature and extent, the court will not, the company being in course of winding-up and a liquidator having been appointed, consider it necessary or expedient to continue a receiver who has been appointed in an action to enforce the deed.*

*A company mortgaged property to trustees to secure mortgage debentures. On the 13th Sept. the trustees commenced an action against the company to carry the deed into execution, and for a receiver. On the 19th Sept. a receiver was appointed. On the 11th Sept. a petition for the compulsory winding-up of the company had been presented, and on the 10th Nov. a winding-up order was made, a liquidator being appointed shortly afterwards. It appeared that questions might arise as to the scope of the trust deed. The liquidator moved that the receiver might be discharged, and that he might be appointed in his stead.*

*Held, that the application must be granted, on the principle above stated, inasmuch as the questions which might arise as to what was receivable by the receiver and what by the liquidator would cause expense and difficulty.*

*This was a motion on behalf of the official liquidator of the above company that C. Barnett, who, on the 19th Sept. 1883, had been appointed receiver in the action, might be discharged, and that, if necessary, the applicant might be appointed in his place.*

*The action was commenced on the 13th Sept. 1883 by the trustees of an indenture of the 7th July 1883, claiming that the trusts of that indenture (which was a trust deed for securing certain*

mortgage debentures issued by the company) might be carried into execution under the direction of the court, and that the property therein included might be sold, discharged from certain mortgages, and that the net proceeds might be applied in payment of the debentures.

Before the commencement of the action, that is to say, on the 11th Sept. 1883, a petition was presented for the compulsory winding-up of the company, and on the 10th Nov. a winding-up order was made. The official liquidator was appointed before the end of the month.

It appeared that there might possibly be some difficulty in ascertaining the nature and extent of the property comprised in the indenture of July 1883.

The notice of the present motion was given on the 15th Jan. 1884.

*Higgins, Q.C. and Levett* for the liquidator.—There is no use having a receiver as well as a liquidator. On the contrary it will only cause difficulty, as they will not be able to agree as to what is payable to them; it will also cause expense. It is like having two receivers. The appointment of the liquidator dates back to the commencement of the winding-up, i.e., 11th Sept. They referred to

*Perry v. Oriental Hotels Company*, 23 L. T. Rep. N. S. 525; L. Rep. 5 Ch. 420;

*Campbell v. Compagnie Générale de Bellegarde*, 34 L. T. Rep. N. S. 54; 2 Ch. Div. 182.

*Cookson, Q.C. and Theobald* for the trustees for debenture-holders.—We do not ask the court to appoint a receiver, but only to continue the receiver already appointed, who is an officer of the court. A liquidator cannot have authority paramount to mortgagees. There would be no additional expense, for the receiver is by this time familiar with the facts. They referred to

*Waterhouse v. Jamieson*, L. Rep. 2 H. of L. Sc. 29.

*Higgins, Q.C.*, in reply, was stopped by the Court.

PEARSON, J.—The question I have to decide is whether I am to discharge or to continue a receiver, appointed on the 19th Sept. 1883 in an action to carry into effect the trusts of a deed for securing certain mortgage debentures, which includes nearly the whole property of the company. It appears that there may be some question as to how much of such property is included in the deed. It appears also that before the commencement of the action a petition was presented for winding-up the company, upon which a compulsory winding-up order was afterwards made, and a liquidator appointed. The present application is to displace the receiver of the deed, and substitute the official liquidator, and the question I have to consider is, whether I ought to do this, or, on the other hand, to sanction the continuance both of the receiver under the deed and the liquidator appointed on the petition. Now, I am of opinion that on principle there ought to be only one receiver, and that such receiver, in a case like the present, ought to be the liquidator. In the case of *Perry v. Oriental Hotels Company*, before Giffard, L.J., there was a mortgage over only a part of the property of the company, the amount being undisputed. A liquidator had been appointed, the company having been ordered to be wound-up under supervision; but Stuart, V.C. had nevertheless appointed, as receiver

of the property comprised in the mortgage, a person nominated by the equitable mortgagee. The Court of Appeal, however, displaced him, and appointed the liquidator to be receiver in his place, on the ground that the appointment of a receiver in addition to the liquidator would cause great and unnecessary expense. That case is an *à fortiori* authority in favour of the opinion which I have expressed, as it would have been simple to appoint the receiver over that part of the property which was included in the deed, leaving the liquidator to deal with the remainder. That, however, could not possibly be done here. There might, and probably would, be disputes between the receiver and the liquidator as to what property is included in and what excluded from the deed. Under these circumstances, I think that the court ought to keep control by appointing the liquidator to be receiver under the deed, directing him to keep separate accounts. It is not a matter relating to the outside creditors, but one concerning the internal arrangements of the company itself in the winding-up. I think, therefore, that the principle of *Perry v. The Oriental Hotels Company* and *Campbell v. Compagnie Générale de Bellegarde* ought to apply. This will, as has been pointed out to me, save expense in relation to the numerous applications to chambers which there will be, and otherwise, by allowing the appointment of only one person, so that all questions may be decided without difficulty. I shall therefore grant this application, and appoint the liquidator to be receiver under the deed, separate accounts to be kept by him as to what is and what is not disputed. Application may be made in chambers for increase of the security. The costs of the receiver to be provided for on his discharge, and the costs of Mr. Cookson's clients to be costs in the winding-up.

*Application granted.*

Solicitors for applicant, *Newman, Stretton, and Hilliard*.

Solicitors for respondent, *Ingle, Cooper, and Holmes*.

## QUEEN'S BENCH DIVISION

*Monday, March 10.*

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

THE MERSEY DOCKS AND HARBOUR BOARD v.  
THE OVERSEERS OF LLANEILIAN. (a)

*Poor-rate—Lighthouse—Rateability of—Not under control of general lighthouse authority—Part of tower used as telegraph station—"Beneficial occupation"—Adjoining buildings—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 430.*

*The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llaneilian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305L., and rateable value of 244L.*

*The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues*

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on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that with the other receipts of the appellants applicable to conservancy purposes they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property.

The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, which contained the flash-light with clock-work for regulating the flashes, and also a room used for working a telegraph wire which was one of the connections of the wire from Birkenhead to Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house adjoining the tower and the other premises were occupied by the light-keepers as servants of the appellants.

The tower of the lighthouse had no occupation value except as a lighthouse and as a telegraph station.

The appellants contended that it was not rateable, on the ground that it was exempted by the 430th section of the Merchant Shipping Act 1854, and that it was not and could not be the subject of any beneficial occupation, and they contended that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.

The respondents contended that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

Held, that the tower was incapable of profitable occupation as a lighthouse, but it being also used as a telegraph station, it was in that respect capable of a beneficial occupation, and therefore rateable, and that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connection with the tower, the assessment made on that footing was correct.

Held, also, that the 430th section of the Merchant Shipping Act did not apply, and was applicable only to lighthouses under the control of general lighthouse authorities.

CASE stated under 12 & 13 Vict. c. 45, s. 11, the material part of which is as follows:—

1. In Aug. 1879 the respondents made a supplemental valuation list of rateable hereditaments in the parish of Llaneilian, in the county of Anglesey, and therein assessed the appellants in respect of a lighthouse, telegraph station, houses, buildings, and land, at Point Lynas, at the gross estimated value of 305*l.*, and a rateable value of 244*l.* The assessment committee of the Anglesey Union confirmed the assessment.

2. On the 19th May 1882 the respondents made a poor rate for the said parish, in accordance with the said supplemental valuation list. The appellants gave notice of appeal to the quarter sessions for the county of Anglesey against the rate, whereupon this case was stated by the consent of the parties and by order of one of the judges of the Queen's Bench Division.

3 and 4. Prior to the year 1857, the docks at Liverpool were vested in the corporation, under

the name of the Trustees of the Liverpool Docks, who were empowered to levy certain dues on vessels entering the port of Liverpool, and amongst others, certain harbour and light dues. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and amongst other matters the property powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy dues as aforesaid, were transferred to the appellants, who are now regulated by the said Act of 1857; the Mersey Dock Acts Consolidation Act 1858; the Mersey Docks (Ferry Accommodation) Act 1860; the Mersey Docks (Various Powers) Act 1867; the Mersey Docks (Liverpool River Approaches) Act 1871; the Mersey Docks Act 1874, and other statutes.

5. By sect. 54 of the said Act of 1857:

The following account shall be kept separately, and shall be dealt with as distinct sources of income and expenditure (that is to say):

(1.) An account of all sums received and disbursed by the board in respect of the following matters, and hereinafter called "conservancy receipts" and "conservancy expenditure;" that is to say, in respect of the maintenance of buoys, landmarks and telegraphs, the expense of lights and lifeboats, the expense of the marine surveyor, the expenses to be incurred as hereinafter mentioned, with the consent of the Commissioners for the Conservancy of the River Mersey, in improving of the port of Liverpool, or the navigation of the river Mersey, the expenses to be incurred in the exercise of the jurisdiction hitherto vested in the corporation of appointing a water bailiff and removing sunken vessels and other impediments to the navigation.

(2.) An account of all sums received and disbursed by the board in the exercise of the powers hitherto vested in the Liverpool Pilotage Commissioners, hereinafter called "pilotage receipts" and "pilotage expenditure."

(3.) An account of all other sums received and disbursed by the board in pursuance of this Act, and hereinafter called "general receipts" and "general expenditure."

By sect. 55 of the same Act:

The board may, with the consent of the Conservancy Commissioners, apply any portion of their general receipts, after providing for the expenses and charges incidental to the Mersey Dock estate, in improving the port of Liverpool or the navigation of the river Mersey; they may also increase or diminish and again increase any rates or dues leviable by them in pursuance of this Act, either generally or in respect of any particular articles.

And by sect. 56 of the same Act:

The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):

(1.) The conservancy expenditure shall be defrayed out of the conservancy receipts.

(2.) The pilotage expenditure shall be defrayed out of the pilotage receipts.

(3.) No portion of the conservancy receipt or pilotage receipts shall be applied in aid of the general expenditure.

(4.) No sums shall be payable in respect of docks by any vessel that does not use the same.

(5.) Save as by this Act provided no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes.

6. Certain lighthouses, lightships, buoys, beacons, landmarks, seamarks, and lifeboats, and lifeboat-houses became vested in the appellants on their incorporation. By sect. 104 of the said Act of 1858, the appellants were empowered to purchase land in convenient situations for the erection of lighthouses, and by sect. 156 of the same Act



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they were empowered to establish and to alter or remove floating lightships in or near the sea channels within or near the port of Liverpool, subject as to the erection or removal of light-houses, and the placing or removal of lightships, to the sanction of the Trinity House. Under the said Acts, and the Merchant Shipping Act 1854, s. 394, the appellants may not discontinue any of their lighthouses without the sanction of the Trinity House.

10. By sect. 238 of the said Act of 1858, certain rates called harbour rates, specified in schedule D. to that Act, were made payable to the appellants in respect of all vessels coming into or going out of the port of Liverpool, and not entering into the docks, according to their tonnage, burthens, and to their respective voyages. By sect. 3 of the Mersey Docks Act 1874 the harbour rates set forth in the schedule to that Act were substituted from and after 1st Oct. 1874 for the said rates in schedule D. to the Act of 1858, and it was provided that the appellants might when and as they should deem it expedient so to do from time to time lower and again advance these rates, but so that the same should never exceed the amounts mentioned in the schedule to that Act, and so that the same when so lowered or advanced should not be with the other receipts of the board applicable to conservancy account higher than was necessary for the purposes of conservancy expenditure. The harbour rates actually levied have been about one half of those mentioned in the said schedule.

11. By sect. 230 of the said Act of 1858, certain dock tonnage rates shown in schedule B. to that Act were made payable to the appellants on all vessels entering into or leaving the docks, according to their tonnage, burthens, and according to their respective voyages. These rates included dock dues, lighthouse dues, and floating-light dues, as shown in the said schedule. By sect. 270 of that Act the appellants were empowered from time to time to lower all or any of the rates mentioned in the said schedule B., and again to advance them. The lighthouse dues and floating-light dues included in the dock tonnage rates were kept separate from the dock dues and were carried to conservancy account and applied for conservancy purposes, but by sect. 5 of the said Act of 1874 it was provided that they should no longer be so dealt with, and should be deemed part of the receipts applicable to the general expenditure.

12. By sect. 6 of the said Act of 1874:

From and after the passing of this Act, all sums received by the board in respect of harbour rates and the conservancy portion of the dock tonnage rates, whether under the Act of 1858 or under this Act, and all sums disbursed by the board in respect of conservancy expenditure as defined by sect. 54, sub-sect. 1 of the Act of 1857, shall be deemed to be conservancy receipts or conservancy expenditure as the case may be, and shall be accordingly thenceforward included in the separate account of conservancy receipts and conservancy expenditure which by that section the board are required to keep, and such account shall be called the conservancy account.

14. All the accounts of the appellants are annually audited by a special auditor appointed for the purpose by the Board of Trade under sect. 8 of the Mersey Docks Act 1867.

15. With the consent of the special auditor a sum of 500*l.* is annually debited to the conser-

vancy account in respect of a portion of certain general expenses of the appellants, which the appellants allege are partly incurred on conservancy account, such as the salaries and office expenses of the general secretary, treasurer, accountant, solicitor, and auditor, and their clerks. There is no permanent debt incurred on conservancy account, though the account is occasionally in arrear owing to larger expenses than usual being incurred in the erection of lighthouses and the undertaking of other structural works. On the 1st July 1881 there remained in hand a surplus of conservancy receipts over conservancy expenditure, amounting to 22,875*l.* The conservancy expenditure for the year preceding was 26,294*l.*, and the receipts 44,430*l.* (including a balance of 5782*l.* carried forward on 1st July 1880). The surplus or deficit on the account in any year is carried forward to the same account in the year following.

16. The lighthouse at Point Lynas, on the north coast of the island of Anglesey, in respect of which the appellants have been assessed as aforesaid, is one of the lighthouses which were maintained by the trustees of the Liverpool Docks and the lease of which for a term of twenty-one years expiring in 1863 became vested in the appellants on their incorporation as aforesaid. The appellants have always since worked and maintained the lighthouse for the convenience and safety of ships frequenting the port of Liverpool, but the light is also of use to other vessels navigating the eastern ports of the Irish Channel.

17. Prior to 1872 poor rates were paid in respect of the lighthouse and lightkeeper's house upon an assessment of 12*l.*, and from 1872 to 1877 (when the present dispute first arose) upon an assessment of 20*l.*, and from 1877 to 1879 upon an assessment of 50*l.* net rateable value. None of the private Acts by which the appellants are regulated contain any express provision exempting the lighthouse or the other assessed premises from the payment of poor rates.

18. Between Nov. 1877 and Aug. 1879 the appellants purchased the freehold of the site of the said lighthouse and of some adjoining land, together about sixteen acres, at a cost of about 3000*l.*, and they spent a sum of about 5600*l.* in structural improvements of the lighthouse in constructing new lighting apparatus, and in erecting two four-roomed houses for the lightkeepers, and a stable. The two houses are in an exposed situation, and partly on that account and partly with a view to making a handsome group of buildings they were built more substantially and expensively than ordinary dwelling-houses with similar accommodation usually are. The said houses, stable, and land, if not used in connection with the lighthouse, might be let by the appellants to other tenants at a rent.

19. The lighthouse consists of a tower and a dwelling-house adjoining. In the tower is the light-room, which contains the flash-light, with clockwork for regulating the flashes, all fitted on cast-iron columns, and on a circular cast-iron base for the light attached to the freehold, and also a room used for working a telegraph wire, which is one of the connections of the wire from Birkenhead to the south stack, Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants, as men-

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tioned in paragraph 8. The said room is one of the telegraph stations of the appellants within the meaning of the agreement referred to in paragraph 8, and the telegraph wire therefrom is worked by them as mentioned in paragraphs 7 and 8. The dwelling-house adjoining the tower and the other premises are occupied by the light-keepers as servants of the appellants.

21. The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station, and the appellants under the present circumstances are the only persons to whom it is of value for those purposes. The appellants contend that it is not rateable on the grounds that it is exempted by the 430th section of the Merchant Shipping Act 1854, and that it is not and cannot be the subject of any beneficial occupation, and they contend that the premises other than the said tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.

22. The respondents contend that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

23. If this court shall be of opinion that the appellants are rateable in respect of the tower and the other premises as used at present for and in connection with the light and telegraph, the present assessment of the appellants' premises is to stand. If in respect of the tower as a telegraph station only, and not as a lighthouse, and the other premises at their value as now used and occupied, the gross estimated rental is to be reduced to 95l., and the rateable value to 76l. But if the appellants are rateable in respect only of the premises other than the tower upon their value supposing they were not used for the light or telegraph but were disconnected therefrom, then the gross estimated rental is to be reduced to 45l., and the rateable value to 40l.

*Carver (Bigham, Q.C. with him) for the appellants.*—The lighthouse belongs to the appellants in their capacity of harbour authority, and it is not capable of a profitable occupation; they are expressly restricted by statute from making any profit. In *Reg. v. The Metropolitan Board of Works* (19 L. T. Rep. N. S. 348; L. Rep. 4 Q. B. 15) it was held that the sewers were not rateable to the poor rate, on the ground that they were not the subject of a beneficial occupation; and that case was followed in *The Metropolitan Board of Works v. The Overseers of West Ham* (L. Rep. 6 Q. B. 193). The tower of the lighthouse is incapable of having a beneficial occupation, even if the adjoining buildings are. It is submitted that the lighthouse is exempt from rates by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 430. (a)

(a) 17 & 18 Vict. c. 104, s. 430: All lighthouses, buoys, beacons, and light dues, and all other rates, fees, or payments accruing to or forming part of the said fund, and all premises or property belonging to or occupied by any of the said general lighthouse authorities, or the Board of Trade, which are used or applied for the purposes of any of the services for which such dues, rates, fees, and payments are received, and all instruments or writings used by or under the direction of any of the said general lighthouse authorities, or the Board of Trade, in carrying on the said services, shall be exempted from all public, parochial, and local taxes, duties, and rates of every kind.

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The following cases were also cited:

*Mersey Docks v. Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. 443;

*Corporation of Worcester v. The Droitwich Assessment Committee*, 34 L. T. Rep. N. S. 288; 2 Ex. Div. 49;

*The Mayor of Lincoln v. Holmes Common*, L. Rep. 2 Q. B. 482;

*Hare v. Overseers of Putney*, 45 L. T. Rep. N. S. 337; 7 Q. B. Div. 223;

*Lewis v. Churchwardens of Swansea*, 25 L. J. 33, M. C.

*Marshall (McIntyre, Q.C. with him) for the respondents.*—Sect. 430 of the Merchant Shipping Act 1854 applies only to lighthouses under the general lighthouse authorities, and not to a lighthouse under a local authority as in this case; the fact that the property is used for public purposes is no ground of exemption:

*Greig v. The University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 438.

There is nothing to prevent a tenant renting the whole of the Mersey Docks estate, and the lighthouse would increase the value of the estate; it is one of the means by which they obtain dues. This case is distinguished from the cases of *Reg. v. The Metropolitan Board of Works* and *The Metropolitan Board of Works v. The Overseers of West Ham* (*ubi sup.*) because, as payment was made for the use of the sewers, there is no suggestion that a profit could have been made out of the whole system in the sewers cases. It does not follow that, because you cannot get a hypothetical tenant, the property is not rateable.

*May 30.*—The judgment of the court (Lord Coleridge, C.J. and Mathew, J.) was delivered by

*MATHEW, J.*—The assessment appealed against seems to have been made on a calculation of what a landlord might charge by way of rent for the premises rated, and not upon an estimate of the rent at which the premises might reasonably be expected to let from year to year, and we are of opinion that the assessment cannot be maintained. It appears from the statement in the special case that the funds out of which the lighthouse and adjoining premises have been acquired and are maintained are chiefly obtained from tolls levied by the appellants under their statutory powers upon vessels using the Mersey Docks or entering the port of Liverpool. These tolls are directed to be so fixed that with the other receipts of the appellants applicable to conservancy purposes they shall not be higher than is necessary for conservancy expenditure. No profits are therefore receivable by the appellants from the occupation of any of the property in question, and if none of the property rated were capable of being used except upon the conditions imposed on the appellants, it would seem that no assessment could be made: (see *Corporation of Worcester v. Droitwich*, 2 Ex. Div. 49.) But, as has been settled by the well-known decisions cited in the course of the argument (the *Mersey Docks v. Cameron*, 11 H. of L. Cas. 443; *The Governors of St. Thomas's Hospital v. Stratton*, L. Rep. 7 H. of L. 477; *Greig v. University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 348), the fact that profits are not earned by the appellants would not extinguish the rateable character of the premises in question if it could be shown that the property was capable of being beneficially occupied in the hands of a tenant from year to

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year. The question, therefore, seems to be whether any, and if any what, portion of the property is thus capable of a beneficial occupation. With respect to the tower, even if the tolls were received in Liverpool as part consideration for the maintenance of the lighthouse, it would seem that the payment would not be a ground for treating this part of the property as rateable: (see *Rex v. Coke*, 5 B. & C. 797.) But the tolls are not so receivable. The lighthouse is a charge upon the funds created by the appellants' statutes. It represents not income but expenditure. In the hands of an ordinary tenant it would yield no return, and would be incapable of profitable occupation as a lighthouse. That it represented an outlay of capital would not render it assessable any more than the property of an analogous character held not to be rateable in *Reg. v. The Metropolitan Board of Works* (L. Rep. 4 Q. B. 15), and in *The Metropolitan Board of Works v. The Overseers of West Ham* (L. Rep. 6 Q. B. 193). But the lighthouse is also used as a telegraph station, and for that purpose it seems to have been found as a fact that it is capable of beneficial occupation. In this respect, upon the authority of the decisions last referred to, it would seem to be rateable, and the rateable value we gather has been fixed at 96l. We see no reason for differing from this conclusion. Then with respect to the adjoining houses, it seems also to have been found as a fact that their value is enhanced from their being used in connection with the tower, and we think that the assessment made on this footing should stand at the rateable value of 76l. It remains to deal with the point which was made, but not much insisted upon by the learned counsel for the appellants, viz., that the property was exempted from being rated under sect. 430 of the Merchant Shipping Act. It seems clear that the Act only applies to lighthouses in charge of the general lighthouse authorities referred to in the statute, and not to those which like the lighthouse at Point Lynas are under the control of a local authority. We direct the rate to be amended in accordance with our judgment, without costs.

Solicitors for the appellants, *F. Venn and Co.*, agents for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Ravenscroft and Co.*, agents for *William Fanning*, Amlwch.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Aug. 3, 1883, and April 30, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

THE NOTTING HILL. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Collision—Carriage of goods—Late delivery—Loss of market—Damages for delay in contract and in tort—Measure of damages.*

*Where by reason of a collision between two steamships, occasioned by the negligence of one, goods carried by the other are delayed in transit,*

*damages for loss of market are not recoverable as being too remote by reason of the uncertainty of the duration of a sea voyage.*

The *Parana* (3 Asp. Mar. Law Cas. 220, 399; 36 L. T. Rep. N. S. 388; 2 P. Div. 118) followed.

THIS was a motion in the Probate, Divorce, and Admiralty Division before the President, Sir James Hannen, by the plaintiffs, owners of cargo, in a consolidated action brought by the owners of the steamship *Clymene*, and the owners of her cargo, against the steamship *Notting Hill*, to refer back the report of the registrar and merchants on the grounds hereinafter set out.

The action arose out of a collision which occurred in Gibraltar Bay, and, after the institution of the suit, the defendants admitted their liability, and the plaintiffs' claims were thereupon referred to the registrar and merchants.

The claims brought into the registry by the owners of cargo, together with the facts of the case, were set out by the registrar in the following report:

On the 27th Nov. 1882 the steamship *Clymene*, bound from Salonica to London with a cargo of maize and barley, arrived at Gibraltar. She was to have resumed her voyage on the 28th after taking in coal and water, but about 9.30. on that morning, as she lay moored alongside of a bulk taking in coal, she was run into by the steamship *Notting Hill*, which struck her on the portside, making a large hole abaft the fore rigging. In order to beach the vessel, her moorings were cut and her engines were put on full speed ahead, but she took the ground with nineteen feet of water round her, and the water rapidly flooded her from the stokehole bulkhead to the collision bulkhead and subsequently her forepeak, but did not enter the afterhold. The grain in the forehold was much damaged by the sea water, and when the hole in the vessel's side had been pitched by divers the water was pumped out and the damaged portion of the cargo was discharged into lighters with so much of the sound cargo as was deemed necessary to lighten the ship. The discharge of the cargo occupied about a fortnight, and the vessel having been temporarily repaired, the dry portion of the cargo was reshipped and the *Clymene* left Gibraltar on the evening of the 30th Dec.

She arrived in London on the 5th Jan., and on or about the 15th, her remaining cargo having been discharged, the ship was put into Limekiln Dock for permanent repairs, which were completed on the 2nd Feb. 1883.

Claims for damage were brought in by the owners of the *Clymene* and the owners of her cargo. The ship-owners claimed (1) For the delay and temporary repairs at Gibraltar; and (2) for the permanent repairs and for the time occupied by them after the arrival of the vessel in the port of London. The charges at Gibraltar were found on the whole to be necessary and reasonable, and little deduction has been made from them except from the remuneration claimed for the services of the ship's agents there, the total amount charged for which exceeded 2600l. Of the expenses in London the charges for repairs in the engine room have been for the most part disallowed, as they were not proved to be consequent on the collision and apparently would have been needed independently of it in order to conform with the regulations under which the classification of the vessel could alone be maintained. Some deductions have also been made from the ships chandlers' account for items which seemed not wholly chargeable to the collision, and for the value of damaged ropes and canvas, for which it was considered that credit ought to have been given. On the cargo-owner's claim an important question arises. The cargo consisted of 4319 quarters of maize and 5309 quarters of barley, which had been shipped at Salonica in Nov. 1882. Of the maize 3317 quarters had been sold for arrival to Messrs. E. Gripper and Sons, and 1002 quarters to Messrs. Lock and Co. at the price of 34s. 10½d. per quarter less freight and discount. Both sales were included in one contract made on the 20th Nov., seven days before the *Clymene* reached Gibraltar, by the terms of which the purchase money was payable on the 20th Feb. 1883, but in fact it was paid on the 6th Dec. pre-

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

ceding, the amount actually paid, after deducting freight and discount, being 6518*l.* 4*s.* 9*d.*, or nearly at the rate of 30*s.* 2*d.* per quarter net. It should be added that of the maize so bought Messrs. Gripper and Sons had, on the 24th Nov., sold for arrival 100 quarters at 38*s.*, and on the 27th Nov. 370 quarters at 38*s.* 6*d.* per quarter, but next day news having come of the collision the sales were necessarily discontinued.

Of the entire shipment of maize little more than one-half (2317 quarters) was delivered in London, the portion damaged by immersion having, by the advice of the surveyors, been sold by auction at Gibraltar, where the net proceeds realised by the sale amounted to only 7060*l.* 7*s.* 8*d.*, or, at the exchange of 3*s.* 10*d.* to the dollar, 1360*l.* 10*s.* 5*d.*

A further loss was sustained on the maize which was delivered in London. At the end of November, and early in December, the supply of maize in the London market was very small, and the prices were proportionately high, but from about the middle of December—chiefly in consequence, it was stated, of importations of maize from America—there was a rapid and continued fall in prices, and consequently the maize, with which the *Clymene* arrived on the 5th Jan., only realised prices varying from 31*s.* 9*d.* to 33*s.* a quarter—in all 3714*l.* 9*s.* 2*d.*, of which, after payment of freight and other expenses, there remained a balance of only 3256*l.* 9*s.* 2*d.*, being at the rate of a little more than 28*s.* a quarter.

The result was that the whole cargo of maize for which the claimants had paid 6518*l.* 4*s.* 9*d.* realised only: (1) The damaged maize sold at Gibraltar, 1360*l.* 10*s.* 5*d.*; (2) The remainder delivered in London, 3256*l.* 9*s.* 2*d.* = 4616*l.* 19*s.* 7*d.*; showing a loss of 1901*l.* 5*s.* 2*d.*

But the owners of the maize claimed a much larger sum. In estimating their loss they put the sound value of the cargo not at the price at which it had been bought, which was 34*s.* 10*d.* less freight and discount, but at 40*s.* per quarter, on the ground that they might have obtained that price for it if there had been no collision, and if consequently the *Clymene* had arrived in London early in December instead of in January; accordingly they claimed the difference between the value of the maize at 40*s.* per quarter (less freight and other charges which they would have had to pay on arrival) and the price actually realised, and they estimated the loss so sustained at 3116*l.* 10*s.*

As regards the maize which was delivered in London, whether the loss sustained by the owners be taken at the difference between the price paid by them for the cargo and the amount realised in London, viz., as the difference between that amount and the price which might have been obtained if the delivery of the cargo had not been delayed by the collision, it appears to me that in neither case can the claim be allowed consistently with the decision of the Court of Appeal in the case of *The Parana* (3 Asp. Mar. Law Cas. 220, 399; 36 L. T. Rep. N. S. 388; 2 Prob. Div. 118). In that case the arrival of the ship having been delayed for more than a month in consequence of the defective state of her engines, the owners of part of her cargo consisting of bales of hemp claimed the difference between the market value at the time when the hemp might have been sold if the ship's arrival had not been delayed by the condition of her engines, and the market value at the time when the hemp was actually ready for sale, and it was held by the Court of Appeal (reversing the decision of the judge of the Admiralty Court, and confirming the registrar's report) that the claim for loss of market could not be allowed.

It was objected by the plaintiff's solicitor that the claim in the case of *The Parana* (*ubi sup.*) was for damage arising from breach of contract, not, as in this case, from a tort, and that consequently one of the grounds of the decision of the Court of Appeal, viz., that a fall in the market price could not have been in contemplation of the parties when the contract was made, does not exist in the present case. It was also urged that, as Messrs. Gripper and Sons had before hearing of the collision begun to sell the maize purchased by them at 38*s.* or 38*s.* 6*d.* per quarter, they would certainly, but for the collision, have continued to sell it at the same, or even a higher price, and would have disposed of all the maize before the market price fell—that the maize was in fact as good as sold at that price before the collision. But however great the probability that if the arrival of the *Clymene* had not been delayed by

the collision the whole of the maize would have been sold at a considerable profit, it appears to me that the loss of that profit is a loss of market which cannot be allowed unless the decision in the case of *The Parana* is applicable only to a claim for damages arising from a breach of contract, and not to a claim for damages arising from a tort. Looking to the grounds of that decision, I do not think that it is so restricted, for in either case the loss of market is an accidental loss, not necessarily or naturally consequent upon the delay in the arrival in the cargo, whether that delay has arisen from the defective condition of the carrying ship, or from a collision caused by the wrongful act of another vessel. The allowance of such a claim would also be contrary to the long-established practice of the Admiralty Court. In the case of *The Parana*, Mr. Rothery, then registrar of the Admiralty Court, reported that, although the case of the loss of markets through the delay in the delivery of goods must frequently have arisen in the Admiralty Court, as for instance when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs (the very case now under consideration), yet he might say with certainty that no such claim had ever yet been preferred, certainly not during his experience of nearly twenty-three years as registrar of the court. This statement is referred to as follows in the judgment of the Court of Appeal: "They (the registrar and merchants) said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accident such as collisions goods were delayed in their arrival it never had been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right." I should add that I know of no later case in which such a claim has been allowed. In accordance, therefore, with the conclusion of the registrar in that case I have only allowed in respect of that portion of the maize which was delivered in London a sum which was considered sufficient to compensate the owners for the loss of interest on their capital during the delay in delivery. To the damaged maize which was sold at Gibraltar a different rule applies. On that portion of the cargo the cost price has been allowed with the addition of a sum to represent the merchant's profit less the proceeds realised by the sale at Gibraltar. It might perhaps have been an equitable adjustment of the claims for the maize delivered in London, if the loss had been estimated in the same way by allowing a reasonable profit in addition to the cost price, deducting, of course, the proceeds realised; but although this is a usual mode of computing the compensation due for cargo which has been totally lost, or which in consequence of a collision has been sold in damaged state, I am not aware that it has ever been adopted where the cargo has only been delayed in delivery; and in view of the decision in the case of *The Parana* I do not feel myself at liberty to apply it to that portion of the maize which the *Clymene* ultimately brought to London. The claim of the owners of the barley which formed the remainder of the cargo has been dealt with in the same manner as the claims in respect of the maize. But on the barley the loss sustained through fall of market was comparatively insignificant, the market price having fallen only from 26*s.* 3*d.* to 25*s.* 3*d.* per quarter during the detention of the *Clymene*, consequently the disallowance on the claim of the barley owners is comparatively small. On the other hand, the claim for maize has been very largely reduced. This, however, is a case in which the reduction has been occasioned not by the fictitious or exaggerated character of the claim, but by the owners having included in it a loss of market actually sustained and for which they may not unnaturally have thought that they are entitled to compensation. In these circumstances I am of opinion that the owners of the maize as well as the other claimants in the case may be allowed the costs of the reference.

J. G. SMITH, Assistant Registrar.

The following were the sums claimed and allowed to the plaintiffs:

	Claimed.	Allowed.
	£ s. d.	£ s. d.
Messrs. Gripper and Co. } (maize)	3116 10 0	1800 0 0
Messrs. Look and Co. (do.)		
Messrs. Sturdy Bros. (barley)	2538 15 5	2270 0 0

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To this report Messrs. Gripper and Lock objected by way of motion, and filed the following objections:

1. Because by the said report the plaintiffs are not allowed the profit in the said report called the loss of market actually sustained by them on the cargo of the *Clymene*, the plaintiffs will contend that they are entitled to 311*l.* 10*s.* or such other sums as the registrar and merchants may find as the actual profit or loss of market sustained by them in consequence of the said collision.

2. The plaintiffs contend in the alternative that the registrar's report finding that they sustained an actual loss of 1901*l.* 5*s.* 2*d.* (being the difference between the amount paid and the amount received by them for the sale of the cargo of maize), they are in any event entitled to be awarded the sum of 1901*l.* 5*s.* 2*d.* instead of 1800*l.*, or 101*l.* 6*s.* 2*d.* more than is due to them by the said report.

3. The plaintiffs will also contend as an alternative to objection No. 1, that in addition to the said sum of 101*l.* 5*s.* 2*d.* they are further entitled to the sum of 401*l.* 3*s.* 1*d.* and 154*l.* 3*s.* 4*d.*, together 194*l.* 6*s.* 5*d.*, being the actual profit made by them as stated in the said report on the sale of 100 quarters of maize at 3*s.*, and 310 quarters at 3*s.* 6*d.*

4. The plaintiffs will also contend as a further alternative to No. 1, that in addition to the sums of 101*l.* 5*s.* 2*d.* and 194*l.* 6*s.* 5*d.* they are entitled beyond those sums to a sum named in the registrar's report as the merchant's profit on the cargo sold at Gibraltar beyond the sums of 1901*l.* 5*s.* 2*d.*

*J. P. Aspinall* (with him *Nelson*) in support of the motion.—The plaintiffs are not excluded in this case from recovering loss of market by the ruling in *The Parana* (3 *Asp. Mar. Law Cas.* 220, 399; *L. Rep.* 2 *P. Div.* 118; 35 *L. T. Rep. N. S.* 32; 36 *L. T. Rep. N. S.* 388.) *The Parana* was a case of contract; this is a case of tort, and as such the tortfeasor should be liable to the last farthing of damage arising from the tort. In *The Parana* it appeared that the arrival of the ship at the port where the goods were to be sold was incapable of being approximately ascertained. In that case and the present it is said that no such damage has been allowed in the Admiralty Registry. That arises from the fact that until recent years the Mediterranean carrying trade was done entirely by sailing vessels, the date of whose arrival could be in no way estimated. Now the trade is done by steamers, and their arrival can be estimated within a few hours, and they are for the purposes of the market as punctual as the railway goods service, and in the carriage of goods by railway the respondents would clearly be entitled to damages for loss of market:

*O'Hanlan v. Great Western Railway Company*, 6 *B. & S.* 484.

Damage for loss of charter-party by collision has been allowed in the Admiralty Registry:

*The Star of India*, 1 *P. Div.* 466; 45 *L. J.* 102, *Adm.*; 35 *L. T. Rep. N. S.* 407; 3 *Asp. Mar. Law Cas.* 261;

*The Consett*, 5 *P. Div.* 77; 42 *L. T. Rep. N. S.* 33; 40 *L. J.* 24, *Prob.*; 4 *Asp. Mar. Law Cas.* 230.

This is in the nature of damage for loss of profits, and is an answer to the argument that no contingent profit should be allowed because an accident might occur preventing the arrival of ship and goods, and consequently the earning of the profit. These goods were sold to arrive, and hence there was in existence an actual contract whereby the consignees would derive a profit in the same manner as shipowners would derive profit from a charter-party actually entered into.

*W. F. Phillimore* and *Barnes* in support of the

report.—The principle adopted by the registrar is the only correct one, when one looks at the decision of the Court of Appeal in *The Parana* (*ubi sup.*). It will be seen that the decision there includes such cases as the present. The cases of *The Star of India* (*ubi sup.*), and *The Consett* are on quite a different footing from the present case, inasmuch as in those cases contracts had been entered into that a fixed sum should be paid for the carriage of goods. Here the amount sought to be recovered is too speculative. As pointed out in *The Parana*, loss of market under similar circumstances must have arisen thousands of times in the Admiralty Registry, and yet never once has it been allowed.

*J. P. Aspinall* in reply.—Although similar cases of loss of market may have come before the registrar, and never been allowed, if they have arisen since the steam carrying trade came into existence, it is submitted that this practice has been formed upon a mistaken view of the law. We are now trying to correct that mistake.

Sir JAMES HANNEN.—I have no hesitation in saying that if I considered this case free from authority I should hold that the registrar's report could not be supported. The difficulties which have been suggested in argument, and which were suggested in the case of *The Parana* (*ubi sup.*), I confess appear to me to be very far from conclusive upon the subject. There are unfortunately difficulties in every judicial investigation, but it is the duty of the tribunal, whether judge or jury, to overcome those difficulties and arrive at the conclusion which they consider proper. And I must say it appears to me that the passage which has been read from Lord Blackburn's judgment in *O'Hanlan v. The Great Western Railway Company* (*ubi sup.*) is applicable to all these cases where the question is what amount of damages should be allowed. He says: "Setting aside all special damage," and no question of special damage was left to the jury, "the natural and fair measure of the damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price if there is a market there for such goods. If there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the time and place of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including any addition to the cost price and expenses of transit, the reasonable profits of the importer which are adjusted by what is called the higgling and bargaining of the market." And so with regard to all these other cases which have been put, it would be a question for the jury or for the registrar and merchants to say whether they had the materials upon which to arrive at the conclusion as to what would have been the price realised had the vessel not been interrupted in her voyage in the manner in which she was. Nor can I regard the possibility of some other collision taking place as being worthy to be taken into consideration. That is a contingency which would happen in every case, and it would be competent for every wrong-doer to say, "Oh! If I had not done you a wrong somebody else might have done it." But I consider, as I have already said, that with regret I feel myself bound by the authority

of *The Parana* (*ubi sup.*). Undoubtedly that case was one of contract, and therefore there is a distinction between the present case and that, and if the present case should be taken to the Court of Appeal I shall be very glad if that court should feel itself justified in treating the distinction I have mentioned as a valid one. But the reason why I do not feel myself justified in so treating it here is, that I find that it was directly under the consideration of the court. In Mr. Rothery's report he goes into the practice of the Admiralty Court during the whole time that he had been registrar, and refers to cases of collision, and his and the merchant's opinion is adopted and sanctioned by the Court of Appeal. "They said," I quote from the report, "that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accident such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right." Therefore, as I say, the distinction was directly under the attention of the court, and though the decision to this extent in *The Parana* is certainly not in accordance with my own view of the law, and I should decide this motion differently had I been free, yet I do not feel that I should be justified in acting in contravention to what seems to me to be laid down in that case. With regard to the other points which have been made, I do not think that the evidence supports them. I was struck at first with the fact that the registrar shows a loss of 1901*l.*, whereas he only gives 1800*l.*, but that is explained. He is lumping together the two transactions when he works it out, showing a loss of 1901*l.*, and there is nothing to show that his computation is incorrect, if you separate the two portions of maize, viz., that which was sold at Gibraltar being damaged from that which was sold in London. He has in effect said, considering himself bound by the decision in *The Parana* (*ubi sup.*): "It is impossible to establish any loss on the goods which were brought to London, because whatever they sell for is to be treated as their proper price, and so there never could be a loss." That is one of the anomalies, shall I say, which the rule of law, as laid down, leads to. But then, with regard to the maize sold at Gibraltar, he has allowed a profit with interest. Why he has done so it is not shown, and has only been worked out by Dr. Phillimore from conjecture; but there is nothing to show that he has not done that which he alleged he has done, and I do not doubt therefore he has done it, viz., allowed on the maize sold at Gibraltar a profit, with interest. Then with regard to the portions which were resold, that really rests upon the conjecture of Mr. Aspinall. There is nothing to show that there has been any actual loss on the sale in any other sense than that there has been a loss on the whole cargo in not being able to get that which buyers would have been willing to give if it had arrived in time. The phrase "on arrival" would naturally import that such goods only were sold as should arrive in that ship. If it were so, then I do not know any reason why these goods should not have been taken by the buyer, but it is sufficient to say that there is nothing to show that there has been any legal loss which can be put on the

same footing as a loss by charter-party, which has been already entered into. That disposes of all the points in the case, and for the reasons I have given I must confirm the registrar's report, and I suppose I must say with costs.

From this judgment the plaintiffs now appealed.

April 30.—*Aspinall and Nelson* (*C. Hall*, Q.C. with them) for the appellants.—The learned judge in the court below based his judgment on the case of *The Parana* (*ubi sup.*), which he considered applicable to this case, and therefore binding upon him. But the distinction between that case and the present is, that that case was one of contract and this is one of tort. This distinction the learned judge [considered to be a valid one, but nevertheless a distinction to which he felt unable to give effect on account of *The Parana*. In this case the goods were being sold to arrive, and they arrived long after the time at which, but for the collision, they would have arrived; in the meantime the market had gone down. [BOWEN, L.J.—And therefore, if when goods arrive by sea they are not necessarily to be sold on arrival, damages in that case do not flow. BRETT, M.R.—But if the market goes up instead of falling, would not the damages be less?] Where a person bought goods and resold them at a profit before delivery, and the goods were not delivered, the vendor was held entitled to recover the price at which he had resold them:

*France v. Gaudet*, L. Rep. 6 Q. B. 199.

The distinction between carriage of goods by sea and by land is one of degree, not one of principle. The regularity with which steam-vessels arrive within a few hours of a calculated time has reduced this distinction to a vanishing point. There is no doubt that in the carriage of goods by land damages for delay are recoverable:

*O'Hanlan v. Great Western Railway Company* (*ubi sup.*).

Such damages ought therefore to be recoverable in cases like the present. There are cases recorded in the Admiralty Registry where such damages have been allowed by the registrar and merchants. The other cases cited below were also mentioned.

*W. G. F. Phillimore* and *Barnes*, for the respondents, were not called upon.

BRETT, M.R.—The only question in this case is whether the damages claimed for delay in the arrival of the goods are too remote. The rule with regard to questions as to remoteness of damage is precisely the same whether the damages are claimed in respect of contract or in respect of tort, and it has been so laid down in *Hadley v. Baxendale* (9 Ex. 341; 23 L. J. 179, Ex.) and other cases. In *Mayne on Damages*, p. 39, it is thus laid down: "The first and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act, or in cases of contract if it appears to have been contemplated by both parties." The latter part of this is only a repetition of the phrase in *Hadley v. Baxendale* (*ubi sup.*) which has since been frequently criticised. In that case the goods were delivered to a carrier with notice of a



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contract which made the delivery of the goods within a certain time an essential part of the contract. We have to apply that rule here, as to the point whether the damages are too remote. The very point was dealt with in *The Parana ubi sup.*, where the question arose as to the application of the rule in the case of loss of market through delay, occasioned by a collision, though it was not the point in the actual decision. Mellish, L.J. there said that loss of market in the sense that you are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And I am of opinion therefore that it is not the natural and reasonable result of a collision at sea. He said that loss of market by delay arising from a collision was too remote to be taken into account as a head of damage when damages are claimed in respect of a collision. That is an authority absolutely binding upon us. For my part I do not wish to say that if I had had to decide that case I should have decided it differently. I can see no distinction between the principles there laid down and those which we have now to apply. It is true, that was an action of contract, and here the question arises in tort; but in the passage I have quoted from *Mayne on Damages*, which is founded on the case of *Hadley v. Baxendale (ubi sup.)*, no distinction is made between the two kinds of actions in considering the natural and reasonable result of an act. I say therefore, upon the question of remoteness of damage, there is no difference between actions upon contract and those not upon contract. As to the question whether the market value of the goods is to be taken upon the day of collision, it appears to me that it cannot be so taken—certainly not in this case, because no damage has been done which has not been allowed for except damage by delay, and that damage by delay does not occur upon the day of collision.

BOWEN, L.J.—I am of the same opinion.

FRY, L.J.—I am of the same opinion, considering myself bound by the case of *The Parana*.

*Appeal dismissed.*

Solicitors for the appellants, *Lowless and Co.*

Solicitors for the respondents, *Stokes, Saunders, and Stokes*, agents for *Hill, Dickinson, and Light-bound*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Wednesday, May 21.

(Before KAY, J.)

CATTON v. BENNETT. (a)

*Vendor and purchaser—Deposit—Sum payable on non-completion—Penalty—Liquidated damages.*

An agreement for sale contained the two following provisions: (9) *As an earnest hereof the purchaser has this day paid into the hands of S. the sum of 500l. as a deposit, the deposit to form part of the purchase money to be paid on the day of possession; and (10) should either vendor or purchaser refuse or neglect to carry out the above*

*arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500l. as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement. The vendor brought this action for specific performance of the agreement, or, in the alternative, payment of the 500l. as liquidated damages. It was contended that this 500l. was a penalty, and was therefore not recoverable.*

*Held, that the meaning of the agreement was that the 500l. should be recoverable, not if some minute provision were not carried out, but if, owing to the fault of either party, the agreement were not carried out at all, and that that sum could be recovered in this case as liquidated damages.*

*Held, that it could also be recovered if the action were looked upon as an action to enforce the forfeiture of the deposit.*

THIS was an action for specific performance of an agreement for the purchase of an hotel, or, in the alternative, payment of a sum of 500l. as liquidated damages.

The agreement was entered into on the 26th Sept. 1882, between the plaintiff Jane Catton, widow, and the defendant Henry Bennett, and the plaintiff agreed to sell, and the defendant Bennett to buy, the freehold property known as the Swan Hotel, Southwold, in the county of Suffolk, and the appurtenances, and the goodwill of the business carried on there, for 4000l., on a good title being adduced.

The furniture, fixtures, and stock-in-trade were to be taken at a valuation to be made by the defendants Messrs. Richard Smith and Co., and possession was to be taken on the 14th Nov. then next.

The memorandum of agreement contained the two following clauses:

9. *As an earnest hereof the purchaser has this day paid into the hands of Messrs. Richard Smith and Co. the sum of 500l. as a deposit, the deposit to form part of the purchase money to be paid on the day of possession.*

10. *Should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500l. as or in the nature of liquidated damages.*

The vendor also agreed not to keep, or be interested in, any licensed house within ten miles of the Swan Hotel during the occupancy of Bennett, or his widow, without returning 1000l. And it was agreed that, should the solicitor of either party require a more formal agreement, the parties would be willing to execute the same.

The memorandum was signed by Richard Smith as agent for Mrs. Catton on her behalf, and Bennett, at the time of signing, paid the 500l. to Richard Smith and Co. according to the agreement.

Shortly before the 14th Nov. 1882, after the plaintiff had made preparations for leaving the hotel, Bennett informed her that he could not carry out the contract, and after some negotiation she brought this action against Bennett and Richard Smith and Co., asking for specific performance of the agreement, or payment of the 500l. by Bennett as liquidated damages, or payment of damages by Richard Smith and Co.

As regards the last-named defendants, she had offered to stay all proceedings, and pay their costs, if they would pay the 500l. into court, but they refused to do so.



It appeared that the sale had been negotiated by the defendant Richard Smith, who carried on the business of a valuer, under the firm of Richard Smith and Co., and that he had inserted in the newspapers an advertisement of the hotel, in which there was the following statement:

The trade is thoroughly genuine; no goodwill is asked for, and the whole of the freehold can remain on mortgage. The valuation, about 1500*l.*, will be all the cash necessary to arrange possession with.

Bennett, in his statement of defence, alleged that he saw the advertisement, and believing from that that the vendor would allow all the purchase money of the freehold to remain on mortgage, he entered into the agreement, but that he was unable to pay the sum of 4000*l.* when the plaintiff insisted on having it paid down. He asked, by way of counter-claim, for rescission of the contract on the ground of misrepresentation in this respect, and for the repayment of the deposit of 500*l.*

Richard Smith and Co. alleged that any representations that they made were made with the knowledge and consent of the plaintiff, and they claimed to retain the 500*l.* in their hands in respect of money due to them for negotiating the sale.

The plaintiff denied that she had ever instructed or authorised Smith to advertise the hotel for sale, or to make any arrangements as to the purchase money remaining on mortgage on the property.

Richard Smith and Co. had, pursuant to an order dated the 25th June 1883, paid the 500*l.* into court to the credit of the action.

The defendant Bennett took out a summons claiming to be entitled to indemnity from the defendant Smith against the plaintiff's claim, and asking that, pursuant to Order XVI., r. 55, of the Rules of 1883, he might be at liberty, notwithstanding his defence had been delivered, to issue a notice of his claim.

This summons was adjourned into court, and was dismissed: (50 L. T. Rep. N. S. 383; 26 Ch. Div. 161.)

The action now came on for trial.

*Hastings, Q.C.* and *Dunning* for the plaintiff.—The plaintiff is in any case entitled to retain the 500*l.*, whether it is looked at as a deposit, or liquidated damages. Looking at it as a deposit, the sale has proved abortive owing to the fault of the purchaser, and if the vendor cannot obtain specific performance she is entitled to retain the deposit:

*Ex parte Barrell*; *Re Parnell*, L. Rep. 10 Ch. App. 512;

*Depree v. Bedford*, 9 L. T. Rep. N. S. 532; 4 Giff. 479;

*Collins v. Stimson*, 48 L. T. Rep. N. S. 828; 11 Q. B. Div. 142;

*Essex v. Daniell*, 32 L. T. Rep. N. S. 476; L. Rep. 10 C. P. 538;

*Fry on Specific Performance*, 2nd edit. p. 617.

If the sum be taken as liquidated damages, the plaintiff can also retain it, for there is nothing illegal in the parties fixing by agreement the amount of damages which are uncertain:

*Kemble v. Farrer*, 6 Bing. 141.

*Kekewich, Q.C.* and *D. L. Alexander* for the defendant Bennett.—This 500*l.* is not liquidated damages but a penalty, and the plaintiff cannot claim it. The money is made payable if either

party should "refuse or neglect to carry out the above arrangement on her or his part," which would apply to a breach of any one of the most unimportant stipulations in the agreement:

*Kemble v. Farrer* (*ubi sup.*);

*Re Newman*; *Ex parte Capper*, 35 L. T. Rep. N. S. 718; 4 Ch. Div. 724;

*Wallis v. Smith*, 47 L. T. Rep. N. S. 389; 21 Ch. Div. 243;

*Hinton v. Sparkes*, 17 L. T. Rep. N. S. 600; L. Rep. 3 O. P. 161.

*Lumley Smith, Q.C.* and *C. G. Ellis* for the defendant Smith.

*Hastings, Q.C.* in reply.—The event in which the 500*l.* is to be paid is the refusal or neglect to carry out the agreement as a whole. A sum made payable on the doing, or not doing, of a particular thing is liquidated damages, and not a penalty:

*Astley v. Weldon*, 2 B. & P. 346.

*Kay, J.* stated the facts, saying that on the evidence it appeared clear to him that Richard Smith had no authority to issue the advertisement that he did, and that the plaintiff in her negotiations for the sale always repudiated the notion that the 4000*l.* was to be allowed to remain on a mortgage of the hotel, and that the defendant Bennett understood this at the time of signing the agreement. In his opinion, therefore, no case of misrepresentation was made out. He continued:—Then comes this question. It is admitted now that Mr. Bennett cannot carry out this agreement. He says in defence he is unable to carry it out. He has not been able to borrow the money on mortgage, and I suppose he has not the wherewithal to carry the agreement out himself. In his defence he says he is not able to carry it out. In this agreement there are first of all a series of clauses: the vendor agrees to sell the freehold for 4000*l.*, and the furniture at a fair value, and to give up possession on or before the 14th Nov. next, on being paid, and to hand over the licence, and to do all acts necessary for the transfer thereof, and to pay all outgoings up to the day of possession. So far on the vendor's part. Then comes the purchaser's part of the contract. The purchaser agrees to purchase for 4000*l.* on having a good title, he agrees to buy the furniture, fixtures, and so on, at a valuation, to take possession on or before the 14th Nov., and to pay to the freeholders the valuation at the time of taking possession, and then come these words, "As an earnest hereof the purchaser has this day paid into the hands of Messrs. Richard Smith and Co. the sum of 500*l.* as a deposit, the deposit to form part of the purchase money to be paid on the day of possession." The 10th clause is, "Should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of 500*l.* as or in the nature of liquidated damages." Then there is an agreement by the vendor not to keep, or to be interested in, any licensed houses, &c., within ten miles without surrendering the sum of 1000*l.* now agreed to be given on demand. Then if either party requires a more formal agreement it is to be executed. The purchaser having stated that he is entirely unable to carry out this agreement, the vendor says, "Very well, I sue for 500*l.* liquidated damages." The answer is, "Oh, no, that is not liquidated damages, but

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a penalty." I am referred to the well-known series of cases of which *Astley v. Weldon*, *Kemble v. Farren*, and the recent case of *Re Newman*, are examples. In *Kemble v. Farren*, after other stipulations, the words of the clause were, "If either of the parties shall neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained." I have not got the words in *Astley v. Weldon* here, but it is said that the agreement in that case contained the general stipulation for liquidated damages in terms as strong as in the present. In *Betts v. Burch* (4 H. & N. 506) the words were, "In the event of the plaintiff or defendant not complying with every particular set forth in the said agreement." In the case of *Re Newman*, which was a case of a building agreement, it was provided that, "in case this contract be not in all things duly performed by the said contractors, they shall pay to the said governors the sum of 1000*l.* as and for liquidated damages." And in *Wallis v. Smith*, where the learned judge held that it was a good contract for liquidated damages, the contract was, "if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in failing to perform any of the provisions therein contained," then liquidated damages were to be paid. Now, what is the meaning of this agreement, "should either the vendor or purchaser refuse or neglect to carry out the above arrangement on his or her part?" Certainly it is not, in terms, "should refuse or neglect to carry out any stipulations herein contained;" but it is said it means that in effect, because, of course, he does not carry out the agreement, or, to use the very words, "he does not carry out the above arrangement on his part" if he fails to carry it out in any minute particular. But is that the real meaning of this document? After all we must read it through, and give the meaning according to what the words show to have been the intention of the parties. Does this contract mean that if some minute provision were not carried out, as, for example, if possession were not given on the very day named, 500*l.* damages were to be recovered; or does it mean this, if you repudiate the agreement entirely, or if your conduct by neglect is such that the agreement cannot be carried out at all, then 500*l.* damages are to be paid? In my opinion it does mean that. If it does, it is, I think, a proper case for liquidated damages. It seems to me the very thing has occurred which the parties who signed this agreement contemplated might occur, namely, that the whole thing was completely thrown up by the purchaser, who is not able to perform his contract, and therefore this 500*l.* is properly recoverable. It is recoverable, in my opinion, as liquidated damages. This is not a contract in which you can treat the 500*l.* as a penalty. There remains another point, even if that should not be the true construction of this contract, and that is this: The amount named for liquidated damages is precisely the same amount as the sum which was to be deposited by the purchaser, and although there is no express contract that the purchaser is to forfeit that deposit, surely when I find in one clause the sum of 500*l.* to be paid is to be deposited, to use the words of this agreement, "as an earnest hereof," looking to the authorities that have been cited on

this subject, I should be strongly inclined to think that "as an earnest hereof" meant a sum which if I do not perform my part of the contract is a sum which the vendor is to keep. Is that weakened by the fact that the next clause provides that precisely the same amount is to be paid as liquidated damages? Surely one clause throws very much light on the other. It is the case very often, according to decisions that have been cited, that without any express provision for forfeiture of the deposit the deposit may yet be forfeited if the agreement on the face of it shows that really was the intention of the parties; and here can I doubt that the purchaser was, in case of his making such default as to put the whole agreement to an end, to pay to the vendor at least 500*l.*, when I find that in one clause that is to be the amount of the deposit "as an earnest hereof," and in the next clause there is actually a specific provision that if the defendant fails in carrying out the contract he is to pay 500*l.* as liquidated damages? There is a reason for putting that in, and a very good one, on the face of the contract, because that applies to both parties, whereas the vendor never pays a deposit. But it seems to me to make the whole agreement all the more clear and plain, and on the whole that, whichever way you take it, whether you are suing as to forfeiture of the deposit, or suing on this contract for liquidated damages, the clear meaning of this agreement is, that if the purchaser repudiates this bargain, or fails to carry it out by negligence of his own, he is to pay the vendor 500*l.*; and so I hold. Accordingly the vendor will recover in this action 500*l.*, and the costs of the action. Then I have only a word to say about the position of Mr. Smith, as to which of course I shall say as little as possible, because I understand that other proceedings are already taken as between the purchaser and Mr. Richard Smith. He had his 500*l.* in hand, and he has paid it into court, and he waives any claim that he might have upon this 500*l.* for any commission or anything of that kind. I therefore think the justice of the case as between him and the plaintiff will be met by saying that as between him and the plaintiff I give no costs. The other costs of the action are to be paid by Mr. Bennett.

Solicitor for the plaintiff, *R. H. Nettleship*, for *H. R. Allen*, Halesworth.

Solicitor for Bennett, *H. Montagu*.

Solicitor for Smith, *R. Jenkins*.

Saturday, June 21.

(Before KAY, J.)

JACKSON v. SMITH. (a)

*Solicitors—Charging order for costs—Property recovered or preserved—Partnership action—Creditors of the partnership—23 & 24 Vict. c. 127, s. 28.*

*An order charging a solicitor's costs upon property recovered or preserved in an action cannot, in the case of an action for dissolution of partnership, be made upon partnership assets in priority to the claims of the creditors of the partnership, unless those creditors are before the court. If, however, the creditors are before the court, such an order can be made.*

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

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*The order should be for "the costs, charges, and expenses properly incurred."*

#### ADJOURNED SUMMONS.

This was a summons by Messrs. Alfred and George Digby, asking for a declaration that they were entitled to a charge upon the sum of 479*l.* 13*s.* 11*d.*, money on deposit in court to the credit of this action, and upon the sum of 208*l.* 0*s.* 10*d.*, or other the balance in the hands of the late receiver in this action, and upon any sums in the hands of the receiver for the time being on account of the debts and effects of the copartnership business of Jackson and Smith, recovered or preserved in this action; for the taxed costs of the applicants in reference to the action as the solicitors of the plaintiff, including the costs of this application, and that the amount of such costs, when taxed as between solicitor and client, might be raised and paid to the applicants out of the aforesaid sums.

The action was brought for the dissolution of a partnership formerly subsisting between the plaintiff and defendant. The plaintiff at first employed as his solicitors the then firm of Digby and Tabor, in which Mr. Alfred Digby was a partner.

On the 1st April 1882 judgment was pronounced dissolving the partnership, and it was ordered that the partnership property should be sold with the approbation of the judge, and the purchase money paid into court, and, in the meantime, a receiver was appointed to get in the outstanding debts and effects of the partnership.

In Dec. 1882, up to which time the business had been carried on as directed by the court, and had realised a profit, the business premises, goodwill, and stock-in-trade were put up for sale by auction, and the stock-in-trade sold for 479*l.* 13*s.* 11*d.*, which was paid into court.

The receiver got in large sums of money belonging to the partnership, and paid many debts owing by it. It was alleged that there was still a balance due from that receiver.

In July 1883 Messrs. Digby and Digby applied to the court on behalf of the plaintiff for the removal of the receiver first appointed, and for the appointment of another. An order to that effect was made.

The firm of Digby and Tabor had become Digby, Tabor, and Digby, and that firm was, in April 1883, dissolved, after which Messrs. Digby and Digby carried on business alone.

In April 1884 the plaintiff ceased to employ Messrs. Digby and Digby as his solicitors in this action, and employed Mr. Tabor.

The applicants contended that, but for the institution of this action, the whole of the partnership assets would have been lost, and that those assets had been preserved by the action, and particularly by the sale, and the appointment of a receiver. They alleged that unless the charging order were made there would be no means of obtaining payment of their costs.

They had not any evidence of the plaintiff's inability to pay such costs, but it was stated that that was the case, and that evidence of it would be forthcoming if required.

The accounts of the plaintiff and defendant had been taken into chambers, and vouched, and the certificate was nearly ready, but the action had not been heard on further consideration. There

were debts owing to the partnership creditors, to a considerable amount, still remaining unpaid.

*Church* for the summons.—The applicants are entitled to this charge under 23 & 24 Vict. c. 127, s. 28, (a) the property having been preserved through their exertions. The claim is in the nature of a salvage claim, and can be made upon the whole fund, and is not confined to the interest of the client of the solicitor making the application:

*Bailey v. Birchall*, 2 H. & M. 371;

*Greer v. Young*, 49 L. T. Rep. N. S. 224; 24 Ch. Div. 545;

*Charlton v. Charlton*, 40 L. T. Rep. N. S. 267;

*Bulley v. Bulley*, 38 L. T. Rep. N. S. 95, 401; 8 Ch. Div. 479.

*Chadwyck Healey*, for the plaintiff, and *J. Gatey*, for the defendant, offered no opposition to the application.

*Graham Hastings*, Q.C. and *Chadwyck Healey* for the creditors.—The rule in partnership actions is the same as in other administration actions, viz., that the costs are payable out of the assets, but those assets are not, in the case of partnership actions, ascertained until the creditors have been paid:

*Hamer v. Giles*, 41 L. T. Rep. N. S. 270; 11 Ch. Div. 942.

We submit, therefore, that this charge, if made, should be subject to the payment of our debts. Besides, this application is premature. The court will not make an order charging the costs, and ordering them to be raised before further consideration:

*Re Green; Green v. Green*, 50 L. T. Rep. N. S. 513; 26 Ch. Div. 16.

*Church* replied.

[KAY, J. referred to *Emden v. Carte*, 45 L. T. Rep. N. S. 328; 19 Ch. Div. 311.]

KAY, J.—This application raises a question of some difficulty, but, as there have been several decisions upon this section, I will not reserve my judgment. The application is made under these circumstances: The action was brought for the dissolution of the partnership between the plaintiff and defendant. Judgment for dissolution has been given, and accounts directed to be taken. That has been done, and the accounts vouched, and the certificate is nearly ready. In the meantime the plaintiff has changed his solicitors, and the solicitors who acted for him at first now come and ask that their costs may be charged, under sect. 28 of the Act of 1860, upon a fund now in court to the credit of the action, and certain other

(a) 23 & 24 Vict. c. 127, s. 28: In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper.

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sums, which have been recovered by a receiver appointed at the instance of the plaintiff while they were his solicitors. This receiver realised certain assets of the partnership, and paid the proceeds into court, and there are still, it seems, certain further sums in his hands, or the hands of his successor, forming part of the partnership estate. These are the funds upon which it is sought to obtain a charge. Now it is admitted that it would be proper to make the charge, not only against the plaintiff's interest in the fund, but also against that of the defendant, as was done in *Greer v. Young*, where it was held that the charge was in the nature of a charge for salvage moneys, and that a solicitor was entitled to it as against all the parties to the action. But the question is whether the charge can be made as against the creditors in a partnership action. It is said that, according to the usual form of order, the costs in a partnership action are directed to be paid only out of the assets remaining after the creditors' debts have been paid: (*Hamer v. Giles*.) But it is clear that the creditors have no lien on the assets, they are not parties to the action, though the assets are administered to them by the court; but the judgment in a partnership action is not a judgment for payment to the creditors of the debts due to them, as the judgment in an action for the administration of a man's estate is, in the case of his creditors, so that these creditors cannot say that any lien of theirs is being interfered with. However, if the creditors were not before the court no order prejudicial to their interests could be made, and if they were not here before me now I should have made an order such as was made in *Hamer v. Giles*. But they are here, being represented by Mr. Hastings, so that I have before me all the parties interested in the fund. Who the creditors are has been practically ascertained in chambers, so that I can now deal with the fund in court in the presence of all parties. Then it is said that I cannot make a charge taking priority to the creditor's claims. Why not? It has been decided that a solicitor by whose exertions a fund has been preserved, has a right to a charge on the fund to the extent, not only of his clients' interest therein, but also of all parties, provided that he has no right to any charge against persons in their absence. As was said by Cotton, L.J., in *Greer v. Young*: "First, it was said that there was no power to charge any property except the property of the person who had employed the solicitor. But that is contrary to the words of the section, which does not say 'upon the property of the person who employed him,' but 'upon the property recovered or preserved.' Undoubtedly, the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff, or of the defendant, which is recovered in the action, and to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff or defendant. But to say that the court has only power to charge the interest of the plaintiff or the defendant would be to repeal the Act." Looking at the reason of the thing it is plain that that was the intention of the Act. The ground of the charge, as was said in *Greer v. Young*, is the recovery of the

property, and it is in the nature of a salvage charge. So that the solicitors might say, "But for our exertions the property might never have been realised at all, so that it is right that our charge should attach, not only against the parties, but against you creditors also, who, without us, might have got nothing." To this the creditors object that they did not employ the solicitors, and the charge ought not to affect them. But it was decided, not only in *Greer v. Young*, but long before in *Bailey v. Birchall* and *Bulley v. Bulley*, that such an answer would be insufficient. How then can these creditors get over this? If there is good ground for making the charge against persons who do not employ the solicitor so long as they take a benefit from the result of the action, why should not the order be made against these creditors now before me? Assuming these funds to have been "recovered or preserved" by the solicitors, the creditors have derived as much benefit from it as the parties, so that, on the ground of its being a salvage charge, the charge would equally attach against them. Though perhaps I could not have made the order against the creditors in their absence, yet, as they are here I can, and I accordingly make an order charging these costs upon the whole fund, and as against the creditors as well as the plaintiff and defendant, but such costs must be those mentioned in *Emden v. Carte*, viz., the costs, charges, and expenses properly incurred, and I leave it to the taxing master to say what comes within that. I will not by this order direct them to be raised now, as before that is done the court must be satisfied that the client cannot pay them, as the Act was not intended to enable a person to avoid paying his solicitor, but to give the solicitor a means of getting a charge upon the fund as a collateral security in case his client cannot pay, so as to prevent him from losing his costs altogether. I therefore give liberty to apply as to raising the costs, and, if the application comes before me, I shall take care that the case is a proper one for ordering that to be done before I accede to it. That involves many considerations, and, amongst others, whether or not the client is able to pay.

Some discussion ensued as to whether the order should direct a charge of "the costs, charges, and expenses properly incurred," or "the costs, charges, and expenses of the plaintiff in the action so far as the same related to the recovery or preservation of the property;" but ultimately the order was made as expressed in the judgment, for "the costs, charges, and expenses properly incurred," as was done in *Emden v. Carte* and *Charlton v. Charlton*. The costs of the creditors, and of the plaintiff and defendant, were made costs in the action, and liberty to apply in case the fund proved insufficient was given.

July 10. — *Graham Hastings*, Q.C. mentioned that he did not represent all the creditors at the hearing of the application, but only one, and he asked for an order that that creditor should represent all the creditors for the purpose of the summons.

KAY, J. made the order as requested.

Solicitors for the applicants, *Digby and Digby*.

Solicitor for the plaintiff, *A. Tabor*.

Solicitors for the defendant, *J. E. and H. Scott*, for *S. S. Smith*, *Fenny Stratford*.

Solicitor for the creditors, *H. J. Haynes*.

May 21 and 22.

(Before NORTH, J.)

JAMES v. YOUNG. (a)

*Forest of Dean—Forfeiture of gale—Forfeiture when complete—Vacant gale—Application for gale—Priority—Re-entry by Crown—Forest of Dean Act 1838 (1 & 2 Vict. c. 43), s. 29—Queen's Remembrancer Act (22 & 23 Vict. c. 21), s. 25.*

*An application for a gale in the Forest of Dean must be made at a time when the gale is vacant. Where a gale had become liable to be forfeited under sect. 29 of the Forest of Dean Act 1838 for non-working:*

*Held, that the forfeiture was not complete nor the gale become vacant until the Crown had intimated its intention of enforcing the forfeiture. Actual resumption of possession by the Crown is not necessary to complete the forfeiture of a gale, and this independently of the Queen's Remembrancer Act (22 & 23 Vict. c. 21), s. 25.*

THE plaintiffs in this action, Richard James (who died after the commencement of the action) and Isaiah Stephens were registered free miners of the hundred of St. Briavels in the county of Gloucester, within the meaning of the Dean Forest Mines Act 1838 (1 & 2 Vict. c. 43), s. 14, and the defendant James Young was also a free miner of the said hundred; the defendant Griffiths was the assignee from the defendant Young of two gales in the Forest of Dean, known as the "Rising Sun Engine Gale" and the "Union Gale," which had been granted by the deputy gavelleur to the defendant Young. The object of the action was to obtain a declaration (1) that as between the plaintiffs and defendants, the plaintiffs were by reason of certain applications made by them on the 5th Dec. 1846 and the 10th Dec. 1847 respectively entitled to have a gale of the Rising Sun Engine Colliery and a gale of the Union Colliery granted to them in priority to the defendant Young; or, (2) in the alternative, if the court should be of opinion that the said gales had not been effectively forfeited before the year 1877, and that an application for a gale not effectively forfeited was of no validity, then a declaration that the said gales had not been effectively forfeited until re-entry thereon on the part of the Crown on the 28th Sept. 1877 (on which day, after such entry, the plaintiffs again applied for a grant), and that the plaintiffs were entitled to have a grant of the said gales in respect of their application of that date in exclusion of all prior applicants.

A gale is the right of a free miner to have the possession of a plot of land within the Forest of Dean and hundred of St. Briavels, and to work the coal and iron thereunder. Previously to 1838 the right of such working was regulated chiefly by custom, but in 1838 the Dean Forest Mines Act 1838 was passed, under which awards were made, which Act was followed by an amending Act or Acts and subsequent awards. Under these Acts and awards the basis on which gales are granted and held is now established.

The Dean Forest Mines Act 1838 enacts by sect. 14, that

All male persons born or hereafter to be born and abiding within the said hundred of St. Briavels, of the age of twenty-one years and upwards, who shall have worked a year and a day in a coal or iron mine within the said

hundred of St. Briavels, shall be deemed and taken to be free miners for the purposes of this Act.

Sect. 24 enacts:

That the commissioners hereby appointed shall, within three years from the passing of this Act, by their award in writing under their hands, ascertain what persons, whether as free miners or as claiming through or under free miners, or as lessees of free miners, were at the passing of this Act in possession of or entitled to gales for coal or iron mines within the said hundred, or stone quarries within the said forest, or of any pits, levels, or other works made by virtue of gales, for the purpose of working the coal and iron mines of the said hundred, or of any estate or interest therein, and shall cause a plan or plans to be made, upon which the situation of the said gales, pits, levels, works, and quarries shall be delineated . . . and shall in and by their said award set forth general rules, orders, and regulations under and subject to which the said mines, minerals, and quarries shall be worked and gotten.

Sect. 29 enacts:

That the commissioners hereby appointed shall in and by their award specify such general rules and regulations as to them shall seem equitable for the mode in which all the said gales, pits, levels, works, and quarries, as well opened as to be opened, shall be worked, and shall also specify what buildings may remain or be erected on any of the open and uninclosed lands of the said hundred, for the purpose of working such gale, pit, level, or work; and shall also, as far as the same can be ascertained, specify the mode and extent to which all future gales, pits, levels, or works shall be granted by the gavelleur or deputy gavelleur for the time being, having regard to the quantity of coal, iron, or other mineral comprised in and which may be got by means of such gales, pits, levels, or works respectively, and the terms and regulations under which the same shall be held and worked; and that after such award all and every the gales, pits, levels, and works in the said hundred, and all the quarries in the said forest, shall be opened and worked according to the true intent of such rules and regulations; and that in case any person or persons entitled to or in the possession of any gale . . . within the said hundred, now granted or hereafter to be granted, awarded, or leased, shall wilfully proceed in opening or working any such gale, . . . contrary to the said rules and regulations, and the directions to be contained in any award of the said commissioners hereby appointed, after seven days' notice in writing from the gavelleur or deputy gavelleur to stop and discontinue such opening and working . . . then the said gales . . . shall be liable to be forfeited as and for a breach of condition, and the same shall always after the said award be considered as held on condition of performing and abiding by the said rules and regulations in all respects; and the person or persons in possession of any such gales . . . may be evicted therefrom by Her Majesty . . . as might be done on the forfeiture of a lease for breach of condition; and all such gales . . . so forfeited shall be subject to be again galed or leased as other the mines . . . in the said forest and hundred, and, in addition to such right or power of eviction, the compliance with such rules, orders, and regulations may be enforced by and on the behalf of Her Majesty . . . or by any other person or persons, by injunction of Her Majesty's Court of Exchequer, or otherwise in such manner as the said court shall on application think fit.

Sect. 60 enacts:

That the gavelleur or deputy gavelleur for the time being shall grant gales to free miners in the order of their applications in writing to be made from and after the passing of this Act; and the entry of such applications in the books of the gavelleur or deputy gavelleur shall be evidence of the priority of such applications respectively; and the said gavelleur or deputy gavelleur is hereby directed to make entries of all such applications as aforesaid, and the order in which the same are made.

In pursuance of sect. 24, the commissioners, by their award dated the 8th March 1841, determined that James Morrell and Robert Morrell, of Oxford, bankers (as mortgagees in possession and claiming through or under free miners), in equal undivided

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shares, were in possession of and entitled to (amongst the others) the Rising Sun Engine Gale and the Union Gale.

In pursuance of sect. 29, a second schedule to the award under the Act laid down, by rule 4, as follows:

All persons now or at any time hereafter holding any unopened gale or gales of coal, either by virtue of the foregoing award or by grant from the gaveller or deputy gaveller, shall *bonâ fide* commence opening the same within the space of five years from the date of the said award, as regards gales thereby ascertained, and as regards all other gales within five years from the date of the grant thereof respectively. Provided, nevertheless, in the event of any unavoidable and unforeseen mining accident or impediment occurring or other reasonable cause of delay being proved to the satisfaction of the gaveller to prevent the opening of such works within the said period of five years, then the time may be extended at the discretion of the gaveller by some writing under his hand according to circumstances.

By rule 9 of the same schedule it was provided as follows:

All persons now or at any time hereafter holding any mine or mines of coal by virtue of a gale or gales shall work and carry on the same in a fair, orderly, and workmanlike manner, and according to the best and most improved system for the time being of working coal mines, and shall not desist from working the same for a space exceeding five years at any one time after the vein of coal has been gained.

It would appear that some difficulty had arisen with regard to the rule 4 above set out, and by the Dean Forest (Mines) Act 1871 it was enacted (sect. 19):

The commissioners may, after due inquiry, ascertain and declare (a) What is the true meaning, construction, effect, and operation of rule 4 [and rule 14] according to law, or (if it shall seem more for the substantial benefit of all parties concerned) (b) What, having regard to all the circumstances of the case, shall be deemed to be the meaning, construction, effect, and operation of rule 4 [and rule 14].

And the commissioners were also empowered to make new rules instead thereof.

In pursuance of this Act the commissioners on the 11th June 1872 made an award, whereof clause 1 was as follows:

The true meaning, construction, effect, and operation of rule 4, in the second schedule annexed to the awards of coal and iron mines, made by the Dean Forest Mining Commissioners in 1841, is, that all persons now or at any time hereafter holding any unopened gale or gales of coal or iron ore, who shall not *bonâ fide* commence opening the same within the space of five years from the date of the grant thereof respectively, or within such extended time as hereinafter mentioned, are, and shall be liable to be, evicted therefrom by Her Majesty, her heirs and successors, as might be done on the forfeiture of a lease for breach of condition, and that the receipt of rent, or the registration of any transfer of any gale after default made in observance of the rule is no waiver of the Crown's future right of re-entry should a breach of condition continue.

Then followed a proviso extending the time of five years for opening the gale in case of unavoidable accident or reasonable cause of delay.

At the date of the said award of the 8th March 1841 the Rising Sun Engine Gale and the Union Gale were both unopened, and it will be seen therefore that if they continued unopened down to the 8th March 1846 they would become liable to be forfeited under the Act of 1838.

The Union Gale in fact remained unopened down to the time of the present action. As to the Rising Sun Engine Gale, it was admitted that it was being worked from the year 1847 to the

year 1851, but it was not proved whether the workings had been begun before the 8th March 1846. It appeared, however, that the amount of coal got down to the end of the year 1847 was but small.

On the 5th Dec. 1846 the plaintiffs made an application for a gale which, it may be taken, would have been, if granted, identical with the Rising Sun Engine Gale, and the application was duly entered in the books of the deputy gaveller on the 5th Dec. 1846, and on the 10th Sept. 1847 they made a similar application for a re-gale of the Union Gale, which was duly entered on the 10th Sept. 1847. At the dates of these applications the rights or estates, if any, in the two gales as were then existing under the award of the 8th March 1841 were vested in James and Robert Morrell or the survivor of them, or the devisees in trust of James Morrell, hereinafter called Morrell's trustees. Nothing it appeared was done under the plaintiffs' application for the gales, and Morrell's trustees continued in possession of both gales down to the year 1877, the dead rents being paid to the Crown down to the 31st Dec. 1876 in respect of both gales, or, as regards the Rising Sun Engine Gale, a royalty during the time it was being worked.

On or shortly after the 24th May 1877 the gaveller served upon Morrell's trustees two several notices of that date, by one of which, after alleging that the holders of the Rising Sun Engine Gale had desisted from working the same for five years after the vein of coal had been gained, he stated that the same had become liable to be forfeited unless the workings were *bonâ fide* resumed before the 30th June 1877, and by the other of which notices he stated that the said Union Gale would upon the expiration of five years from the date of the award of the commissioners of 1872, that is to say, on the 11th June 1877, become forfeited to Her Majesty unless Morrell's trustees should have sooner *bonâ fide* commenced opening such gale. No workings having been proceeded with in consequence of these notices by Morrell's trustees, the gaveller on the 17th Sept. 1877 signed two notices addressed to Morrell's trustees, by one of which he gave them notice that the Rising Sun Engine Gale had become and he thereby declared the same to be forfeited, and by the other of which he gave them notice that in consequence of the Union Gale not having been *bonâ fide* commenced to be opened before the 11th June 1877 the said Union Gale had become and that he thereby declared the same to be forfeited.

On the same 17th Sept. 1877 the gaveller signed two other documents addressed to the Receiver of Crown Rents of the Forest of Dean and the deputy gaveller, whereby, after noticing that the said gales had become forfeited to Her Majesty, he authorised the receiver and deputy gaveller to make entry on behalf of Her Majesty and to take possession of the gales. It did not appear precisely on what date the notices were received by the deputy gaveller to whom they were forwarded, the receiver of Crown rents being absent at the time, but the two notices addressed to Morrell's trustees were served upon their solicitors on the 19th Sept. 1877 and came to the knowledge of Morrell's trustees some time before the 21st Sept.

On the 21st and 24th Sept., the defendant Young made applications in writing to have a gale granted to him of the Rising Sun Engine



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Gale and the Union Gale, but the deputy gaveler declined to receive the applications or to enter them, on the ground that the forfeiture not being complete at the date thereof the gales were not open gales capable of being applied for.

On the 28th Sept. 1877 the deputy gaveler, on the part of the Crown, took actual possession of both gales.

On the same day after possession taken by the deputy gaveler, the plaintiffs, or one of them, made applications in writing for grants of the two gales, and the applications were duly entered in the books of the deputy gaveler.

On the 10th Dec. 1878 the defendant Young and one Grindell (since deceased) filed a petition of right praying that it might be declared that Young was entitled to have his applications of the 21st and 24th Sept. 1877 for the two gales entered on the books of the gaveler as of the 21st Sept., submitting that the forfeiture of both the said gales was completed immediately upon an intimation of the said notices of the 17th Sept. 1877 addressed to Morrell's trustees and of the contents thereof coming to their knowledge. The plaintiffs in the present action were not parties to nor served with the petition, and the same was opposed by the Attorney-General on behalf of Her Majesty.

The petition was heard on the 8th Dec. 1880 (see *Ex parte Young and Grindell*, 50 L. J. 221, Ch.), when Bacon, V.C. declared that the petitioner Young was entitled to have his said two applications for the two gales entered in the gaveler's books as of the 21st Sept. 1877.

On the 18th March 1881 the plaintiffs commenced their action claiming as above, and since the issuing of the writ the deputy gaveler had granted the gales to the defendant Young, who had assigned them to the defendant Griffith. The plaintiff insisted that he was entitled to have a grant of the two gales in question, on the ground that he was the first applicant after the gales became open, contending that either the gales had become vacant by forfeiture for non-working previously to the plaintiffs' application in 1846 and 1847, or that if they were not vacant then by reason of the alleged forfeitures, then that they were not vacant until actual re-entry by the Crown on the 28th Sept. 1877, after which entry the plaintiffs were the first applicants.

The action now came on for trial.

*J. G. Wood and Vernon B. Smith* for the plaintiffs.—We submit that both the gales became forfeited on the 18th March 1846 under the Act, not having been opened within five years from the date of the award in 1841. As regards the Union Gale, it is unopened at the present time; and as regards the Rising Sun Engine Gale, though it was being worked in 1847, yet the admissions in the case show that so little coal had been got that the court will assume that the gale had not been opened so far back as the 8th March 1846. Then on the 5th Dec. 1846 the plaintiffs are the first to apply for a grant to them of the Rising Sun Engine Gale, and on the 10th Sept. 1847 for the Union Gale. We contend that, the gales being absolutely forfeited at that time, the Crown had no power to waive the forfeiture, there being third parties interested, namely, the other free miners who were entitled to apply for the gales. Rule 4 gives the gaveler power to waive

forfeiture for a time in case of accident or unavoidable delay, which seems to show that except in those two cases he has no such power. Then as to the applications themselves, sect. 60 of the Act which provides that gales shall be granted to the free miners in order of their application does not say that a gale must necessarily be vacant before application can be made for it. But we submit that, if the plaintiffs' applications in 1846 and 1847 were too soon by reason of the forfeiture not being complete at that time, then the defendants' application of the 21st Sept. 1877 must also have been too soon, as the entry on behalf of the Crown had not then been made. The plaintiffs were the first to apply after re-entry, namely, on the 28th Sept. 1877. The present plaintiffs were not parties to the petition of right in *Ex parte Young and Grindell* (*ubi sup.*). They cited

*Re Brain*, L. Rep. 18 Eq. 389;

*James v. The Queen*, 36 L. T. Rep. N. S. 903; 5 Ch. Div. 153.

Evidence was given by the deputy gaveler that the practice had been for a considerable time to enter only those applications for gales which were made at the time the gales were vacant.

*W. W. Karslake, Q.C.* for the defendants.—The argument on the part of the plaintiffs confuses "forfeiture" with "liability to forfeiture." What the Act says (sect. 29) is, that a gale unopened for the term of five years from the time of grant shall be "liable to be forfeited," and an additional remedy is given, namely, injunction. It rests with the Crown whether it will enforce the forfeiture, and in this case the Crown by receiving the dead rents down to 1876 showed by an unequivocal act its election not to take advantage of the forfeiture in 1846:

*Scarfe v. Jardine*, 47 L. T. Rep. N. S. 258; 7 App. Cas. 345; (Lord Blackburn, at pp. 360, 361).

An application is not good, as we submit, unless made at a time when the gale is vacant. Here the gales were not vacant when the plaintiffs made their applications in 1846 and 1847. The first applications made after the gales were vacant were those of the defendant Young on the 21st and 24th Sept. The Crown had then declared the forfeiture, and authorised the receiver to take possession. It was not necessary that the actual possession of the 28th Sept. should be taken in order that the gales should be effectually forfeited. Then the plaintiffs' application of the 28th Sept. came too late. They cited

*Doe v. Bancks*, 4 B. & Ald. 401;

*Roberts v. Davey*, 4 B. & Adol. 664;

*Arnsby v. Woodward*, 6 Bar. & Cr. 519;

*Rede v. Farr*, 6 Man. & Sel. 121.

*J. G. Wood* in reply.—The case is not analogous to that of a landlord terminating a lease. This is an estate on a condition. On the happening of certain events the estate is forfeited, and the rights of the other free miners are let in *instantly*. The interest of a free miner in a gale is an estate, and not a mere licence:

*Morgan v. Craveshay*, 24 L. T. Rep. N. S. 889  
L. Rep. 5 E. & Ir. App. 304.

*NORTH, J.*—This is an action in which the question is raised as to who is entitled to two gales in the Forest of Dean, called the "Union Gale" and the "Rising Sun Engine Gale." Now, a gale is well known to be a right on the part of a free



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miner to take possession of a plot of land defined by certain bounds, and to work the coal and iron or one of them under it. The right is a very old one, and before 1838 it was regulated chiefly by custom. It appears that a good deal of uncertainty and confusion had arisen as to the rights of parties, and for some six or seven years the issue of the grant had been suspended; but in 1838 an Act was passed and awards made under it, and then there was an amending Act or Acts, and further awards were subsequently made, and under those Acts and awards the basis on which gales are granted and held is now established. The Act of 1861—one of the amending Acts—defines in the 1st section what the interest in a gale is, and that is that, "The grant of a gale of coal or iron, or of a stone quarry, shall be deemed to have conferred, and shall confer, on the galee, his heirs and assigns, a licence to work the mine, vein, or pit therein described, and such grant shall be deemed to have conferred on the grantee, his heirs and assigns, an interest of the nature of real estate, such licence nevertheless being conditional on the payment of all the rents, royalties, and other dues from time to time payable to Her Majesty, her heirs and successors, in respect thereof, and the observance and performance of the several enactments, provisions, rules, and regulations for the time being in force for the proper opening, working, use, and management of the gale." Now, as I read that section, it is not merely dealing with matters in the future, but it also defines the position of owners of gales who already had a grant at the time when that Act was passed. It says not "shall confer" merely, but "shall be deemed to have conferred and shall confer" what I have just mentioned. That, therefore, seems to me to define clearly what the position of the galee was under the gales existing before the Act had been actually passed. The 24th section of the Act of 1838 provided that the commissioners appointed under it should, within three years from the passing of the Act, make an award in writing, and ascertain by it what persons, "whether as free miners or as claiming through or under free miners, or as lessees of free miners, were, at the passing of the Act, in possession of or entitled to gales for coal or iron, or iron mines," and certain directions were given as to the way in which that award was to be made, and what plans were to be made for the purpose of pointing out the general situation of the gales, and what schedules should be made for the purpose of specifying the mode in which the same should be worked. In pursuance of that, an award was made on the 8th March 1841, and that recites the Act, and then it goes on to say that the commissioners do by their award "ascertain and determine that the several persons hereinafter named were, at the passing of the said Act (either as free miners or as claiming through or under free miners, or as lessees of free miners) in possession of or entitled to the several hereinafter named gales." And among those I find that Messrs. Morrell, the bankers of Oxford, are (as mortgagees in possession and claiming through or under free miners) entitled in equal shares to, among other gales, the Rising Sun Engine Gale and the Union Pit. And the land included in those gales was defined in a subsequent part of the award. The next thing is that the 29th section of the Act of

1838 says: [His Lordship read that part of sect. 29 above set out which provides for the making an award, and after reading also rule 4 above set out, continued:] Some little difficulty apparently arose as regards that rule, and by the Amendment Act of 1871 it is provided by sect. 19 that "the commissioners may, after due inquiry, ascertain and declare what is the true meaning, construction, effect, and operation of rule 4;" and another rule, "according to law, or (if it shall seem more for the substantial benefit of all parties concerned) what, having regard to all the circumstances of the case, shall be deemed to be the meaning, construction, effect, and operation" of that rule 4; and then there was power also to make new rules in substitution for that if felt desirable. The commissioners did make an award under that Act in June 1872, the first clause of which runs thus: [His Lordship read from the award of the 11th June 1872 as above set out, and continued:] Then there was a proviso similar to that which I read from the old rule as to extending the time in case of any unavoidable or unforeseen accident or impediment happening to prevent the opening of the works within the period of five years. I may say I read that clause, not as the stops are here "are, and shall be liable to be, evicted therefrom," but, as I read it, it is "are and shall be," not "evicted," but "liable to be evicted therefrom." The word "are" applies not to absolute eviction, but to the possibility of eviction. I am of opinion that is how those words are to be read. Now, the five years under the Act from the date of the award made under the Act expired on the 8th March 1846, and at that time it is clear that the Union Gale had never been worked at all. The question arose whether the Rising Sun Engine Gale had been worked or not. What appears from the admissions is this—that in 1847 the working of it had been carried so far that during the first half of that year 1847 they got a certain amount of coal from it. The gale was then thirty yards deep, therefore the workings must have taken some time. I do not know how long before the coal was actually got. The question was whether I ought not to infer from the small quantity of coal got in 1847 that all the workings towards it must have been done after the 8th March 1846. I could not draw any such inference. The plaintiff is seeking to deprive of the gales, to which they are entitled under the grant, certain defendants who have got the grant, and who are in possession of the gales referred to; and it appears to me, therefore, that it is for the plaintiff to prove the case under which he is claiming to turn them out. If he claims, as he does, under some forfeiture of the Rising Sun Engine Gale, it is for him to show that the forfeiture has occurred; or, in other words, it is upon him to show that no working had taken place within the five years pointed out by the Act. That is not proved in evidence, and in my opinion, the onus being upon him, and he not producing any evidence of it, he has failed upon that. I was told that the defendants could give evidence to show that there was working in that time, but I did not call upon them to do so, because the onus of proof was upon the plaintiff. As I have mentioned, the 8th March 1846 was the time when the five years expired. Then in Dec. 1846 the plaintiffs applied for a regale of the Rising Sun Engine Gale—not in terms, I am told, for the

Rising Sun Engine Gale—but it is not in dispute that what was applied for was in reality the Rising Sun Engine Gale, and that application was duly entered in the book, and there was no prior application. So far as regards that, I should say it appears at that date that all applications for a gale were entered in the book independently of whether or not the gale was full at the time. Then, on the 10th Sept. 1847, a precisely similar application was made by the same parties, the plaintiffs, with respect to the Union Gale. I say the plaintiffs, because, although one of them has died in the course of the action, nothing really turns upon that now. That application was made, but nothing was done under it for the Morrells, and after their death their trustees were in possession of these gales, so far as an unopened gale could be said to be in possession of anyone, and from that time down to the year 1877 they regularly paid the dead rent for those gales. The Union Gale never was worked during the whole of that time. The Rising Sun Engine Gale was worked by getting coal from it from 1847 to 1851, and must have been worked to a certain extent a little before 1847; and, when I said that the dead rent was paid during the whole time, I suppose that the dead rent was swallowed up by a royalty during the time that the royalty was paid. But, subject to that, the dead rent was paid upon it down to the year 1877. The state of facts is shown by the admissions, and it appears that on, or very shortly after, the 24th May 1877 the gaveller served upon Morrell's trustees two notices, one of which stated that the holders of the Rising Sun Engine Gale had desisted from working the same for five years after the vein of coal had been gained, and stated that such gale had become liable to be forfeited to Her Majesty, and would be so forfeited unless the workings were *bonâ fide* resumed before the 30th June 1877. That period of five years after the vein of coal had been gained is fixed by the 9th rule, which I did not read. The 4th rule having provided for the state of things if workings had not begun, the 9th rule provided for the state of things if the workings had been begun and were then discontinued for five years after the vein of coal had been gained. Therefore they had been discontinued at any rate from 1851 down to 1877. And by the other of these notices the gaveller stated that the said Union Gale would, upon the expiration of five years from the date of the award of the commissioners of 1872—which period would be on the 11th June 1877—become forfeited to Her Majesty unless Morrell's trustees should have sooner *bonâ fide* commenced opening such gale. Nothing was done under that, and, notwithstanding the notice, Morrell's trustees were still in possession. Then on the 17th Sept. 1877 the gaveller signed two notices addressed to the trustees, by one of which he gave them notice that the Rising Sun Engine Gale had become, and he thereby declared the same to be, forfeited, and by the other he gave them a similar notice with respect to the Union Gale, that that had become, and was thereby declared to be, forfeited. Then on the same day he signed two other documents addressed to the Receiver of Crown Rents and the deputy gaveller, by which, after reciting that they had been forfeited, he authorised them to make entry and take possession of these gales. Now, those notices were sent on the 18th Sept.

1877, and it appears that nothing was done under them, and possession was not actually taken under them until the 28th. In the meantime the two notices addressed to Morrell's trustees were served upon their solicitors on the 19th Sept. 1877, and either on that or on the following day—at any rate, before the 21st Sept.—the fact of those notices addressed to the trustees having been served upon the solicitors, and the contents or effect of the notices, were communicated to Morrell's trustees. Then, on the 21st Sept., that is to say, after Morrell's trustees had notice of what had been done, the defendant Young made two applications to have gales granted to him of these two plots of land or mineral, and the gaveller declined to receive those applications or either of them, or to enter them in the books of the gaveller kept for that purpose, on the ground that by reason that the forfeiture of the gales was not complete at the date thereof, the gales were not open gales capable of being applied for. Then the admissions state that possession was not taken until the 28th Sept. and then it appears from the admissions also that the plaintiff on the 28th, after the gaveller had taken possession, made application under the Act for grants to him of those two gales. Therefore his case turned upon his giving the applications in 1846 and 1847 respectively; and, secondly, upon the application of the 28th Sept. 1847. In addition to that, Young, whose application had not been entered, presented a petition of right to have it declared that he had a right to be entered, and a decision was come to in his favour on the 8th Dec. 1880, and the grant of the gales to him was afterwards completed, although that appears to have been done after this action was commenced. Now, the first point taken by Mr. Wood was this: that at the time when the plaintiff's applications were made in 1846 and 1847 respectively, the gales were already forfeited; that they were open gales, and that there is no reason therefore why that application, which was admittedly first, should not have full effect given to it. The first question, therefore, is, What is the effect of omission to work for the five years from the date of the award? It applies beyond all question to the Union Gale. It would have applied to the Rising Sun Engine Gale if I had not decided the first point in the way I have decided it. Now, the 29th section of the Act provides for the making of an award in the terms I have read already, and I will not read it again. It then provides this, and I will read the words shortly so far as they are applicable to this case: [His Lordship read from the Act and continued:] It is said that, under that section, as soon as there is any default in working under the rules, or non-compliance with the rules under those words, there is an absolute forfeiture which cannot be got rid of. At the end of the five years the gales therefore came to an end, without the exercise of any discretion by the gaveller or any other person. In the first place, if the Legislature had intended that, I think they would have said so. Nothing would have been easier than to have said "it shall be forfeited and come to an end." I say nothing about the construction of those words if they had been there, but where the words are not "shall be forfeited," but "shall be liable to be forfeited," it seems to me that what was intended was not that there should be an

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absolute forfeiture out and out, but a liability to forfeiture which might or might not be enforced. Then the first amended rule which I read recognises precisely the same thing, when it says: "The true meaning of rule 4 . . . . is that all persons . . . . who shall not *bonâ fide* commence opening the same within the space of five years . . . . are and shall be" not "evicted," but "liable to be evicted." Therefore, clearly again it points to the liability that a person comes under of his being evicted, and not to the absolute certainty of the loss of the gale coming to an end without anything further being done. Then, further than that, it is not only that it shall be liable to be forfeited, but there are other words; it says they "may be evicted." Now, I do not think those words throw much light upon it, because "may be evicted" are words which I think might be used even if the forfeiture had been clear and absolute. It would not follow that the eviction should be compulsory. The gaveler might do as he pleased about that. But then the further words at the end seem to me very important because they seem to provide, in addition to the right of eviction, that there shall be something else, and it says that the compliance with the rules and regulations may be enforced by injunction or otherwise. It is quite true that an injunction might be granted in case of a threatened breach of covenant, and such things are not unfamiliar; but, in ninety-nine cases out of a hundred where an injunction has been granted, it is where a breach has taken place, and I think that clearly contemplates the granting of an injunction to enforce the regulations where a breach has taken place. Now, if a breach has taken place, according to the argument of the plaintiffs, this lease would be entirely at an end, without the option of anybody to continue it; and, if so, I do not see how there could possibly be any injunction granted to restrain any further breach of it, when, by the mere fact of the breach taking place, the interest of the gales had entirely come to an end. It seems to me that from beginning to end that section contemplates the liability to a forfeiture, but not forfeiture unless the party having the right to take advantage of it chooses to express a wish to that effect. Then there is this further, that this section and the award made under it both recognise the analogy between the state of things existing where a man had a gale under a licence and the condition of a lessee under a lease. The two things are treated as being very similar. It is to be effected as might be done on the forfeiture of a lease for breach of condition. Now, in a lease, it is quite clear where the provision is expressed that on a breach of condition the lease shall be void to all intents and purposes whatever, that does not mean void in the sense in which a person not a lawyer might understand it, but it means this, "shall be void if the person who is entitled to take the benefit of the provision chooses to say that it shall be so." But then it is said that that does not apply here, notwithstanding the reference by analogy to a lease, because it is said the whole matter rests with the lessor and lessee, and no third person is interested in it, whereas here a person who applies for a gale of the same property—a third party, therefore,—has an interest in it, and would have a right to receive the grant of a gale if the other interest

was out of the way, and that it is impossible to say that he is to have an option whether it is to be enforced or not; and, if that is so, to give effect to his rights, the gaveler or the Crown cannot have the option which beyond all question a landlord has. As regards that, it seems to me that the person who exercises the right to say whether forfeiture has taken place or not, is the person who has the right to grant the gale to any other galee if application is made for it, and that it is left to the Crown, or to the representative of the Crown, to say whether the forfeiture shall be enforced or not and when it shall be enforced, and I do not think that the applicant for a gale for that purpose, has any interest in it. Then, further, it is said that it is impossible to say that the gaveler can have a right of suspending the forfeiture for such time as he pleases, because there is an express provision contained in the Act and the rules saying that, in two particular cases, he may extend the time, and that that means that in all other cases than that he cannot extend the time. Now I do not accept that argument, for this reason. It might be that at the end of five years the right to forfeiture had accrued. It might be that the galee had not money to go on with, but saw his way to getting money for the purpose if he could get an extended term, and it might well be that a further term should be granted to him if the person making the grant saw that he was likely to carry out the gale, and to give effect to the grant of the gale to him; and therefore, under that clause, it seems to me that the persons representing the Crown would have a right to say, if they thought it was a proper case for it, "notwithstanding that the right of forfeiture has accrued, we will give you a further term of, say, five years," or whatever time it might be; "we will give you a further definite time in which you may get money and carry out the gale." And, if so, it is clear they could not take any further step until the expiration of that time. Therefore the right to remain in possession for a given time is quite a different thing from remaining in possession permissively from day to day simply because the person who has power to evict has not chosen to put his power in force. Therefore, it seems to me, that the option of waiving the right of forfeiture depends on whether the Crown or its representative chooses to enforce it, and that the gale continues, notwithstanding non-working, until that option to take possession has been exercised. It might well be, in the present case, that it was not exercised because it was considered better for the miner to remain liable to pay the dead rent than that possibly the mines should not be worked at all. Then, the next point raised by Mr. Wood is this: He says that, even if there was no forfeiture, and the gale was full, and that the Morrells were the galees still, his applications made in 1846 and 1847 were good applications, and that those came into active effect, and must have effect given to them whenever subsequently to that time, if ever, the gales became vacant; and he says, under those applications in 1846 and 1847, when a forfeiture was declared some time in 1877, the plaintiffs were then the first applicants, and they are the first persons who ought to have the grant made to them. Now, that raises a question which I am told has never been actually decided, whether the application must be an application made at the time when a gale is

vacant or not. Sect. 60 is the one which points to the way in which applications are to be made, and that provides "that the gavelor or deputy gavelor for the time being shall grant gales to free miners in the order of their applications in writing to be made from and after the passing of this Act; and the entry of such applications in the books of the gavelor or deputy gavelor shall be evidence of the priority of such applications respectively." Therefore it is said that the applications in 1846 and 1847, being admittedly prior in point of date to any other application, must have effect given to them as soon as by the expiration of the existing interest a new grant can be made. It appears to me, in the first place, that that construction would be extremely inconvenient. It would lead to this: that you might have an application made as a matter of course by every free miner as soon as he attained twenty-one for every gale in the whole district and the whole forest, and the inconvenience of having such a number of claims would be very great indeed. It is quite true that he never could get a grant of more than three (see Act of 1838, s. 61), and as soon as he got three there would be an end of it. But still, until such grants were made, there would be all these applications for every gale, and the inconvenience, as I have said, would be extreme. It is said that sect. 60 does not say in terms that the application shall be made only when the gale is empty; it is true there are no words there that say it in terms, but I must say I think that is the effect of it, and I think the 56th section rather points to the same conclusion. I do not say that it settles it at all, because it does not; but it seems to me to look in that direction very strongly. It provides as to the rules to be observed in granting gales, and towards the end of the section there is a second proviso: "Provided nevertheless, that no gale shall hereafter be granted until fourteen days' notice at the least of the application for the same, specifying the situation and particulars thereof, shall have been published by the said gavelor or deputy-gavelor for the time being in some one or more newspaper or newspapers published and circulated in the said county of Gloucester, and in which notice the day and hour on which, and the place at which, it is intended to grant the said gale shall be specified." Of course it is possible that under these applications made in 1846 and 1847 an advertisement might be issued when the gale became vacant in 1877—I say that is possible; but, reading the section, I cannot help feeling strongly that the Legislature in passing it were contemplating the case of, not the postponement for an indefinite time, but the provision that an application shall not be followed by a grant until fourteen days have elapsed; that is to say, they are contemplating that an application and a grant would come very near together, and they are postponing the time for the grant (in order that notice may be given to other persons) to a time beyond the time at which I think the Legislature thought the grant would probably have been made but for that postponement taking place. Then, further than that, the practice in the office has been for a good many years to enter only those applications which are made when the gale is empty; and the practice was changed, it previously having been the practice to enter all; and, though the practice in the office does not bind me in any

way, yet it shows that there practically has been felt the very serious inconvenience which I pointed out might possibly arise if the construction was adopted which has been put forward. But I do not think it stops there, because there seems to have been, I will not say a judicial decision, but an express opinion against Mr. Wood's contention on the subject. In the first place, I have been looking at the decision of Malins, V.C. on the demurrer in the case of *James v. The Queen*. I find that he says (L. Rep. 17 Eq. 502, 509): "Then, being a free miner, he has the rights which he had in point of fact before the passing of this Act, which are confirmed to him by the Act; and amongst the rights is that of applying for a gale, and, as I read the Act of Parliament, the gavelor or deputy gavelor (the gavelor is the person who exercises the function, and the deputy acts for him) has no discretion whatever, but upon an application being made by a free miner for a gale which is free from any other application, the first applicant is to have the gale. What the gavelor has to do is to consider, Is the applicant a free miner? Does he apply for a gale which is unoccupied?" Now, that is very clear. It is clearly the opinion of the judge at that time that the application must be for a gale which is unoccupied, and that it was not his duty to consider any application for a gale which was made at a time when that gale was already given to the possession of somebody else; and I find remarks to the same effect by the same judge upon the hearing (5 Ch. Div. 153, 155), and there he points out: "Beddis's grant came to an end by his forfeiture in 1868, and it would be very inconvenient to treat the application of Adams and Jordan"—that is, a previous application—"as one subsisting after that grant, which in fact was, under 24 & 25 Vict. c. 40, a grant of the fee simple of the gale, leaving nothing in the Crown but a right of re-entry for forfeiture." In that case it is pointed out that all that the Crown has got when the gale is full is this—the right to receive the rent and royalty, of course, and also a right of re-entry in case of forfeiture. It seems to me that it would be very strange if the construction were that the application should be treated as made to the persons who had no such right but that. For instance, supposing an application were made now to the Crown in respect of property which the Crown might get hereafter by escheat, it is very unlikely indeed that any such application would come to anything, and an application for a gale when it is full seems to me really very much in the same position. Then there is another case, namely, *Ex parte Young and Grindell* (*ubi sup.*). Now, if Mr. Wood's argument is correct, the decision of Bacon, V.C. in *Ex parte Young and Grindell* was entirely misconceived. The point was this: The application was by Young and Grindell to have it declared that the forfeiture was complete between the 21st and 24th Sept., when their applications were made. Now, if the application could be entertained, and ought to be entertained and entered at all times, there is no possible ground for deciding when the forfeiture was declared; it is decidedly immaterial when the forfeiture was declared, because, if the forfeiture had been on the 28th only, and the application had been on the 23rd or 24th, still, if the application might have been properly made at a time

when the gale was full, it ought to have been entered. It would have been a complete answer to the point if it had been raised by the petition there. It would have been said they were entitled to have their application entered in the books, whether the forfeiture had been complete or not; and not only did no one suggest that, but the Vice-Chancellor proceeded to deal with the case on the footing that it was necessary for him to decide at what time the forfeiture had taken place, because (and this is the view he took) if the forfeiture had not taken place before the application was made, the application could not be entered. It was necessary, therefore, to decide whether the forfeiture did or did not take place before the application was made. The common case of all parties on that occasion was one which is exactly opposite to the contention of Mr. Wood now. It seems to me, therefore, that, inasmuch as the applications made in 1846 and 1847 were made long before there had been any act as to electing to forfeit, those applications were not good applications. Then the next point raised by Mr. Wood is that, if he is wrong in the first, and if the first application is of no use, then the second application of the plaintiffs on the 28th Sept. 1877 is good, because, though their first was premature, the defendant's application on the 21st and 24th Sept. was premature also, and, if that were so, the plaintiffs' application on the 28th Sept. was the first one made after the gale was empty. Now, for that purpose, it is necessary to consider whether on the 21st and 24th Sept., when the defendant's application was made, the application was good or not. It seems to me clear that at that time there had been a forfeiture; and with respect to that, in the first place, I refer to, without citing them in detail, the cases mentioned by Mr. Karslake. The only one I intend to mention, on account of some observations of Littledale, J., is the case of *Roberts v. Davey* (*ubi sup.*). I may say the case was this: There was trespass for breaking and entering the lands of the plaintiff. Plea, a licence to dig for a term of twenty-one years. Replication, that the supposed licence was granted subject to a condition "that if the grantee, his executors, &c., should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture and the liberties and licences thereby granted, should cease, determine, and be utterly void and of no effect." The question was what that meant. Littledale, J. says (4 B. & A. at p. 671): "The replication cannot be supported. It seems to me that, according to *Doe v. Banks* (4 B. & A. 401), this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that were impossible, by claim. This instrument is a mere licence to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this licence, the grantor should have given notice of his intention so to do. The giving of such notice

in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed." The opinions of the other judges—Parke, J. and Denman, C.J.—were to the same effect. I do not think I need to refer to other cases on that point except that I wish to refer to the very clear statement given in the judgment in the Court of Exchequer Chamber in 1871 in the case of *Clough v. London and North-Western Railway Company* (25 L. T. Rep. N. S. 708; L. Rep. 7 Ex. 26), where the judgment was pronounced by Mellor, J., which, I think, in another case, Lord Blackburn says that he himself prepared (*Scarfe v. Jardine*, 7 App. Cas. at p. 360). At page 34 there is this very clear statement of the law, perhaps the clearest which can be found anywhere. What was being dealt with there was the question when a contract obtained by fraud could be got rid of, what act could get rid of it, and the judgment is this: [His Lordship read the judgment, beginning at the words, "We agree that the contract continues valid," down to the words, "it will preclude him from exercising his right to rescind," on the following page, and continued:] Now, that being the law, what took place here was this: First of all there is a formal notice given in May 1877 that, if the galee does not work, there will be a forfeiture. Of course, if that were all, that would be nothing; but that is a warning in the first instance. But then that is followed by the order made to the receiver to take possession, and that was a deliberate act of determination—a statement that an election had been made and a direction to him to take possession—a direction which was not a mere threat, but a direction which was acted upon as soon as the man was able to act upon it, although it did not happen to be for about ten days. Then that order when delivered was at once communicated to Morrell's trustees, and they knew of it, and it appears to me, at any rate, that as soon as it was communicated to them there was an end of the matter, because it was a matter which could not have been revoked except by the persons who had given the notice to Morrell's trustees, who would have had a right to say, "You elected to determine and communicated that to us, and we at this time are perfectly free." I think Morrell's trustees would have had a right to say so. And so in the same way, as they were bound by it and had the benefit of it, the other parties giving the notice were also bound by it, and they had the benefit of it. Then I find that this very point was decided by Bacon, V.C., because, although Mr. Wood put it to me that all he decided was that there was a notice at any rate as early as the 17th, I find in the note at the end of the report that the order made is this, "Order the applications on the 21st and 24th Sept. to be entered in that order, the forfeiture being declared to be on the 17th." Therefore there was an express decision by the Vice-Chancellor by the order that the forfeiture did take place at that time. Now, Mr Wood says that his client was not there on that occasion, and that is perfectly true. It is not therefore a decision against him in the sense of being *res judicata*; but as against him it is a case so precisely in point, so indistinguishable from the present, that, there being no decision of any sort to the contrary, I should not hesitate for a moment to follow the decision of Bacon, V.C. on

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that point even if my view were more doubtful than it is; but, independently of that, I quite agree in the view that he took, and I think his decision is a clear one. Then there is one further observation to be made, that is, that in this case it is not really very important what took place or not, because the re-entry on the 28th is entirely immaterial. For the Crown to have all the benefits arising from re-entry and no actual re-entry is necessary at all, because under the Act which was referred to (the Queen's Remembrancer Act) there is this express provision, that re-entry in the case of the Crown is not necessary. If, therefore, in the case of a subject it would have been necessary—and here I do not think it would, because it appears to me that the giving the notice was all that could be done under the circumstances—but, even supposing it were necessary in the case of any party other than the Crown, it was not necessary in the case of the Crown. In my opinion therefore the gales were vacant at the time that the applications of the defendants were made on the 21st and 24th Sept. That being so, those applications were good and prior to the subsequent applications of the plaintiff, and the defendants therefore are entitled under them. Under these circumstances the plaintiff's case fails, and the action is dismissed with costs.

Solicitors for plaintiff, *Peacock and Goddard*, for *John Hullett*, Coleford, Gloucester.

Solicitors for defendants, *Starling and Giblett*, for *William Roberts*, jun., Coleford, Gloucester.

May 28 and June 11.

(Before PEARSON, J.)

Re TUGWELL. (a)

*Lands Clauses Consolidation Act 1845* (8 & 9 Vict. c. 18), ss. 7, 69, 78—*Person of unsound mind not so found*—*Compulsory purchase of land*—*Purchase by agreement*—*Confirmation by committee*—*Confirmation by heir-at-law*—*Conversion into personality*—*Fund in court*—*Payment out*.

A corporation gave notice under the L. C. C. Act 1845 of their intention to take lands belonging to a person of unsound mind not so found by inquisition. Her uncle assumed to act for her, and surveyors were appointed by him and the corporation, and the price fixed was paid into court to the credit of the corporation. The money was afterwards paid into court to the credit of the corporation. It was afterwards invested, and placed to the credit of an account "Ex parte the [corporation]; the account of P. T., a person of unsound mind."

P. T. was afterwards duly found to be a lunatic, and committees were appointed, to whom the dividends were subsequently ordered to be paid for application in the same manner as the rents had been applied previous to the sale.

No conveyance to the corporation was ever executed. Upon P. T.'s death the question arose whether the fund in court representing the purchase money was to be treated as realty or personality; and a petition was accordingly presented by the heir-at-law asking that it might be paid out to him, he being willing to convey the land to the corporation.

*Held, that the petition must be granted, on the ground that realty of a person of unsound mind could only be converted by the statutory and proper methods, which had not been observed.*

*Ex parte Flamank* (1 Sim. N. S. 260) *disapproved*..

In 1854 Phoebe Jackson Tugwell, a person of unsound mind not so found by inquisition, was beneficially entitled in possession to certain freehold hereditaments, part of the rents of which were, under an order in an action of *Tugwell v. Tugwell*, applicable for her maintenance and support.

In the course of that year the Mayor, Commonalty, and Citizens of the city of London (hereinafter called the corporation), under the powers of the Clerkenwell Improvement Act 1851, which incorporates the Lands Clauses Consolidation Act 1845, gave notice of their intention to take part of the premises.

There being at the time no person who could legally act for Miss Tugwell, a claim was (under legal advice) sent in on her behalf, signed by her uncle, H. Tugwell, for her. He also appointed a surveyor to act for her, and the purchase money was afterwards fixed at 4468*l.* 15*s.* by such surveyor and the surveyor acting for the corporation.

On the 14th July 1854 the purchase money was paid into court to the credit of the corporation, in the matter of the Clerkenwell Improvement Act 1851; and on the 20th Jan. 1855, on the petition of Phoebe Tugwell by H. Tugwell, her next friend, it was ordered that the purchase money should be invested in New Three per Cent. Annuities, and the dividends paid to H. Tugwell, to be applied by him in the same manner as the rents of the premises were by the decree in *Tugwell v. Tugwell* directed to be applied. The purchase money was afterwards duly invested, and at the time of the petition was represented by 4850*l.* 14*s.* 10*d.* New Three per Cent. Annuities standing to the credit of an account entitled, "*Ex parte* the Mayor, Commonalty, and Citizens of the City of London. The account of Phoebe Tugwell, a person of unsound mind."

In 1860 Miss Tugwell was duly found to be of unsound mind, and committees of her person and estate appointed.

Upon her death, intestate, in Jan. 1884, the question arose whether the fund in court was to be treated as realty or personality.

It was not clear under which section of the L. C. C. Act 1845 the money had been paid into court in 1854. Requisitions on title had been delivered on behalf of the corporation; but no conveyance of the premises to them had ever been executed. The City Comptroller had stated at the time that the corporation would be satisfied with a conveyance by any person empowered by the court in any way for the purpose, and that he considered the case as one of a compulsory sale.

A petition was presented by the heir-at-law of Miss Tugwell, asking for the payment and transfer out to him of the funds in question. It now came on for hearing.

*Vernon R. Smith* for the petition.—Either the premises were taken properly under the Act, in which case the money is land under sect. 69; or they were taken improperly, and are therefore unconverted, it being impossible for a person of unsound mind to consent to conversion.



CHAN. DIV.]

Re TUGWELL.

[CHAN. DIV.]

*Northmore Lawrence* for the administratrix of Miss Tugwell.—The case is covered by *Ex parte Flamank* (1 Sim. N. S. 206). If the premises were not properly taken, the heir-at-law has his remedy against the corporation. The court may distribute the money under sect. 78. He referred to

*Kelland v. Fulford*, 6 Ch. Div. 491;

*Re Barker*, 44 L. T. Rep. N. S. 33; 17 Ch. Div. 241.

Sir A. Watson for the corporation.—The committee confirmed the sale to us by obtaining an order after his appointment that the dividends should be paid to him.

*Vernon R. Smith* in reply.—In *Re Flamank* the land was taken under compulsory powers and not by agreement. The money here was paid in under sect. 69. H. Tugwell acted as a trustee for Miss Tugwell within the meaning of sect. 7. He referred to

*Re Harrop*, 3 Dr. 726.

His Lordship reserved judgment.

June 11.—PEARSON, J. (after stating the facts).—When I first heard the circumstances of the case I thought it was so plain that there really could be no doubt about it, for it is clear that it is impossible to change the character of property belonging to a person of unsound mind, not so found by inquisition, except by statutory authority of some sort or other. Now, the land in question in the present case was taken by the corporation at a time when the owner was a person of unsound mind not so found, and it seems to have been valued under the clauses of the Lands Clauses Consolidation Act which relate to persons under disability. The purchase money was paid into court, and the committee who was afterwards appointed received the dividends upon such money, and, under an order of the court, applied them for the benefit of the owner in the same manner as the rents and profits of the land had been applied. And now here is the heir-at-law perfectly willing to confirm the sale and convey the land to the corporation, and he asks to be paid the money. The facts being as I have stated them, I confess I should be surprised to find that there is any doubt, for in cases of disability the Lands Clauses Act expressly says that land is to be treated as land, and I am, as I have said, not aware of anything but statutory authority which can change it. Mr. Northmore Lawrence, however, arguing for the personal representatives of the lunatic, has cited to me the decision of Lord Cranworth when Vice-Chancellor in *Re Cross*; *Ex parte Flamank*, and I agree that that decision does seem to cover the present case; but, having read the report of it very carefully, I must say that, with all respect for the Vice-Chancellor, I am utterly unable to follow it. The reasons that Lord Cranworth gives in that case do not satisfy me that a title had properly been gained by the personal representatives of the lunatic. In that case the owner of the lands, Cross, like Miss Tugwell in the present case, was of unsound mind. Notice of the company's intention to take the land was duly served on him, and no regard paid to it. The property was then valued by a jury and taken by the company, and the purchase money paid into court. There are two or three sentences at page 267, which contain the gist of the Vice-Chancellor's judgment. He says: "Now did sect. 7 authorise Cross to sell, or did it not? If it did, the effect,

in my opinion, was to make his contract as good as if he had been *compos mentis*; and his executrixes would clearly be entitled to the 740l. He was compelled to sell; but, when he had sold, he stood in the same situation as he would have been in if he had been *compos mentis* and had sold voluntarily." Looking at sect. 7, however, I cannot think that it can be construed, as Lord Cranworth really says it can, to authorise a person of unsound mind to do that which he was not in a condition to do. [His Lordship read the material parts of the section and proceeded:] Now, as that clause puts in that the persons who are to be able to sell and convey are not the infants, lunatics, and so on, themselves, but their guardians or committees, I think it cannot be held to mean that a man who from the condition of his mind cannot agree shall be able to agree; and then follow clauses showing the steps to be taken in cases of persons being under disability. "I am clear, therefore, in my own mind, and I am bound to follow my conviction, that the section did not allow Miss Tugwell to sell. Then Lord Cranworth goes on: "If he was not authorised to sell, and therefore the company were not justified in taking his land under the compulsory powers of the L. C. C. Act, still, the devisees under his will cannot be entitled to the money. Their claim would be to the land, and not to the money. And it does not lie in the mouth of the company to make the objection; for they have taken the land, and therefore they cannot say that there was no authority to take it. Therefore I can deal with the money in no other way than as if it had been paid for the purchase of land sold by a person seised in fee, and who was competent to sell it." I have read that over a great many times, and it seems to me to be impossible to understand how he could come to any such conclusion. For it amounts to this. He says that the money is in court as proceeds of the sale of land; the person who he says is entitled to the land is willing to accept that money as the price, and to confirm the purchase. And yet he comes to the extraordinary conclusion that persons who never were entitled to the land, and who did not and could not sell it, and are unable to confirm the purchase, are yet to be entitled to the money. So that the land was to be taken from the company because they had bought from the wrong person; and the money also, because they did not find out the right person to pay it to. I cannot understand how a court of equity can hesitate to do justice in such a case; and whatever mistake may have been made before it can now be remedied. I therefore decide that the money in court belongs to the heir-at-law, and must be paid out to him upon his undertaking to execute a conveyance to the corporation. The costs will be according to the Act.

Solicitors: Wood, Bigg, and Nash.



May 20 and June 11.

(Before PEARSON, J.)

Re WATTS; CORNFORD v. ELLIOTT. (a)

*Mortmain Act—Interest in land—Mortgage of life interest in trust funds invested on mortgage of land—Mortgage of life interest and of estate in remainder in similar trust funds.*

A testator gave to trustees upon trusts in favour of charities certain property, including (a) 100*l.* due to him from a husband and wife, and secured by a mortgage by them of the wife's life interest under a will in a sum of money which was at the time of the testator's death invested upon a mortgage of freeholds; (b) two sums of 800*l.* and 200*l.*, due to him from a widow and her two children, and secured as to the 800*l.* by a mortgage of the widow's life interest and one child's estate in remainder in settlement funds, and as to the 200*l.* by a mortgage of such life interest, and the other child's estate in remainder in the same funds. The settled funds were at the time of the testator's death invested upon mortgages of freeholds.

Held, that the bequest of the 100*l.* debt was good, it being pure personality, since the testator could in no manner obtain possession of the land; but that those of the 800*l.* and 200*l.* debts were void as being impure personality, since he might, not necessarily, but by possibility, obtain possession of the land by foreclosure.

In Oct. 1880 the testator Mr. Watts died, having by his will (among other bequests) given certain charitable legacies, which he directed should be paid out of such part of his personal estate as was by law applicable to charitable purposes, and having by a codicil (after certain other provisions) given the residue of such part of his personal estate as could by law be bequeathed for charitable purposes to his trustees and executors upon trust for such charities in Cheltenham as they should select.

Questions having arisen as to what parts of the testator's personal estate came within the above definition, a special case was prepared, submitting the matter to the court.

The case contained the following paragraph, viz.:

Part of the testator's personal estate consisted at his death of the following particulars:

(a) A sum of 100*l.* due to the testator from C. G. F. Mevins and Emma his wife, and secured to him by a mortgage dated 1st July 1879, and made between the said C. G. F. Mevins and Emma his wife of the one part, and the testator of the other part, which was subsisting at his death. The security assigned to the testator by the said mortgage consisted of the life estate of the said Emma Mevins in a sum of 3000*l.* derived under the will of her father, and of a policy of assurance on his life. The said will authorised the investment of the said 3000*l.* on, among other securities, real security, and such sum was, both when the said mortgage was executed and at the testator's death, invested in the names of the trustees of the father's will on mortgage of certain freehold dwelling-houses situate at Cheltenham in the county of Gloucester.

(b) A sum of 800*l.* due to the testator from Martha Smith, widow, and Maria Morison, her daughter, and secured to him by an indenture of mortgage and four several indentures of further charge, dated respectively the 10th May 1873, the 1st Aug. 1874, the 28th Oct. 1875, the 30th Oct. 1877, and the 10th May 1879, and respectively made between the said Maria Smith and Maria Morison (then Maria Smith) of the one part and the testator of the other part, and all of which were subsisting at his

death. The security assured to the testator by the said mortgage and deeds of further charge consisted of the life estate of the said Maria Smith, and the half share of the said M. Morison, her daughter, expectant on her death, in the trust funds settled by her marriage settlement. Such settlement authorised the investment of the trust fund on, among other securities, real security, and both on the execution of the said mortgage securities and at the death of the testator the greater part of the trust fund was invested in the names of the trustees of the settlement on mortgage of real estate.

There was also a sum of 200*l.* due to the testator from the said Maria Smith and her other child, Charlotte Smith, under a mortgage of 2nd Aug. 1879, of a nature similar to that in the case of the 800*l.*

The special case now came on for hearing.

Vernon R. Smith, for the charities, referred to *Shadbolt v. Thornton*, 13 Jur. 597.

He distinguished

*Brook v. Badley*, L. Rep. 3 Ch. 672.

Yate Lee, for the executors, referred to

*Ashworth v. Munn*, 43 L. T. Rep. N. S. 553; 15 Ch. Div. 363;

*Attres v. Haws*, 38 L. T. Rep. N. S. 733; 9 Ch. Div. 337.

PEARSON, J.—The question in this case is, whether certain parts of the estate of the testator, Mr. Watts, are interests in land within the meaning of the Mortmain Act. [His Lordship stated the will and the nature of the 100*l.* mortgage above mentioned, and continued:] All there fore that the testator took or could take under that mortgage to him was the income or interest arising out of the mortgage of the Cheltenham property, which latter mortgage might at any time be called in and the money invested in consols. His mortgagor, Mr. Mevins, had only a right to receive the income, and he himself could not therefore, either by foreclosure or in any other way, obtain the estate. It would, in my opinion, therefore be stretching the doctrine too far to say that the interest taken by him under this mortgage was an interest in land within the Act. The next two items I must take together, for they relate to the same property. [His Lordship stated the nature of the 800*l.* and 200*l.* mortgages above mentioned and continued:] It is plain therefore that, by virtue of these two mortgages, the testator obtained control not only over the mother's life interest, but over the whole of the property. He could have foreclosed them both in the event of the interest not being paid, and could in this manner have got possession of the land comprised in the mortgages, and I must consequently hold that he had an interest in land. It is not at all like the former case, where the life interest and nothing more was vested in him. Here he might no doubt, not necessarily, but still by possibility, obtain possession of the land mortgaged, and I must therefore decide that these two debts cannot by their nature be the subject of a charitable bequest.

Solicitors, Peacock and Goddard.

CHAN. DIV.]

Re HALL; HALL v. HALL—CLAPHAM v. ANDREWS.

[CHAN. DIV.]

Saturday, June 21.

(Before PEARSON, J.)

Re HALL; HALL v. HALL. (a)

*Will—Construction—Legacy—Residuary gift—Charge of legacy on real estate—Additional legacy given by codicil.*

*The principle that where a will contains a gift of legacies and residue the legacies are (in the event of the personal estate proving insufficient for their payment) to be deemed to be charged upon the real estate applies in favour of an additional legacy given by a codicil to a legatee named in the will.*

*A testator, by his will, gave 300*l.* to his wife, and "all the residue of his property, of whatever description," to his sister. By a codicil he left to his wife "the sum of 700*l.*, in addition to what he had already left her by his will."*

*The personal estate proved insufficient for the payment of debts and legacies in full.*

*Held, that the 700*l.*, as well as the 300*l.*, was charged on the real estate.*

On the 27th Jan. 1880 T. E. Hall made his will, by which, after giving certain articles of furniture to his wife, and the rest of his furniture to his sister, he gave and bequeathed to his said wife a sum of 300*l.*, to be paid to her within three months after his decease, or to bear interest at the rate of 10 per cent. per annum; and, after another legacy, he gave and bequeathed to his said sister all the residue of his property of whatever description.

By a codicil, dated the 3rd Jan. 1881, the testator left to his wife the sum of 700*l.*, in addition to what he had already left her in his will, and altered the rate of interest.

The testator died in 1882, and the will was duly proved in Feb. 1883. It was found that the personal estate was insufficient for the payment in full of the debts and legacies. There was some real estate. The present question was whether the additional bequest of 700*l.* to the wife was charged upon the real estate.

T. L. Wilkinson for the sister, the residuary legatee.—The additional legacy is not charged on the real estate. I admit that it is settled that a gift of residue, following a gift of legacies, operates as a charge of the legacies upon the real estate:

*Greville v. Brown*, 7 H. L. Cas. 689.

And it is also settled that the legacies are so charged even where they are given later in the will than the residue:

*Elliott v. Dearsley*, 44 L. T. Rep. N. S. 198; 16 Ch. Div. 322.

But it has never been held that a legacy given by a codicil is charged on real estate by virtue of a gift of residue in the will.

Bunting, for the widow, was not called upon.

PEARSON, J.—I have no doubt whatever in this case. The testator, by his will, gives certain legacies, including one of 300*l.* to his wife; and then he gives the residue of his property, of whatever description, to his sister. Then, being of opinion that he has not given enough to his wife, he makes a codicil, increasing her legacy to 1000*l.*, for that is what it really comes to. I am clearly of opinion that the 1000*l.* must come out of the property before anything goes to the sister.

There can be no difference between the original legacy and the additional legacy. Mr. Wilkinson cannot be bold enough to contend that the money should not come out of the personal estate; and there can be no possible reason why it should not come out of the real estate.

Solicitors for the residuary legatee, *Indermaur and Brown*, for *Fisher*, Doncaster.

Solicitors for the widow, *Howard and Shelton*.

Saturday, June 21.

(Before PEARSON, J.)

CLAPHAM v. ANDREWS. (a)

*Mortgage—Foreclosure—Costs of action for foreclosure of mortgages of two estates—Conveyancing Act 1881 (44 & 45 Vict. c. 41), s. 17.*

*The costs of a foreclosure action brought by a mortgagee in respect of mortgages to him of two distinct estates by the same mortgagor to secure two distinct advances will not be apportioned between the two estates, but an account will be directed of what is due to the plaintiff for principal and interest under each mortgage and of the whole costs of the action, and the mortgagor will not be at liberty to redeem either one of the two estates except upon payment of what may be so found to be due.*

In 1882 E. Andrews, the defendant, signed an instrument whereby he charged and agreed to mortgage an estate at Leytonstone in favour of A. H. Clapham, the plaintiff, to secure repayment of an advance of 125*l.*, with interest at 5 per cent.

In 1883 the defendant mortgaged to the plaintiff certain hereditaments at Ratcliff to secure another advance of 225*l.*, with interest.

Default having been made in each case, the plaintiff commenced the present action for foreclosure of both mortgages. The defendant did not appear.

The only question was as how the costs of the present action should be provided for, having regard to sect. 17 of the Conveyancing Act 1881, which does away with consolidation of mortgages.

*Stallard* submitted that there should be no apportionment of the costs, but that the order should be that an account should be taken of what was due to the plaintiff in respect of principal and interest upon each mortgage, and of the costs of the action, the defendant to be at liberty to redeem upon payment of what should be so found.

PEARSON, J.—The mortgagor cannot be permitted to redeem either estate separately without payment of the whole costs of the action. The whole costs of the action must be included in the account relating to each estate.

Solicitors, *Clapham and Fitch*.

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

CHAN. DIV.]

Re VISCOUNT RANELAGH; BEETON v. LONDON SCHOOL BOARD.

[CHAN. DIV.]

March 29 and 31.  
(Before PEARSON, J.)

Re VISCOUNT RANELAGH; BEETON v. LONDON  
SCHOOL BOARD. (a)

*Vendor and purchaser—Leasehold for lives—Trust for renewal—Rights of tenant for life and remainderman—Renewal become impossible.*

*Renewable leaseholds for lives stood limited to Lord R., under the will, made in 1814, of his father, who died in 1820, for life, with ultimate remainder to him in fee. By the will the legal estate was devised to trustees, in trust, in the first instance, to renew the lease from time to time, paying the necessary fines and expenses out of the rents or raising them by mortgage.*

*In 1825 the lease was renewed by the landlord, the Bishop of London, for three lives, that of Lord R. and two others.*

*In 1851 an Act (13 & 14 Vict. c. 104) was passed prohibiting the Ecclesiastical Commissioners, in whom the reversion had become vested, from granting renewals of leases for lives of lands such as that in question.*

*In Oct. 1876 Lord R., who had become the sole remaining life upon which the lease was held (the other two persons having died in 1855 and 1859), entered into a contract to sell all his interest in the land to B. The conveyance, however, was not executed till March 1879.*

*In Dec. 1876 B. contracted with the Ecclesiastical Commissioners for the purchase from them of the reversion, and in Aug. 1879 it was conveyed to him "subject to such trusts, equities, estates, and interests" as then affected the leasehold interest. Meanwhile, in June 1878, part of the land had been taken by the London School Board under their statutory powers; and in Jan. 1880 they paid the purchase money into court. A petition was now presented by B., who had executed a conveyance of the premises to the board, asking that the purchase money and interest might be paid out to him. The legal estate in the lease was still outstanding in the representatives of the last surviving trustee of the will.*

*Held, that B. must be deemed to have purchased the property subject to and to hold it upon the trusts of the will; and that, therefore, the only order which could be made would be one for the payment to him of so much of the fund in court as represented interest and accumulations of interest, with a direction that interest on the corpus should be paid to him during Lord R.'s life.*

THIS was a petition by a Mr. Beeton, asking for the payment out to him of a sum of 1840l. 11s. 4d., representing a sum of 1650l., with accumulations, which had been paid into court in Jan. 1880 by the London School Board upon a purchase by them, under their compulsory powers, of a piece of land at Fulham.

The land in question once formed part of certain estates held of the Bishop of London by the present Lord Ranelagh, under the will of his father, upon a lease for lives renewable.

By such will, dated in 1814, certain freehold hereditaments in Norfolk were devised to the use of Lord Ranelagh for life, with remainders to his sons and daughters (which never took effect, Lord Ranelagh having no children), with remainder to the use of trustees during the natural lives of his

(testator's) three daughters, upon trust for such daughters for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the heirs of the body of such daughters, and if there should be a failure of issue of the bodies of all such daughters but one, or, if there should be but one such daughter, to the use of the heir of the body of such only remaining or only daughter, with remainder to the use of the right heirs of the testator.

The testator then gave and devised to trustees all his property situate in the parish of Fulham (which included the property in question), "to hold the same unto and to the use of the said trustees and their heirs for and during all such terms, estates, and interests as he the said testator had or might claim therein, upon trust from time to time, as often as occasion should require, to renew the lease or leases of the same premises in their names or the name of the survivor of them, or the heirs of such survivor;" and he directed that they should, "by and out of the rents, issues, and profits of the same hereditaments and premises, pay the rents, and also all charges and expenses attending the lease, and should from time to time, with and out of the rents and profits of the same premises, or by sale or mortgage thereof, or by any other lawful ways and means, levy and raise such sum as should become due and payable upon any renewal of the grants or leases of the same premises, or any part thereof, and all expenses attending the same, and in or about procuring such new grants or leases, and, subject thereto, upon trust that all and singular the said hereditaments and premises lastly thereinbefore devised, with their appurtenances, should remain and go along with the freehold and copyhold estates in the county of Norfolk thereinbefore devised, and be therewith held and enjoyed."

The testator died in 1820, and in 1825 the trustees obtained a renewal of the lease for the lives of Lord Ranelagh and two others (who died in 1855 and 1859 respectively).

The reversion subject to the lease became vested in the Ecclesiastical Commissioners, who about the year 1851 discontinued the practice of granting renewals of leases for lives thus vested in them, having by the Act 14 & 15 Vict. c. 104, become enabled to arrange with lessees for the sale to them of the fee simple in such lands. By sect. 3 it was enacted that

*The interest in lands acquired by any lessee under this Act shall be deemed in equity to be acquired in respect of his equity under his lease, and shall be subject to the same trusts, charges, or incumbrances as his lease or any lease obtained for a renewal thereof would have been subject to, so far as the different natures of the properties will admit.*

In 1876, by an agreement dated October of that year, Lord Ranelagh contracted for the sale to Beeton of his interest in the leasehold estates. No conveyance under this contract, however, was executed until March 1879.

On the 30th Dec. 1876 Beeton entered into a contract with the commissioners, by which in consideration of 2300l. and surrendering part of the property, he was to acquire the fee simple of the remainder.

On the 7th Aug. 1879, in pursuance of this contract, the reversion on the lease was accordingly conveyed to him in fee simple by the com-

CHAN. DIV.]

Re VISCOUNT RANELAGH; BEETON v. LONDON SCHOOL BOARD.

[CHAN. DIV.]

missioners, the conveyance being expressly made "subject to such trusts, equities, and interests" as then affected the leasehold interest.

In June 1878 the land in question was taken by the London School Board, the purchase money, as above stated, being paid into court in Jan. 1880. The land had been duly conveyed by Beeton to the Board. The legal estate in the lease was outstanding in the representatives of the last surviving trustee of the will.

The petition now came on for hearing.

*Glasse, Q.C. and Bleby* for the petition.—The purchase of the reversion by Mr. Beeton from the commissioners was for his own benefit; and the property was by their conveyance to him vested in him absolutely and not as trustee. At any rate under his purchase from Lord Ranelagh he is entitled to so much of the fund in court as represents the value of the leasehold interest in June 1878, when the School Board took the premises, and he is further entitled to the 2300*l.* as against the estate, which he paid to the commissioners on purchasing the reversion in 1876. They referred to

*Hardman v. Johnson*, 3 Mer. 347;  
*Randall v. Russell*, *Ibid.* 190;  
*Morris v. Hodges*, 27 Bea. 625;  
*Tardiff v. Robinson*, *Ibid.* 629, note,

*Phillip V. Smith* for the London School Board.—We are bound to see that our purchase money is paid out to the right person. If Lord Ranelagh had not sold his interest, but had himself purchased the reversion on the lease from the commissioners, he would have taken it subject to the will, and to the trust for renewal. It makes no difference that he has assigned his interest. His assignee can stand in no better position than he. He referred to

14 & 15 Vict. c. 104, ss. 1, 3;  
17 & 18 Vict. c. 116, s. 9;  
23 & 24 Vict. c. 124, ss. 24, 35;  
*Keech v. Sandford*, 1 White & Tudor L. C. (5th edit.) 46;  
*Re Wood's Estate*, 23 L. T. Rep. N. S. 430; L. Rep. 10 Eq. 572;  
*Hollier v. Burne*, 28 L. T. Rep. N. S. 531; L. Rep. 16 Eq. 168;  
*Maddy v. Hale*, 35 L. T. Rep. N. S. 134; 3 Ch. Div. 826;  
*Re Barber's Estate*, 44 L. T. Rep. N. S. 433; 18 Ch. Div. 624.

*Glasse, Q.C.*, in reply.—At any rate I am entitled to the interest of the money during the life of Lord Ranelagh, with liberty to apply. He referred to

*Postlethwaite v. Lewthwaite*, 6 L. T. Rep. N. S. 779; 2 J. & H. 237.

*Cozens-Hardy, Q.C. (amicus curiæ)* referred to *Isaac v. Wall* (37 L. T. Rep. N. S. 227; 6 Ch. Div. 706.)

*Cur. adv. vult.*

*March 31.*—PEARSON, J. (after stating the facts).—Now, the first contention raised on the part of the petitioner is that, as he purchased the property, he purchased it for himself, and it is therefore not to be deemed to be held by him upon or subject to the trusts of the will. Now, if I were to treat this question as depending simply upon the terms of the conveyance from the Ecclesiastical Commissioners to Mr. Beeton, that conveyance, in form at all events, indicates that the property was purchased upon the trusts of the will. But I should not like to rely upon that.

I think that, if Mr. Beeton was entitled to purchase the property for himself, without any reference to the trusts of the will, he ought not to be bound by the form of the conveyance, which was probably insisted on by the commissioners. But the question is whether in 1876 he was at liberty to purchase in his own interest; or whether it must not be considered, according to the ordinary doctrine of this court, that he purchased as trustee and must hold as trustee; and if so he would be entitled to be recouped his expenses in respect of the purchase. I am of opinion that it is impossible to decide that he could have purchased otherwise than as trustee. At that time the legal estate in the leasehold property was vested in the representatives of the trustees of the lease. Although Lord Ranelagh's life was the last life for which the renewed lease was held, yet there was in the will an express trust for the renewal of the lease; and if the trustees themselves had been present, and acting in the trust, it would have been their duty, inasmuch as they could not obtain a renewal of the lease, to have purchased the reversion from the commissioners. I think that this is in accordance with the cases of *Re Wood's Estate*, *Hollier v. Burne*, and *Maddy v. Hale*. In his judgment in the case of *Re Wood's Estate*, James, L.J., then Vice-Chancellor, said, referring to the two cases of *Morris v. Hodges* and *Tardiff v. Robinson*: "I am of opinion that I am not in the present case bound by those cases. In those cases the conclusion arrived at by the court was, that the tenant for life was entitled *in specie* to the whole rents and profits, charged only with the payment of such a sum as might be required for the renewal, and, as no renewal was practicable, there was nothing by which the charge could be ascertained, and no means by which any substantial benefit could be ascertained by the court to be given to the remainderman. In this case, however, the primary and paramount intention was, 'that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so continue to be provided for for ever.'" And he further says that the paramount object of the testator "was to have the estate renewed for the equal benefit of all the persons entitled in succession, and so continue to be provided for for ever; and that all of them in succession would have the benefit of that liberality. He intended to create, and was creating, as he thought, a perpetual estate out of which he was carving successive interests." When that case was cited before the present Lord Chancellor in *Hollier v. Burne* he said this: "When a testator by his will contemplates and provides for the perpetual continuance of church leaseholds settled upon a tenant for life with remainders over, by a series of renewals, his purpose evidently is not that the tenant for life should receive any benefit at the expense of the remainderman, but that the remaindermen should succeed in due course to the enjoyment of the same property of which the tenant for life is entitled to the income. If the trust for the renewal is absolute, and overrides his interest, the tenant for life is not entitled to object, on the ground of the reduction of his income, to any arrangement in lieu of renewal which may be made under the provisions of the Act of Parliament, when renewal ceases to be possible, so long as the best practicable terms are

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attained. The property purchased from the commissioners at the price agreed upon represents, under these circumstances, the permanent or capitalised value of the trust property, for the purpose of that succession of interest which the testator intended." Under these circumstances, I think that, considering that there was a paramount trust for the renewal of the lease, overriding the interests of the tenant for life, and that, under the Act, the renewal became impossible, it was the duty of the trustees, unless it was impossible, to purchase the fee from the commissioners. Mr. Glasse very properly pressed upon me the case of *Hardman v. Johnson*, stating that, in that case, after consideration, Sir William Grant had thought that the purchase of a reversion upon a lease belonged to the purchaser, and not to the persons taking under the will. Now that was a very peculiar case, and I think it is no authority upon the present. The testator, by his will, gave his leasehold interest, which was a lease for three lives and twenty-one years beyond, to his daughter, and in case she died without children then it was to go over, I think, to her sister. The daughter lived until the expiration of the three lives, and during the twenty-one years which commenced upon the expiration of the last life she obtained a renewal. She then died after the expiration of that first twenty-one years, without issue, having, by her will, given all her property to the defendant John Johnson, on the supposition that she was entitled to dispose of that renewed lease. Upon her death her sister entered upon the property, claiming so to do under the will of the testator, and the defendant John Johnson, brought ejectment against the sister, and succeeded at law and entered into possession under the judgment at law, and whilst he was so in possession under that judgment he bought the reversion. Then a bill was filed in equity against him, claiming, on the part of the sister, both that the renewed lease had been taken by the first daughter of the testator, and also that the reversion had been bought by John Johnson upon the trusts of the will of the testator, and that both belonged to her. Sir William Grant was at first uncertain whether or not she was entitled to the whole of the relief she asked, and, upon further consideration, he gave her the renewed lease which the first daughter had obtained, but he decided that John Johnson, the defendant, was entitled to keep the reversion which he had purchased. Now there are, to my mind, two essential differences between that case and the present. In the first place, there was no trust for renewal in that will. In the second place, it appeared that John Johnson bought that reversion whilst he was in possession by virtue of the judgment of a court of law that he was entitled to the property. I suspect—I can only suspect, because Sir William Grant does not give his reasons—that Sir William Grant came to this conclusion, that, seeing he had bought it under those peculiar circumstances, it was impossible to suppose he had bought it as a trustee for the persons entitled to the lease under the will. Therefore, he could not give the sister anything but the renewed lease which had been taken by the first daughter of the testator. That is a very different case from this, in which I am dealing with persons who, not having the legal estate in the lease in them, and assuming to

act with reference to this property as if they had, must, I think, be considered to have acted in the place of the real trustees of this lease, and to have acquired this property for the benefit of all persons taking under the will. That disposes of the first question. But then it is said, if that be so, at all events the petitioner is entitled to be paid the value of his leasehold interest at the time when the School Board took the property. That has been ascertained by the chief clerk to be the sum of 5456l. But the question is, was there any leasehold interest in existence at the time when the School Board took the property? I think a little confusion has arisen from the fact that the petition sets out the conveyance of the property from Lord Ranelagh to Mr. Beeton, but it does not state, except by way of recital, the time when the contract for this sale was entered into. Now, the contract for the sale by Lord Ranelagh to Mr. Beeton was in Oct. 1876; the contract with the commissioners which gave Mr. Beeton the equitable interest in fee simple was in Dec. 1876, and the School Board did not take the property till 1878. At the time, therefore, when they took the property, there was no leasehold interest in existence. In equity the fee simple had been acquired by Mr. Beeton, and that which he was possessed of was not the leasehold interest depending upon the life of Lord Ranelagh, but the fee simple which had been exchanged for that leasehold interest. That being so, all that Mr. Beeton was entitled to was the rent of the property which he had acquired and exchanged during the life of Lord Ranelagh; that was simply a life interest in that property during the life of Lord Ranelagh, in exchange for the interest in the leasehold during the life of Lord Ranelagh. It is the ordinary case of property which is the subject of a settlement being taken under statutory powers, in which case a person entitled to a life interest cannot ask to be paid the value of that life interest, but is entitled simply for his life to the interest of the fund so paid into court, subject to this, that in the present case the petitioner may be entitled to have that invested in a different way from the ordinary investment in consols. I am therefore of opinion, that the only order I can make upon this petition is to pay the petitioner the interest upon the fund in court. I have not lost sight of the fact that he will be entitled to be recouped, as against the estate, the 2300l. which was paid to the commissioners. But looking at the very slight and meagre evidence respecting the family of the late Lord Ranelagh, as regards the existence of any person interested in the estate between Lord Ranelagh's estate for life and Lord Ranelagh's estate in reversion, I do not think I can deal with that sum, which is corpus, in the absence of any person representing those interests. Therefore, what I propose to do is to make an order for payment to the petitioner of the interest upon the fund in court. And if the petitioner desires it, I will adjourn the rest of the petition in order to enable him to make further inquiries as to the existence of any person entitled to an intermediate estate. He can then make an application as to the raising of the 2300l. My impression at the present moment is, that the petitioner is entitled to that 2300l.; and, whatever income has accrued, of course he would be entitled to, and it ought to be paid out now. So much of the interest or accumulation of

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interest as is in court will be paid to the petitioner, and all future income.

Solicitors for petitioner, *Noon and Clarke.*

Solicitors for the London School Board, *Gedge, Kirby, and Millett.*

# QUEEN'S BENCH DIVISION

*Tuesday, April 1.*

(Before DAY and SMITH, JJ.)

BREYSON v. RUSSELL. (a)

*Contagious Diseases (Animals) Act 1878 (41 & 42 Vict. c. 74)—Action against constable for wrongful conversion of cattle—Local venue—Notice of action—1 & 2 Will. 4, c. 41, s. 19—2 & 3 Vict. c. 93, s. 8.*

*Sect. 19 of 1 & 2 Will. 4, c. 41 (an Act by which special constables were appointed) provides that all persons sued for anything done in execution of the provisions of that Act shall be entitled to local venue and one month's notice of action.*

*Sect. 8 of 2 & 3 Vict. c. 93 provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable has within his constabliwick by virtue of the common law, or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.*

*In an action brought against a constable . . . for detainue and wrongful conversion of the plaintiff's cattle . . . while acting under the powers and provisions of the Contagious Diseases (Animals) Act 1878:*

*Held, that the right to local venue and notice of action given by sect. 19 of 1 & 2 Will. 4, c. 41, though extending to constables appointed under 2 & 3 Vict. c. 93, but acting under the earlier Act, does not extend to constables acting under the provisions of any subsequent Act, and, consequently, that the constable sued in respect of acts done under the Contagious Diseases (Animals) Act 1878 was not entitled to local venue or notice of action.*

QUESTION of law raised by the pleadings under Order XXV., r. 2.

The action was brought for detainue and wrongful conversion of cattle belonging to the plaintiff.

From the statement of defence, it appeared that the defendant was a superintendent of police for the county of Cumberland, and that he had stopped and detained the plaintiff's cattle under the powers given by the Contagious Diseases (Animals) Act 1878, on the ground that such cattle had been removed into the county of Cumberland without a licence, contrary to certain regulations made under that Act by the local authority of the place, and also that the plaintiff had refused to inform the defendant as to the place or district from which the cattle had been removed, or to take the cattle back to that place.

The 4th paragraph of the defence, upon which the present question turned, was as follows:

The defendant further says that the acts complained of were committed by him in the execution and in pursuance of the Acts 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, as well as under and in pursuance of the Contagious Diseases (Animals) Act 1878, and this action has not been laid in the county where the said acts were committed,

*viz., in the said county of Cumberland, and no notice in writing of the said cause or causes of action was given to the defendant one calendar month before the commencement of the said action, pursuant to the said first-mentioned statutes.*

The venue in the action was laid in the county of Northumberland, and the question was whether the defendant was entitled to have the venue laid in Cumberland, or to have one calendar's month's notice of action, as alleged in paragraph 4 of the statement of defence.

By sect. 19 of 1 & 2 Will. 4, c. 41 (an Act under which special constables were appointed), it is provided,

*That all actions and prosecutions for anything done in pursuance of this Act shall be tried and laid in the county where the fact was committed, and notice in writing of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action.*

And by sect. 8 of 2 & 3 Vict. c. 93, it is provided,

*That the chief constable and other persons so appointed (i.e., as constables under this Act) shall have all the powers, privileges, and duties throughout the county . . . which any constable duly appointed has within his constabliwick by virtue of the common law, or of any statute made or to be made; and every provision of the first recited Act (i.e., 1 & 2 Will. 4, c. 41) shall be deemed to extend to constables appointed under this Act.*

*Ridley for the plaintiff.*—As to local venues, all local venues were abolished by the Judicature Act 1875. By sect. 19 of 1 & 2 Will. 4, c. 41, special constables acting under that Act are entitled to local venue and notice of action; and by sect. 8 of 2 & 3 Vict. c. 93, constables appointed under the later Act are to have the same rights and privileges when acting under that Act as special constables appointed under the former Act. Again, by sect. 110 of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), persons acting under that Act were entitled to local venue and notice of action. My point is that, inasmuch as notice of action was required by these statutes, and no notice was required by the Act of 1878, the Legislature must have intended that constables acting under the Act of 1878 should not be entitled to notice of action. [He was stopped.]

*R. O. B. Lane for the defendant.*—The position of constables is unaltered and is the same as under 2 & 3 Vict. c. 93. By sect. 5 of 1 & 2 Will. 4, c. 41, special constables appointed under that Act are to have all the powers and advantages which any constable duly appointed now has within his constabliwick. If I stopped at this section I should be in the difficulty of importing into that Act any subsequent rights and duties; but, coming to sect. 8 of 2 & 3 Vict. c. 93, this section provides that constables appointed under that Act shall have all the powers, privileges, and duties which any constable duly appointed has within his constabliwick by virtue of the common law or any statute made or to be made, thus giving constables the same privileges under any law then existing or afterwards to be made. The 19th section of the earlier Act would seem to limit me to acts done in execution of that Act; but, turning to the later Act, the effect is that we must read the provisions of the earlier Act into the later Act. If this be the right construction of these statutes, then so long as 2 & 3 Vict. c. 74 is unrepealed, constables acting under the provisions of the Contagious Diseases (Animals) Act 1878,

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law

are entitled to the privilege of that Act, for sect. 50 of that Act imposes on constables appointed under 2 & 3 Vict. c. 74 the duty of carrying out the provisions of the Act of 1878. We must read 2 & 3 Vict. c. 74 as if it contained the 19th section of 1 & 2 Will. 4, c. 41. Then sect. 50 of the Contagious Diseases (Animals) Act 1878 says that one of the functions and duties of a constable (i.e., a constable appointed under 2 & 3 Vict. c. 93) shall be to execute the provisions of that Act. Again, if a constable is not entitled to notice of action, he would have no opportunity of making amends. In all the Police Acts the provisions for notice of action have always been repeated, and the strong inference is that the Legislature intended the police to have this protection in all cases and everywhere, and therefore, if they have omitted it here, it was because they thought it unnecessary, as the provisions of the earlier Act should be deemed to have been extended to the later Act.

DAY, J.—I cannot undertake a duty so onerous as to correct a statute, as Mr. Lane argues we ought to do. He contends that in a great number of instances the Legislature have introduced provisions into statutes for the protection of the police, and as that has not been done in the present case we ought to do it for them. I rather draw an opposite inference, and think that if the Legislature omitted these provisions it was because they intended that they should be omitted, and that constables acting under the provisions of the Act should not have the protection given by the former statute. I find here in the first Act a protection to police in respect of things done in pursuance of that Act: this protection was, no doubt, necessary and desirable, as a large number of duties was imposed on them by that Act. Then, 2 & 3 Vict. c. 74 was passed, which regulates rural police, and sect. 8 of which provides that constables appointed thereunder shall have all the powers, privileges, and duties throughout the county which any constable duly appointed has within his constableness, by virtue of the common law, or of any statute made or to be made; and that every provision of the first recited Act (i.e., 1 & 2 Will. 4 c. 41) shall be deemed to extend to constables appointed under this Act. The effect of this is that a constable appointed under the second Act, but acting in pursuance of the former Act, is, no doubt, entitled to the protection given by sect. 19 of the former Act. The whole question is whether the provisions of the 19th section of the former Act can be deemed to protect a constable in respect, not of acts done under that Act, but in respect of acts done under an Act lately come into force. I can find no real or substantial ground for holding that those provisions do extend to the protection of constables acting under a recent Act. In the last Contagious Diseases (Animals) Act, the police are not protected by any such provision as is contained in sect. 19 of 1 & 2 Will. 4 c. 41; and when police seize cattle under the Act of 1878 they are not acting under the former Act. I think, therefore, that paragraph 4 of the statement of defence is bad, and must be struck out.

SMITH, J.—The defendant here is a county constable, who is sued by the plaintiff for having taken his cattle, and he can only be protected under the Contagious Diseases (Animals) Act

1878, for without that Act he could not be justified. The defendant says that under that Act he is entitled to local venue and notice of action. But under the Act of 1878 there is no provision which entitles him to local venue or notice of action; but then he says that by sect. 19 of 1 & 2 Will. 4, c. 41, he is protected. By that Act special constables might be appointed, and they would have all the rights and powers which any constable duly appointed has by virtue of the common law or of any statute; and by sect. 19 of that Act constables sued in respect of acts done in execution of that Act would be entitled to local venue and notice of action. So matters stood till 2 & 3 Vict. c. 93, sect. 8 of which provides "that constables appointed thereunder shall have the same powers, privileges, and duties throughout the county which any duly appointed constable has within his constableness by virtue of the common law or of any statute made or to be made." It cannot be said that this local venue or notice of action was a privilege within the meaning of that 19th section; but then it is said that the defendant is entitled to notice of action, as the protection given by sect. 19 of the earlier Act is incorporated into the Act 2 & 3 Vict. by the latter part of sect. 8 of that Act, which says that "every provision of the first recited Act shall be deemed to extend to the constables appointed under this Act." It may be observed that the Act of Will. 4 is not incorporated in the Act 2 & 3 Vict. Now, let us look at the first recited Act, it says "for the protection of all persons acting in the execution of this Act, all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act;" that is, in pursuance of this first Act, but not in pursuance of any subsequent Act. I think, therefore, that the defendant is not entitled to local venue or notice of action. Mr. Lane says the Legislature must have meant it, and he argues that, because in many statutes the police have this protection, the Legislature must have meant to extend it to them in this case. Why, if the Acts of Will. 4 and 2 & 3 Vict. gave this protection, was there an express provision in the Contagious Diseases (Animals) Act 1869 giving the same protection? Then came the Act of 1878, in which the protection was left out. Local venues were abolished in 1875, and I have no doubt the Act of 1878 advisedly left out the provisions as to local venue; but it may be that the Legislature intended to retain the notice of action, and that it was left out unintentionally; but, if so, I cannot now put it in. I am of opinion, therefore, that the defendant fails on the question now before us.

*Judgment for the plaintiff. Order to strike out paragraph 4 of the statement of defence.*

Solicitors for the plaintiff, *Bell, Brodrick, and Gray.*

Solicitor for the defendant, *Morris.*



Q.B. Div.] REG. on the prosecution of *GAY v. POWELL AND OTHERS*, Justices of Truro. [Q.B. Div.]

Monday, May 26.

(Before STEPHEN and MATHEW, JJ.)

REG. on the prosecution of *GAY v. POWELL AND OTHERS*, Justices of Truro. (a)*Bye-law—Validity of—Playing concertina through streets of city—Conviction for—Reasonable cause—Disqualifying interest of justices—Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 90.**Sect. 90 of the Municipal Corporations Act 1835 gives powers to boroughs to make bye-laws for the good rule and government of the borough, and for the prevention of all such nuisances as are not already punishable in a summary way.**Under these powers the city of Truro made the following bye-law: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street, or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause," &c.**Edwin Gay was summoned before the justices of Truro on the 13th Oct. 1883, and convicted by them of an offence against the above bye-law, and fined 2l. 2s. and costs. It was proved that Gay was a captain in the Salvation Army, and that on the morning of Sunday, the 7th Oct., he was in Victoria-square, Truro, playing a concertina, and surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines, and triangles; that they had been frequently cautioned and required to desist, as many complaints had been made of their proceedings.**On a rule for a certiorari to remove the conviction into this court:**Held, that the bye-law was not unreasonable, and that the conviction thereunder ought to stand; also that there was reasonable cause for calling on the prosecutor to desist from playing.**Held, also, that the mere fact of the justices having attended a meeting, convened by the superintendent, at which a summons was applied for, but refused, did not render them interested parties so as to disqualify them from afterwards dealing with the case, even if at that meeting they had discussed the facts of the case.**RULE calling on the justices of Truro to show cause why a writ of certiorari should not issue to remove into the High Court a conviction dated the 13th Oct. 1883, under which one Edwin Gay was convicted for an offence against a bye-law then in force in the city of Truro.**The facts of the case, as it appeared from the affidavits, were as follows:—**Edwin Gay, against whom the conviction was obtained, was a member of the body called the Salvation Army, and about the month of Sept. 1883 he came to Truro as captain of the branch of the army there.*

In the early part of 1883 numerous complaints were made to the police of the great annoyance caused to the inhabitants of the city by the proceedings of the army, especially with reference to disturbances caused by them in marching through the streets, accompanied by banners, and sounding tambourines and triangles, and playing concertinas, thereby attracting disorderly crowds. A summons was taken out by the police against the officers of the army, but, as they undertook to desist from playing musical instruments in the streets, no fines were inflicted. As soon as Gay was appointed captain the playing of instruments began again, and complaints were again made by the inhabitants. Gay was cautioned by the superintendent of police, and requested to desist, but the proceedings were continued as before, with complaints on the part of the inhabitants.

On the morning of Sunday the 7th Oct. Gay was in Victoria-square, surrounded by a large crowd. He was playing a concertina, and was again requested to desist by the superintendent, who informed him that he had reasonable cause for making such request, as many complaints had been made by the inhabitants. Gay refused to desist from playing the concertina, and he was accordingly summoned by the superintendent for an offence against sect. 17 of the bye-laws of the city, which section is as follows:

*Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever in any street or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of any illness of any inmate of such house, or for any reasonable cause, &c.*

This bye-law was made under the powers of the 90th section of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), which provides that

*It shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences, provided that no fine shall exceed the sum of 5l.*

Gay was convicted by the justices under the above bye-law, and fined in the sum of 2l. 2s. and costs. Notice of appeal was given for the next quarter sessions at Bodmin; but, as Gay had omitted to serve a notice of such appeal on the superintendent, objection was taken to the appeal on that ground, which was held to be fatal.

It appeared that on the 1st Oct. the superintendent wrote a letter in which he said that he was directed by the magistrates to say that they would not allow the playing of musical instruments in the streets. No such direction had in fact been given by the magistrates.

It was also stated in one of the affidavits filed on behalf of Gay that there were three meetings held by the magistrates to consider the question of issuing the summons against Gay, and it was argued that the magistrates were thus in fact the prosecutors in the case, and so were disqualified from dealing with the case as being interested in it. But by the affidavit of the justices it appeared that one meeting only was held by them. This was convened by a circular issued by the superintendent, and at that meeting a summons was

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Q.B. Div.] REG. on the prosecution of *GAY v. POWELL AND OTHERS*, Justices of Truro. [Q.B. Div.]

applied for against Gay, which was refused, and the justices further stated that they were in no way acquainted with the facts of the case against Gay until it came on for hearing before them in the ordinary course.

A rule for a *certiorari* was obtained on the following grounds:

(1) That the bye-law, under which the conviction was made, is an unreasonable, illegal, and bad bye-law, and contrary to the common law of England.

(2) That there was no evidence of any such "reasonable cause" for calling on the said Edward Gay to desist playing his concertina on the occasion in question, nor any evidence of any offence against such bye-law having been committed.

(3) That the justices who made the said conviction, or some of them, were interested in the matter of the said conviction.

*A. Charles, Q.C. and Fraser Macleod* showed cause.

*A. Collins, Q.C. and Pitt-Lewis*, in support of the rule, cited the following cases:

*Everett v. Grapes*, 3 L. T. Rep. N. S. 669.

*Stationers Company v. Salisbury*, Comberbach Rep. 221;

*Torquay Local Board v. Bridle*, 47 J. P. 183;

*Reg. v. Milledge*, 40 L. T. Rep. N. S. 748; 4 Q. B. Div. 352; 45 L. J. 139, M. C.; 27 W. E. 659;

*Reg. v. Lee*, 9 Q. B. Div. 394; 30 W. E. 750.

STEPHEN, J.—There are three questions in this case, the first of which is, whether the bye-law is good; the second is, whether there was any evidence of reasonable cause; and the third is, whether the magistrates were interested in this matter. Taking these questions in their inverse order, I do not see the smallest evidence that the magistrates were interested in this matter. If the case of *Reg. v. Milledge* (*ubi sup.*), which has been referred to, is looked into, it will be found that the magistrates there who took part in the proceedings were substantially prosecutors in the case, and it was on that ground they were not allowed to sit as judges also, which would be a perfectly proper and wholesome ground in any case. If the magistrates in this case had taken a part to show they were prosecutors, I should not have had any doubt or hesitation in saying they could not sit as magistrates; but I see no evidence of anything of the kind. I see a very indiscreet, and, as it now appears, an untrue letter written by the superintendent of the police, which might give Mr. Funnell a notion of undue interference on the part of the inspector of police, and I think the inspector of police took upon himself a part in this matter which certainly was not well judged. I think he was presumptuous. I think he took upon himself a position which he had no right in point of fact to take. He wrote to the magistrates and gave them notice to attend a meeting—an act which, had I been a magistrate, I should have considered an insulting act from a public officer. It was not a proper thing to do; but to say, because the magistrates talked about the matter they had disqualified themselves, would be to lay down a principle of a most dangerous kind. Nothing should ever induce me to give any assent to the proposition that, when it is known a question more or less of importance is to come before judges, the judges who are well aware such a question is to be brought before them, are to have their judgment set aside, and

are to be described as interested parties merely because they may meet and discuss the matter. It may, in many cases, be most necessary they should meet. In former times it was not an uncommon thing, and even in the present day it is not a thing which is unknown, that, when matters which are likely to require judicial decision are about to come before the judges, the judges should talk over those matters and exchange their views as to what the law is. I could give very many instances in which such conversations have taken place. I am by no means disposed to lay down the rule that merely because magistrates meet together and talk over a matter which may arise before them, therefore they are to be said to come before the court with their minds biased and prejudiced. I do not see the smallest evidence of it in this case. Then the second question is, whether there was evidence of reasonable cause. That is a matter of evidence. This court does not sit here for the purpose of acting as a court of appeal from justices. When we are asked to issue a *certiorari* we are not in such a position as to magistrates as that in which we stand upon a motion for a new trial on appeal from a judge of the High Court. The proper course is to call up their decision to be quashed upon a variety of grounds which may be made to appear before us, such as mistakes upon the matter of jurisdiction, and other things I need not go into now. But it is not our duty to consider the proceedings that take place before the magistrates, and to say there was no evidence on which they could rightly prohibit this playing of the concertina. The parties were not without a remedy if they thought the magistrates had acted improperly in that way. Not only were they not without a remedy, but they took their remedy of an appeal to quarter sessions. Unluckily, there was a technical mistake about a notice, and that mistake prevented the appeal being heard upon its merits. That was a misfortune so far as it went, but that is a misfortune we cannot set right. I agree with the quarter sessions in thinking it was not the wisest thing in the world to object to that notice, but the objection was taken. The matter might have been heard on the evidence, and the quarter sessions could have given their decision. Then we come to the third and great question, which is, whether this bye-law is in itself unreasonable. I do not consider that, in discussing that question, I am bound to look at or I am at liberty to look at every word that the bye-law contains, and to consider whether some of the words may or may not be ill-chosen and too vague. It would be a very strong thing indeed to say that the bye-law is unreasonable and void merely because particular matters which do not refer to the question under consideration might turn out to be unreasonable. With regard to the case which has been cited about the fowls, I should decide in the same words if I had to decide it again. The point which was there decided was, not only that the bye-law was completely unreasonable, but that its unreasonableness was exhibited in the particular case which then arose, because its unreasonableness was shown in a man being liable to be fined 30l. on account of six fowls which had got through into his park, and I suggested that it was quite as reasonable that a little boy should be kept to turn them out of the park, as that people should be called upon to

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fence their hedges. Now, if we look at this bye-law, the part I am now considering, and which is all we have to deal with, is: "Every person who shall sound or play upon any musical instrument, or sing or make any noise whatsoever, in any street or near any house within the said borough, after having been required by any householder resident in such street or house, or by any police constable, to desist from making such sounds or noises, either on account of the illness of any inmate of such house, or for any reasonable cause." Now what is there unreasonable in that? I have not the words of the London Act before me, but it is exactly like a well-known provision in some of the metropolitan Acts, which in substance enables any householder, who does not like barrel organs, to order them to go away out of his hearing. We have heard about the common law of England and the liberty of the subject, which are always suspected words. It is like talking Latin. When one talks of the liberty of the subject and the common law of England, one always suspects it cannot be true. The liberty of the subject always consists in doing something a man is not forbidden to do, and why it is unreasonable and void that he should be forbidden to play a musical instrument in the public streets of Truro, I cannot see. It is a thing which nobody would visit with severity; but on the other hand it is an extreme annoyance to have a man playing under your window with a concertina for a couple of hours, and having a number of people to listen to it and to sing. That may be a great nuisance. It is for the magistrates to say whether it is or not. If I saw, or if there was the least reason to think, that that bye-law was strained unjustly, and distorted from its natural meaning; if I thought that, merely because these people did not like the Salvation Army and their meetings, they tried to strain that bye-law to prevent their doing what they *prima facie* have a right to do, my view of the case would be altogether different; but, as far as I can judge, it appears from the whole of the proceedings there was fair reason to think that the playing of this musical instrument in this place was an annoyance to some of the persons who heard them, and the man who was summoned and fined was fined for that reason. On the one hand he has every right to be protected in conducting religious worship in whatever harmless way he thinks fit; but, on the other hand, he must obey the law, and if the law of a particular borough is that he is not to play a musical instrument in the streets if people object, then he must not play it there, or he must play it where people will not object, and I daresay there are many places where he could play it without getting into trouble. Therefore this rule will be discharged.

MATHEW, J.—I am of the same opinion. I agree with my brother Stephen. An attempt has been made to induce us to rehear this case, and we have been invited to differ from the conclusion to which the magistrates have come. We have no power to rehear the case; our functions are extremely narrow in a case of this sort. We have to consider whether the magistrates had jurisdiction to dispose of the matter. I am clearly of opinion that they had jurisdiction. It is said they had not, because the bye-law was bad. Upon reading the bye-law, I think it is most reasonable, and I cannot help thinking the learned counsel

who has addressed us against it would have some difficulty in framing a bye-law in a better form, such bye-law having the laudable meaning this one has, to prevent people being disturbed by disagreeable noises from musical instruments. The magistrates here had entire jurisdiction, and, that being so, we cannot interfere.

*Rule discharged with costs.*

Solicitors for the prosecutor, *F. E. Bennett, for Greenway, Truro.*

Solicitors for the defendants, *Street and Poynder, for Cock, Truro.*

*Thursday, June 19.*

(Before MATHEW and DAY, JJ.)

KING v. THE OXFORD CO-OPERATIVE SOCIETY. (a)  
APPEAL FROM A DECISION OF THE JUDGE OF THE  
OXFORD COUNTY COURT.

*Practice—Appeal from County Court—Action for damages—Power to enter judgment for sum claimed—Order XL., r. 10.*

*In an appeal from a County Court in an action for damages, the court has power to give judgment for the plaintiff for the sum claimed, if satisfied, upon the whole of the evidence before the County Court judge, that judgment ought to be so entered, although judgment had been given by the County Court judge for the defendant.*

THE action was brought for 20*l.* damages for injury to a well belonging to the plaintiff, in consequence of the leakage of oil from the defendants' premises. The defendant had a store in which were placed some barrels of paraffin oil. Some of this oil, leaking from the barrels, percolated through the soil and found its way into the plaintiff's well, thereby poisoning it. There was a conflict of evidence as to the probable cost of providing another well for the plaintiff.

The learned County Court judge, after hearing all the evidence, and relying on the case of *Ballard v. Tomlinson* (50 L. T. Rep. N. S. 230; 32 W. R. 589; 26 Ch. Div. 194), found for the defendants on the ground that, whether the oil came into the plaintiff's well over the surface or underneath it, the defendants were not liable.

*Ashton Cross*, for the plaintiff, was stopped.

*H. D. Greene*, for the defendants, cited *Ballard v. Tomlinson* (*ubi sup.*).

MATHEW, J.—I think the judgment of the County Court judge was wrong. He thought the plaintiff had no cause of action, whether the oil came into the plaintiff's well over the surface or underneath it. He relied on *Ballard v. Tomlinson* (*ubi sup.*), but Pearson, J. expressly excepts the very case now before us; this exception is distinctly applicable to the present case. Then we are asked to send the case back to the judge to assess the damages; but it appears to me that we have the power to enter judgment for the plaintiff, and for the amount we may think he is entitled to. I adopt the views of the witnesses for the plaintiff rather than those for the defendants, and I think judgment must be entered for the plaintiff for 20*l.*, the amount claimed, and costs.

DAY, J.—I quite concur.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*H. D. Greene* asked leave to appeal on the point whether the court has power to assess the damages. The decision on this point is a perfectly new one; at all events, there is no case on the point in any of the reports. *Whiteman v. Hawkins* (39 L. T. Rep. N. S. 629; 4 C. P. Div. 13; 27 W. R. 262) was referred to.

*MATHEW, J.*—It has been held that the rules apply to appeals from County Courts.

*Judgment for the plaintiff for 20l. and costs. No leave to appeal.*

Solicitors for plaintiff, *Hurford and Taylor*, for *Bickerton*, Oxford.

Solicitors for the defendants, *Lake, Beaumont, and Lake*.

Tuesday, June 10.

(Before STEPHEN and WATKIN WILLIAMS, JJ.)

REG. v. HASLEHURST. (a)

*Poor law—Select vestry—Workhouse and industrial schools—Power to pay Roman Catholic clergymen for religious ministrations—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 46; Poor Law Order 1867.*

*Sect. 46 of the Poor Law Amendment Act 1834 gave the Poor Law Commissioners power to direct the overseers or guardians of any parish or union to appoint "paid officers," which term, by sect. 109, was to include clergymen.*

*By a Poor Law Order of 1867 "the guardians" (which included the select vestry of a parish) "might employ such persons as they should deem requisite in or about the workhouse premises, or on the land occupied for the employment of the pauper inmates, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as should appear to them to be suitable."*

*Held, that the select vestry of L. had power, under the above statute and order, to appoint and pay Roman Catholic clergymen to minister to the Roman Catholic inmates of the workhouse, and the industrial schools connected therewith.*

This was an application on behalf of William Jones, a member of the select vestry of the parish of Liverpool, for a writ of *certiorari* to remove into this court the certificate of disallowance made on the 1st Aug. 1883 by George Haslehurst, the district auditor, where he disallowed the several sums of 37l. 10s., 37l. 10s., 18l. 15s., and 18l. 15s., being payments made by the select vestry to the Rev. Thomas O'Donnell and the Rev. Frederick Bonte, Roman Catholic priests, for performing religious services at the workhouse and the industrial schools respectively belonging to the vestry, and surcharged William Jones with those sums.

The material facts were as follows:—

The administration of the poor laws in the parish of Liverpool was by a local Act of 1842, placed in the hands of a select vestry.

On the 16th Nov. 1880 the select vestry passed the following resolution: "That this board is prepared to receive and to consider favourably applications for payment made by persons rendering religious services to the inmates of the workhouse where, in the judgment of the board, the

nature and extent of the services rendered are such as reasonably call for remuneration."

Consequent upon this resolution applications were made to the select vestry by the Rev. Thomas O'Donnell and the Rev. Frederick Bonte, the Roman Catholic priests in attendance respectively at the workhouse and the industrial schools, for payment in respect of their services, and on the 30th Nov. 1880 the select vestry resolved to grant to the Rev. Thomas O'Donnell a salary at the rate of 150l. per annum during the pleasure of the vestry for his services to the Roman Catholic inmates of the workhouse; and to grant to the Rev. Frederick Bonte similarly a salary of 75l. per annum for his services to the Roman Catholic inmates of the industrial schools.

The Local Government Board, on being asked for their approval of these arrangements, replied that with regard to the inmates of the workhouse the select vestry had power under the General Order of 1867, without the assent of the board, to employ such persons in the workhouse as they should deem requisite upon such terms and conditions as appeared suitable; and with regard to the schools, the board gave their assent.

Payments were accordingly made to the two Roman Catholic priests from the 30th Nov. 1880, for the religious services rendered by them at the workhouse and industrial schools.

At the audit of accounts on the 1st Aug. 1883, for the half-year ending at Lady-day 1883, the district auditor disallowed the payments made on account of the half-year's salary of the two Roman Catholic priests, and surcharged William Jones (who signed the cheques for these payments) with these sums.

The reasons given by the auditor for the disallowance, so far as material, were as follows:

1. Because the offices to which the said Rev. Thomas O'Donnell and Rev. Frederick Bonte were appointed were not offices contemplated or authorised to be created at the charge of the poor rate by 4 & 5 Will. 4, c. 76, or by any other statute.

2. Because the proviso to sect. 19 of 4 & 5 Will. 4, c. 76, only authorises licensed ministers to attend at the workhouse for the purpose of affording religious assistance in the case therein specified, and the statutes have not authorised the payment of any salary or remuneration in respect thereto, and further because sect. 21 of 31 & 32 Vict. c. 122 permits an inmate to attend some place of worship of his or her own denomination.

3. Because the Poor Law Order of the 9th Aug. 1867 did not authorise the select vestry to make such an appointment or pay such salary or remuneration; and because the select vestry had not any statutory or other lawful authority to make such appointments nor to make such payments out of the funds of the parish.

4 & 5 Will. 4, c. 76, s. 19:

No rules, orders, or regulations of the said commissioners, nor any bye-laws at present in force or to be hereafter made, shall oblige any inmate of any workhouse to attend any religious service which may be celebrated in a mode contrary to the religious principles of such inmate . . . provided also that it shall and may be lawful for any licensed minister of the religious persuasion of any inmate of such workhouse, at all times of the day on the request of such inmate, to visit such workhouse for the purpose of affording religious assistance to such inmate, and also for the purpose of

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instructing his child or children in the principles of their religion.

## Sect. 46 :

It shall be lawful for the said commissioners, as and when they shall see fit, by order under their hands and seal, to direct the overseers or guardians of any parish or union . . . to appoint such paid officers, with such qualifications as the said commissioners shall think necessary, for superintending and assisting in the administration of the relief and employment of the poor, &c.

## Sect. 109 :

The word "officer" shall be construed to extend to any clergyman, &c.

Poor Law Order of 1843 (to the select vestry of Liverpool) : (a)

Art. 60: For the performance of the duties and ensuring the observance of the regulations herein set forth, the select vestry shall, as soon as may be requisite, and from time to time hereafter upon the occurrence of any vacancy, appoint all or any of the following officers, that is to say . . . a chaplain . . . and also such assistants and servants as shall be necessary for the efficient performance of the duties of the said several officers.

Art. 76: The duties of the chaplain are to read prayers and preach a sermon on every Sunday, and to read prayers on every Good Friday and Christmas-day, and to examine the children, and to catechise such as belong to the Church of England at least once in every month, &c.

## Gen. Order of the 19th Aug. 1867 :

Art. 1: The guardians may employ such persons as they shall deem requisite in and about the workhouse or workhouse premises, or on the land occupied for the employment of the pauper inmates of the workhouse, or otherwise in or about the relief of the indoor poor, upon such terms and conditions as shall appear to them to be suitable.

Art. 6: The word "workhouse" shall include every school, infirmary, or hospital, provided by the guardians for the reception of paupers.

*French* (C. Russell, Q.C. with him) for the motion.—Sect. 46 of the Poor Law Amendment Act of 1834 does not mean that the Poor Law Commissioners (now the Local Government Board) can only direct the appointment of a clergyman of the Church of England as a "paid officer." By sect. 109 paid officer includes "clergyman," which may mean a clergyman not a member of the Church of England. This is shown by the definition clause (sect. 74) in the Poor Law Amendment Act 1844, where a minister is defined to mean a person in holy orders and also every person teaching or preaching at religious worship in a certified place of meeting. No doubt by the order of 1843, articles 60 and 76, the select vestry could only appoint a chaplain, such chaplain to be, it is admitted, a clergyman of the Church of England. By sect. 43 of the Poor Law Amendment Act 1844, schools are put upon the same footing as workhouses as regards the appointment of paid officers, and as regards the conscience clause in the matter of religious instruction. But then by a General Order of the 19th Aug. 1867, the Poor Law Board authorised the guardians (the select vestry being included in that term) to employ such persons as they think requisite. These words are wide enough to include a clergyman of the Roman Catholic Church. Sect. 19 of the Poor Law Amendment Act 1834 gives religious freedom to all inmates

(a) A General Order of the 24th July 1847 contains, in articles 153 and 211, provisions similar to those contained in the above special order of 1843, which was only directed to the select vestry of Liverpool.

of a workhouse, and a licensed minister may visit the workhouse for the purpose of affording religious assistance to his co-religionists. Surely Parliament intended that these ministers should not be mere volunteers, but should be paid by the vestry or guardians, and be under their control. Moreover, by sect. 21 of 31 & 32 Vict. c. 122 (Poor Law Amendment Act 1868), if no religious service is provided in the workhouse for the inmates according to their creed, they may go to some place of worship outside. This shows that the guardians or vestry may direct religious services, other than those of the Church of England, to be held in the workhouse, and that they have the power to pay the ministers who conduct them. Hence in this case the select vestry had power to appoint and pay these two Roman Catholic clergymen.

Sir H. Giffard, Q.C. and C. Higgins, for the auditor, showed cause.—Sect. 46 of the Poor Law Amendment Act 1834 only gives power to the Poor Law Commissioners to direct the guardians or vestry to appoint "paid officers," which words are to include clergymen. The Poor Law Commissioners or their successors have never directed the appointment of any clergymen other than those of the Church of England. It is admitted that under the Order of 1843 the chaplain must be a clergyman of the Church of England. Then the sole question remains whether the General Order of 1867 gave the vestry power to appoint what may be called Nonconformist clergymen. The words of article 1 seem to point to persons of a lower class than clergymen. If such an important change were intended, it would not have been made by such general words, but the Poor Law Board would have dealt with the appointment of Nonconformist clergymen specially. Neither in sect. 19 of the Poor Law Amendment Act 1834, nor in sect. 21 of the Poor Law Amendment Act 1868, which give the vestry power to allow any minister to attend in the workhouse and hold religious services there, is any payment to such ministers contemplated. Hence these payments were properly disallowed.

*French* was not called on to reply.

STEPHEN, J.—I must say that I do not feel any difficulty in deciding this question. But, as it is one of considerable importance, I wish to go through the different sections of the various Acts of Parliament, and also the Poor Law Orders. It is with great satisfaction that I give the judgment I am about to give, as it is only right and proper that those who give such religious instruction to the inmates of a workhouse should not be mere unpaid volunteers, but should receive payment for their work, and be in a recognised position responsible to the guardians or vestry. A great many sections have been referred to, and the first one is sect. 19 of the 4 & 5 Will. 4, c. 76 (Poor Law Amendment Act 1834), and that section, in effect, provides that no rules shall oblige any inmate of a workhouse to attend a religious service contrary to his conscience, and that licensed ministers may give religious assistance in the workhouse to their own people. I agree that certain privileges were given to clergymen of the Church of England in workhouses, who were called chaplains, which privileges other ministers did not possess. Then comes sect. 46, which authorises the appointment of "paid

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officers." I may observe that a judicial decision has been given upon this section in the case of *Reg. v. Braintree Union* (1 Q. B. 130), that the Poor Law Commissioners had power to direct the appointment of a chaplain, with a salary, under the words "paid officers," sect. 109 saying that officers are to include clergymen. The next Act that I come to is the Poor Law Amendment Act 1844, which by sect. 43 seems to recognise that the chaplain of a workhouse, and a school attached thereto, is to be a clergyman of the Established Church, but a proviso is inserted as to religious teaching similar to that contained in the earlier statute. Coming now to the Poor Law Order of 1843 as to officers to be appointed by the select vestry, I quite agree that by articles 60 and 76, taken together, the "chaplain" must be a clergyman of the Established Church, being to that extent placed on a different footing from other clergymen. Then we come to the General Order of the 19th Aug. 1867, and the question is, whether article 1 authorises the appointment of paid Roman Catholic clergymen to afford religious assistance to the inmates who profess their creed, who are not called chaplains, but who have many of the duties of a chaplain. It is clear to me that it does. The words are wide enough to include clergymen of any denomination, and I think that very probably the Poor Law Board intended that to be so, wishing to do quietly what might otherwise have created a considerable amount of feeling. I am strengthened in this view by article 3 of this order, which provides that the foregoing articles of this order (except so much thereof as relates to their quarterly or other periodical payments) shall not apply to the following officers or persons: (amongst others) the chaplain. Why should I limit the application of article 1 as to payment to the chaplain? Why should it not also include a Nonconformist clergyman? But the case does not stop there, because the very next year the Poor Law Amendment Act 1868, drafted by persons familiar with the law, was passed, and sect. 21 of that Act provides that any inmate who has no religious service according to his own creed provided for him in the workhouse, may attend some place of worship of his own denomination. If my interpretation of the Order of 1867 is correct, the guardians (in this case the select vestry) received authority by that order to appoint and pay a clergyman to hold such services in the workhouse, and it is only when they are not held there that the inmate may attend some place of worship outside the workhouse. This, moreover, was the view taken by the Local Government Board in this very case. Upon the whole, therefore, I am of opinion that the select vestry had power by article 1 of the General Order of 1867 to appoint and pay these Roman Catholic clergymen, and that the auditor having disallowed these payments, and surcharged the applicant with them, this rule for a *certiorari* must be made absolute.

WATKIN WILLIAMS, J.—I agree.

*Rule absolute.*Solicitors for the applicant, *W. W. Wynne and Son, for T. J. Smith, Liverpool.*Solicitors for the auditor, *Kennedy, Hughes, and Kennedy.*

## Supreme Court of Judicature.

## COURT OF APPEAL.

May 26, 27, and 28.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. on the prosecution of THE ASSESSMENT COMMITTEE OF THE POPLAR UNION v. THE EAST AND WEST INDIA DOCK COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), ss. 46, 47—Supplemental valuation list—Alteration—Dock company—Diminution of profits—Sufficiency of evidence of alteration.*

*Upon an appeal against a supplemental valuation list, under the Valuation (Metropolis) Act 1869, evidence showing a diminution in the profits of a dock company within the preceding twelve months is admissible as evidence of alteration in value, and is prima facie evidence of an alteration within the meaning of the Act.*

*Per Brett, M.R. and Bowen, L.J.: Where it is shown that there has been an alteration in value during the preceding twelve months, only the amount of such alteration, and not the present rateable value, can be inquired into.*

*Per Fry, L.J.: The present rateable value should be inquired into and ascertained.*

*Judgment of Grove and Manisty, JJ. reversed.*

THIS was an appeal by the East and West India Dock Company from the decision of Grove and Manisty, JJ. (reported 49 L. T. Rep. N. S. 363; 12 Q. B. Div. 721), where the material parts of the special case and the provisions of the Valuation (Metropolis) Act 1869, on which the question for decision depended, are set out.

Sir H. S. Giffard, Q.C., Marriott, Q.C., and K. E. Digby for the appellants.

Sir F. Herschell (S.G.), W. H. Holl, Q.C., and Fullarton for the respondents.

The arguments were similar to those used in the court below, and are sufficiently referred to in the judgments.

The following authorities were cited:

*Reg. v. Abney Park Cemetery Company*, 29 L. T. Rep. N. S. 174; L. Rep. 8 Q. B. 515;

*Reg. v. New River Company*, 4 Q. B. Div. 309;

*Reg. The Grand Junction Railway Company*, 4 Q. B. 18;

*Reg. v. Bristol Dock Company*, 1 Q. B. 535;

*Reg. v. Castleton*, 10 L. T. Rep. N. S. 605.

BRETT, M.R.—In this case the Divisional Court has overruled the order of the Court of General Assessment Sessions, and has come to the conclusion that there was evidence, which was admissible and relevant, but was not *prima facie* evidence of such an alteration in value as to make it necessary to order that a supplemental list be made out. It is impossible to deal with this appeal without considering the order of the Court of Sessions as well as the decision of the Divisional Court. If we disagree with the decision of the Divisional Court, we shall have to see whether the order of the Court of Sessions ought to be altered. The question is, as to the rateable value of the East and West India Docks. The dock company say that there should be a

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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supplemental list, because there has been an alteration in value within the last year. It is said against them that there is no evidence of any alteration in value within that period. It is clear that, unless the dock company can show that by reason of something that took place within the last preceding year the value was altered, then the quinquennial list, and the valuation then fixed, must stand, whether that valuation was right or wrong when it was fixed. The Divisional Court thought the evidence was relevant and admissible, but that it made out no *prima facie* case of an alteration in value within the year. Here it was argued on behalf of the respondents that there was no evidence of such alteration. The evidence consisted in the first place of books of accounts, and there was evidence to show that those accounts correctly showed the receipts and expenditure of the dock company during the last preceding year. Evidence was also given as to the receipts and expenditure during other preceding years, and it was urged that, as during the last preceding year there had been a falling off in receipts, the necessary inference was that there had been a diminution in the receipts of the company by reason of a less amount of tonnage having come into the docks to such an extent as to cause an alteration in value. Supposing that evidence stood alone, would it be evidence of an alteration in rateable value within the last preceding year? It is not necessary to decide this, but I am inclined to think that it would. But the dock company want to show that this falling off is not an accident, but that there has been a successive and permanent diminution in their profits. If this is so, I am of opinion that there is *prima facie* evidence of a diminution in rateable value within the last preceding year. The fact of diminution of profits may be explained; it may be shown that the diminution does not affect the rateable value, or the inference that it does may be rebutted by proof of other facts. If the diminution is a mere accident, and will be rectified in the future, it is a matter which no tenant would care for, and therefore it does not affect the rateable value. But if there is a falling revenue, and the diminution is going on, a tenant would take this circumstance into account. It seems to me therefore that the court below was right in holding that the evidence was admissible and relevant; but I differ from them as to the other question, for I think it was *prima facie* evidence of a diminution in value within the last preceding year. This being so, the Court of Sessions should consider that evidence, and should see whether within the last preceding year there has been an alteration in rateable value by reason of the diminution of receipts. But it would be wrong to send the case back to the sessions without giving them proper directions as to how they ought to deal with it. The question is one of extreme difficulty. It has been argued on behalf of the appellants that, if it is proved that there has been an alteration in value within the last preceding year, admitting the existence of such alteration to be a condition precedent to the admissibility of a supplemental list, yet when once the existence of such an alteration has been shown, then the whole inquiry as to the rateable value is to begin *de novo* as if the property had not been valued before, and then the new valuation must be compared with the existing list, and, if it is found to be less than the value

stated in the existing list, the rate must be diminished accordingly. The Solicitor-General has pointed out difficulties which will arise if this is the true view, and I agree that it would be in the power of anybody to force on an appeal against the existing list after the time for appealing had elapsed, because by making an alteration in the property he could reopen the valuation, and that is virtually an appeal. It might follow that, although the property had within the year been increased in value, yet, because the former valuation had been erroneous, the rateable value in the supplemental list would be less than it had been before. I cannot construe the statute so. I think the prior decision as to value must be taken to have been correct, and it must be ascertained whether what has occurred within the last preceding year has affected the value. If what has occurred within the last preceding year has altered the value which was previously decided, then I think this proposition is true, that the gross rateable value in the supplemental list is to be ascertained, assuming that such value in the list then in force be correct at the commencement of the year in question, and the result is to be arrived at by adding thereto or subtracting therefrom the addition to or diminution from such value resulting from the alteration arising during the year. That being so, I do not adopt the proposition that the whole inquiry is thrown open. When it has been ascertained what the alteration is, the value, as altered, should be entered in the supplemental list. The result will be, that we vary the judgment of the Divisional Court by sending the case to the sessions, that they may hear the evidence and solve the difficult proposition to which I have referred, and if there has been an alteration in rateable value within the last preceding year, a supplemental list should be made out, and the value as altered should be entered.

BOWEN, L.J.—The question is one of great difficulty. It has to be decided whether what happened within the preceding twelve months has entitled the dock company to have a supplemental list made out. The argument is divided into two branches: first, as to whether there is any evidence which, if unaltered, uncontradicted and unqualified, would amount to *prima facie* evidence of an alteration in rateable value during the last preceding twelve months. If this is so, we have to consider how far effect is to be given to such evidence. It seems that during the last year there has been a falling off in the receipts of the company, because a less amount of tonnage has come into the docks, and, looking at that circumstance with the help of the light afforded by the previous fall in the company's profits, I think there is some evidence that the value of the property is not what it was before. We do not decide that there has been an alteration in value, but only that the figures require explanation, and furnish *prima facie* evidence of such an alteration. Secondly, to what extent is the inquiry to be pursued? Is the quinquennial list to be set aside, and the true value assessed, or is the alteration only to be taken into account? This question is difficult, and the language of the Act is not explicit. As the Solicitor-General has pointed out, the quinquennial list is part of the machinery of assessment. It is not intended that the assessment should go on according to the same valuation



year by year, nor, on the other hand, that the value should be inquired into in each year. There is a compromise, by which the valuation is to be readjusted on certain conditions, and within certain limits. The preamble to the statute (32 & 33 Vict. c. 67) is not unimportant. It is: "Whereas it is expedient to provide for a common basis of value for the purposes of government and local taxation, and to promote uniformity in the assessment of rateable property in the metropolis." The first section dealing with the quinquennial list is sect. 43, which provides that the valuation list "shall last for five years, subject to any alterations that may be made by any supplemental or provisional list, as hereinafter mentioned." Then sect. 46, on the true construction of which the decision must turn, contains provisions for readjusting the valuation by means of a supplemental list. Now what is to be put on the supplemental list if the words of the Act are followed? Sect. 46 does not say that the true value shall be shown, but that the supplemental list "shall show all the alterations which have taken place during the preceding twelve months." To my mind it is intended that the supplemental list shall show the figures to which the rateable value is to be altered. There are practical difficulties in the way of adopting the other view. One is that any dissatisfied ratepayer practically could always appeal against the valuation after the time for appealing had elapsed, by altering his premises, or by taking advantage of some alteration which might have occurred, and thus could re-discuss the quinquennial list before another tribunal. It is no doubt a *reductio ad absurdum* to take the case of a man adding a story to his house, and then claiming to reopen the valuation list, but still it is an illustration of the difficulties attending the construction contended for on behalf of the appellants. It is to be observed that what sets free the ratepayer, so as to enable him to demand a supplemental list, is not merely an alteration in the rateable value, but any alteration "in any of the matters stated in the valuation list." It seems an absurd result if because any alteration, however trifling, has taken place, a valuation *de novo* should be within the reach of the ratepayer. In my opinion the broad view of the meaning of this obscure Act of Parliament, is that it is not consistent to suppose that the quinquennial list is to be thrown aside whenever an alteration takes place within the last preceding twelve months, but that only the measure of the alteration is to be taken into account.

FRY, L.J.—There are two questions to be considered. The first is, whether a fall of profits is evidence of a diminution of rateable value. I am of opinion that it is some evidence that the rateable value has been diminished, such as might reasonably be expected to affect the mind of a yearly tenant. The fall in the profits may be casual, or it may be explained by other circumstances, or it may have been taken into account in making the previous valuation, so it is not conclusive; but I think it is some evidence. Secondly, assuming there has been an alteration within the last preceding year, is the rateable value to be ascertained *de novo* for the purpose of making out the supplemental list, or is the alteration only to be ascertained? On this point I differ from the opinion which has been expressed by the other

members of the court. The Act of Parliament is intended to provide machinery for the purpose of finding out the true rateable value. The quinquennial valuation is to remain in force until an alteration takes place in some of the matters stated in the valuation list. The list is then to be amended, and two modes of doing this are provided—by a provisional and by a supplemental list. As the result of an examination of the provisions of sect. 46, I have come to the conclusion that the section contains machinery for ascertaining the rateable value, but none for getting at the amount of the alteration. I think it leaves the alteration to be ascertained by a comparison of the true rateable value, when that is ascertained, with the existing valuation list. By the terms of the section, if it is necessary to make out a supplemental list, such list is to be in the same form as the quinquennial valuation list, and no other form is given. It is said that the supplemental list may be made to show the alterations in two ways, by showing the difference between the old list and the true value, or by showing to what extent the old valuation has been affected, without showing what the real value is, but one way only will allow the list to be in the same form as the quinquennial list. Sub-sect. 3 is important, for it contains directions as to the mode in which the supplemental list is to be made out, and it contains no provision for ascertaining the difference. Then as to the arguments which have been brought forward in support of the opposite view, it is said that, under sect. 47, sub-sect. (1), the provisional list is to show "the gross and rateable value as so increased or so reduced," and that this must refer to the quinquennial valuation list as increased or reduced; but I think it means the true gross and rateable value as increased or reduced. Then it is said to be improbable that the Act should be intended to allow the true value to be ascertained after a lapse of only one year from the date of the quinquennial valuation. I think the answer is, that the quinquennial valuation is to be assumed to be right, and is to remain in force unless an alteration takes place; but if it then turns out to be wrong, I see no reason why it should not be corrected. Then it is said that the occupier might make an addition to his premises and suggest that there was an alteration, and reopen the quinquennial valuation list, and so get a reduction of his rates. I am inclined to think that, under such circumstances, he would not be able to prove an alteration within the meaning of sect. 46; but the case suggested is highly improbable, and extreme cases are not safe guides to the construction of a statute. Moreover, I am not satisfied that it would be unreasonable that the occupier should obtain a reduction if his property was really valued too high, for he has suffered a wrong. For these reasons I think the Act provides machinery for ascertaining the real value.

*Judgment reversed.*

Solicitors for appellants, *Freshfields and Williams*.

Solicitor for respondents, *J. W. Marsh*.

CT. OF APP.] LONDON SCOTTISH PERMANENT BENEFIT SOCIETY v. CHORLEY AND OTHERS. [CT. OF APP.]

May 14 and 30.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

LONDON SCOTTISH PERMANENT BENEFIT SOCIETY v.  
CHORLEY AND OTHERS.(a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice — Costs — Taxation — Solicitor suing or  
defending in person.*

*Where a solicitor sues or defends an action in person, and obtains judgment with costs, he is entitled to recover from his adversary the same costs as would have been allowed if he were not a party to the action, but were acting as solicitor for another person, subject to this, that the costs to be allowed must not include any items which the union of the two characters renders impossible or unnecessary; and where any items are attributable to the fact that the solicitor is acting in the two characters, such items should be treated on taxation as attributable to his character as party to the action, and not to his character as solicitor.*

*Judgment of Denman, Manisty, and Watkin Williams, JJ. affirmed.*

An action for money received was brought by the plaintiffs against the defendants, Chorley, Crawford, and Chester, who were solicitors. At the trial the matters were referred to a barrister, who decided in favour of the defendants, and directed that the plaintiffs should pay to the defendants their costs of the reference and certificate, and the plaintiffs should bear their own costs.

The defendants, Crawford and Chester, who had conducted their own defence, presented their bill of costs for taxation. The solicitor for the plaintiffs objected that the defendants, being solicitors, and having appeared throughout the whole of the action as defendants in person, ought not to be allowed any other costs than costs out of pocket, or such costs as they would be entitled to if they were non-professional men. The master overruled the objection and allowed costs as between party and party, with the exception of certain charges for instructions.

The plaintiffs applied by summons to review the taxation. Mathew, J. referred the summons to the court, and the Divisional Court (Denman, Manisty, and Watkin Williams, JJ.) refused the plaintiffs' application.

From this decision (which is reported 50 L. T. Rep. N. S. 265; 12 Q. B. Div. 452) the plaintiffs now appealed.

**May 14.—Cock for the plaintiffs.**—There is no decision in favour of the supposed practice on which the court below acted, and it is unreasonable that a solicitor suing or defending in person should be in a better position than any other litigant. The first appearance of any statement in favour of such a practice is to be found in Lush's Practice, published in 1840 (p. 775 in the 1st edition, 896 in the 3rd), where it is laid down that "an attorney regularly qualified is allowed to make the same charges for business done when he sues or defends in person as when he acts as attorney for another." No authority is cited for this proposition. The rule is stated in Chitty's Practice as follows: "Where a solicitor is a party to an action, and obtains a judgment in his favour, he is entitled to the same costs as if he had conducted the action as solicitor for some other

person, and not merely to the costs which another person suing or defending in person would be entitled to:" (13th edit. p. 82.) This proposition appears for the first time in the 7th edition (also published in 1840), and is not to be found in any of the first six editions. The cases cited are *Jervis v. Deves* (4 Dowl. 764); *Paraloe v. Foy* (2 Dowl. 181); and *Leaver v. Whalley* (2 Dowl. 80), none of which bear out the statement. The earlier text-books are silent on the point, and the later text-books, where they mention it, seem to follow one or other of the two books already quoted. He also referred to

*Gordon on Costs*, 195; *Sayer on Costs*, 5; 1 *Hullock on Costs*, 8; *Beames on Costs in Equity*; *Dax on Masters' Practice*, 31; *Pulling on Attorneys*, 267, 3rd edit.; *Gray on Costs*; *Marshall on Costs*; *Cordery on Solicitors*, 120; *Coke's Institutes*, part 2, p. 288;

*Sclater v. Cottam*, 3 Jur. N. S. 630;

*Price v. McBeth*, 10 L. T. Rep. N. S. 521; 33 L. J. 460, Ch.

**H. Tindal Atkinson** for the defendants.—The rule that is in substance laid down by the judgment of the Divisional Court is that a solicitor who conducts his own case and recovers costs against his opponent is entitled to charge him for all work actually done. This is the correct rule, and the effect of it is that the scale of costs prescribed by R. S. C. 1883, Order LXV., r. 8, and Appendix N. would apply, subject to the exception that a few items, such as, for instance, "instructions to sue," or "to defend," which the solicitor would be entitled to charge against the other side when he was acting on behalf of a client, would not be allowed to him when acting on his own behalf. It is clear that a solicitor is entitled to employ another solicitor, and if he does so his costs will be allowed; it seems unreasonable, then, that because, instead of employing another solicitor, he devotes his own professional skill and labour to the case, he should be deprived of costs. The natural result of upholding the appellants' contention would be that in all cases where a solicitor was a party to litigation he would employ another solicitor to act for him. He also referred to

*Ex parte Chamberlayne*; *Re West*, 14 Jur. O. S. 997;

*Guy v. Brown*, L. Rep. 1 P. C. 411;

2 *Bacon's Abridgment*, 332.

*Cock* replied.

*Cur. adv. vult.*

**May 30.**—The following judgments were delivered:—

**BRETT, M.R.**—In this case an action was brought against the defendants, who are solicitors. The result of the litigation was in the defendants' favour, and they recovered costs against the plaintiffs. The defendants claimed to have their costs taxed as if they were acting as solicitors for another person, and the question is, whether this contention can be maintained. It is argued on the one side that, with regard to taxation of costs, there is no difference between a solicitor and any other party to an action who sues or defends in person; and, on the other side, that a solicitor who sues or defends in person and is successful is entitled to the same costs as if he were acting for a client. In my opinion, neither view is strictly accurate. I think the costs of a solicitor under such circumstances must be taxed differently from the costs of another person, but I do not agree

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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with the suggestion that a solicitor acting on his own behalf is entitled to the same costs as if he were acting for a client. The law is that, if a person is forced into litigation, and is successful, the person who has forced him into the litigation should indemnify him against the pecuniary loss which it has occasioned to him. A person who is not a solicitor having been successful in litigation should be indemnified against the pecuniary loss which his opponent has caused him to suffer; but the difficulty is, that one cannot say how much of the loss sustained has been caused by the successful party's own over-anxiety, and how much by the conduct of his opponent; that is the difficulty which gives rise to the difference in amount between cost taxed as between party and party and cost taxed as between solicitor and client. Where a person who is not a solicitor sues or defends in person the law does not indemnify him for his loss of time, but if a party appears by a solicitor it costs money, and what he pays is to be paid back to him. When a party appears in person his own time and trouble is not a pecuniary loss of which the law will take cognisance, and therefore he can only recover his costs out of pocket. Whatever he pays out of pocket is a pecuniary loss, for which he is to be indemnified, but his own trouble and annoyance is not such a loss. A solicitor is entitled to employ another solicitor to act for him, and if he does so he has to pay, and is entitled to recover the costs which he incurs. If the solicitor acts on his own behalf, and has to do for himself what otherwise would be done for him by another solicitor, that is not loss of time but of money. To say that he must employ another solicitor in order to be entitled to recover these costs amounts to mere circuity. Therefore, when a solicitor sues or defends in person, the items which he is entitled to charge against his opponent are substantially the same as his out-of-pocket costs where he employs another solicitor. This being so, it is true to say that the costs of a solicitor acting on his own behalf are to be taxed differently from the costs of any other litigant; he cannot charge for instructing himself, because in fact he has not done so. In the same way, to speak of a consultation with himself would be nonsense, and he cannot attend upon himself. This seems to me to be the rule, that where a solicitor sues or defends in person, and recovers judgment for costs, he is entitled to the same costs as if he were not a party to the litigation, but were acting on behalf of a client, subject to this, that his costs are not to include items which the union of the two characters in the same individual renders impossible, such as instructions to, consultations with, and attendances on a solicitor, who in such a case is the party himself; and where any items are attributable to the fact of his acting in both characters, such items should be treated as attributable to his character as party, and not to his character as solicitor. As far as I can see, no rule to the contrary has ever been laid down. Then is there an inveterate practice the other way? Even if there were, that would not be conclusive, for the practice of the masters cannot make the law; but it has been ascertained that the practice is not uniform, and in some cases a rule similar to that which I have stated has been adopted. Therefore there is no authority against that rule, and it appears to me to

be sensible. In the report of the case in the Law Reports in the court below (12 Q. B. Div. 452) the head-note goes a step further than the judgment. It is this: "Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary." This is nearly the same as what I have already stated. I think, therefore, that the judgment in the court below is substantially right, and that the statement in the head-note to the report is even more right; but the taxation in the present case is not accurate, and therefore the bill of costs must go back to the master in order that he may ascertain whether any items have been allowed which ought not to have been allowed according to the rule which I have stated. What the effect of this may be we cannot now tell, and therefore we will consider the question as to the costs of this appeal when we know the result. For the present the question of costs will be reserved.

BOWEN, L.J.—I am of the same opinion both as to the decision and as to the reasons for it. The great principle is, that the courts are open to everybody for the purpose of asserting civil rights; and if a person is injured by the assertion of a wrongful claim, the protection afforded to him is that which is the creation of statute, that costs are awarded to the successful party. This protection was first introduced by the Statute of Gloucester (6 Edw. I., c. 1), and the view has always been that a person who has wrongly been put to expense should be indemnified. The following passage from Coke's Institutes, in my opinion, gives the key to the true view as to costs: "Here is expresse mention made but of the costs of his writ; but it extendeth to all the legall cost of the suit, but not to the costs and expences of his travell and losse of time, and therefore *costages* commeth of the verb *constare*, and that againe of the verb *constare*, for these *costages* must *constare* to the court to be legall costs and expences:" (Coke Inst., part II., p. 288.) Now, what does Coke mean by this passage? He means that the party is only to be allowed legal costs, and such as are the exact and natural result of his having been forced into litigation. Professional skill and labour are recognised by law as the result of litigation; but private expenditure of time and labour is not what the law can measure, nor is it dependent on litigation. Private expenditure of time and labour is outside the litigation; but professional skill and labour are not less the results of litigation because they are used by the litigant himself. I can see no rule which makes it right to allow costs if the work is done through another solicitor, but not to allow costs for the same work if it is done for the litigant by his own clerks. I agree with the Master of the Rolls that this is not a question of solicitors' privilege. The practice has not been altogether uniform, and the Chancery and common law practice have differed somewhat. We find the rule thus stated by the late Lord Justice Lush, who was a very great authority on all matters of practice: "A party not an attorney, suing or defending in person, is entitled to no more than his expenses out of pocket, or at most to a reasonable allowance beyond for his loss of time; but an attorney

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regularly qualified is allowed to make the same charges for business done when he sues or defends in person as when he acts as attorney for another:" (2 Lush's Practice, 896, 3rd edit.) I think that what is meant by this passage is in substance the same as the view expressed by the Master of the Rolls, with which I concur.

FRY, L.J.—I am of the same opinion. In no sense is this a question of the privilege of solicitors. The conclusion at which we arrive will prove beneficial to the non-professional public, for, if the rule were otherwise, a solicitor engaged in litigation would always employ another solicitor, and in that case the opposing party if he were unsuccessful would have to pay full costs.

*Judgment affirmed.*

Solicitors for plaintiffs, *Harries, Wilkinson, and Raikes.*

Defendants in person.

May 22, 23, and 30.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. v. THE JUDGE OF THE COUNTY COURT AT CROYDON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bankruptcy—Contempt of court—Committal—Powers of County Court judge—32 & 33 Vict. c. 71, ss. 96, 66—46 & 47 Vict. c. 52, ss. 27, 100.*

*By the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 96 (which is substantially re-enacted by the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 27), the court had power under certain circumstances to summon persons to attend and give evidence or produce documents, and in case of refusal to cause such persons to be apprehended and brought up for examination.*

*By sect. 66 (which is substantially re-enacted by sect. 100 of the Act of 1883) judges of local courts of bankruptcy had, for the purposes of the Act, in addition to their ordinary powers as County Court judges, all the powers and jurisdiction of judges of the High Court of Chancery, and their orders might be enforced accordingly.*

*A County Court judge sitting in bankruptcy summoned a person to attend under sect. 96; this summons was disobeyed, and the judge thereupon made an order for the committal of the person so summoned.*

*Held (affirming the order of Grove, J. and Huddleston, B., who had discharged a rule for a prohibition to prevent proceedings on the order of committal), that the remedy for disobedience to the summons was not confined to that prescribed by sect. 96, but the judge had power under sect. 66 to make the order for committal.*

This was an appeal by A. W. Gibbons from the decision of Grove, J. and Huddleston, B., discharging a rule nisi for a prohibition to prevent proceedings on an order of committal.

The deputy-judge of the County Court at Croydon, sitting in bankruptcy, had made an order under the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 96 (b) directing the appellant to

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 96: The court may, on the application of the trustee at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or

appear before the court for the purpose of giving information as to a bankrupt's estate. This order having been disobeyed the deputy-judge made an order for the committal of the appellant.

May 22 and 23.—*Charles, Q.C. and Stephen Lynch*, for the appellant, supported, and *Horne Payne* opposed, the application for a prohibition.

The following authorities were cited:

*Reg. v. Lefroy*, L. Rep. 8 Q. B. 134;  
*Ex parte Martin*, 4 Q. B. Div. 212, 491;  
*Ex parte Ferridge*, 32 L. T. Rep. N. S. 507; L. Rep. 20 Eq. 289;  
*Re Bank of Hindustan*, L. Rep. 13 Eq. 178;  
*Re English Joint Stock Bank*, 15 L. T. Rep. N. S. 206; L. Rep. 3 Eq. 203;  
*Wright v. Maude*, 10 M. & W. 527.

*Cur. adv. vult.*

May 30.—The following judgments were delivered:—

BRETT, M.R.—In this case the County Court judge, sitting in bankruptcy, issued a summons under 32 & 33 Vict. c. 71, s. 96, ordering the appellant to appear before the court. The appellant neglected to appear under such circumstances as induced the judge to issue an order committing him to prison for contempt of court. The appellant moved for a prohibition, and a rule nisi was granted, but was discharged by the Divisional Court; from their decision the present appeal is brought. The question is important, for, if the judge has the power which he has exercised, it is a great and extraordinary power. The solution depends on the statute under which the County Court judge acted when sitting in bankruptcy. In the first place, what is his authority when sitting in bankruptcy? The Court of Bankruptcy is a court of record, and the County Court judge sitting in bankruptcy is a judge of a court of record; and it follows, without any statute, that he has certain powers of committal. He can commit for contempt in the face of the court; but here the contempt was not in the face of the court, for it consisted in not coming to the court. If, therefore, it stood on his being a judge of a court of record merely, I should think he had not the power which he has exercised. It is suggested that the County Court, when sitting in bankruptcy, is not only a court of record, but a superior court of record. I cannot accede to that

his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination.

32 & 33 Vict. c. 71, s. 66: Every judge of a local court of bankruptcy shall, for the purposes of this Act, in addition to his ordinary powers as a County Court judge, have all the powers and jurisdiction of a judge of Her Majesty's High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed.

This Act is repealed by the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 169, but the above sections are in substance re-enacted by sects. 27 and 100 of the Act of 1883.

contention. If the judge were a judge of a superior court of record he would have the same powers as the judges of the Court of Chancery and of the courts at Westminster had, and would have full power to commit. In Chancery there are two kinds of power: there is the ordinary power of a superior court of record, and there is also power to issue an attachment for not carrying out the process of the court; that power follows from the decree, and the court possesses it besides the other power of committal for the misconduct of a party before the court. If, therefore, it stood on the court being a superior court of record, I could not agree that the power now claimed existed. It seems difficult to suppose that the Legislature intended to give such an extensive power to County Court judges, sitting in remote parts of the country, isolated, and without that control which exists where judges sit and act together, and not subject to the criticism of the Bar. The question, however, is whether the statute is so worded. It turns on the Bankruptcy Act 1869 (32 & 33 Vict. c. 71). By sect. 96 a witness could be brought up in custody, and if he then declined to answer he would be guilty of a contempt in the face of the court, and could be committed to prison; therefore, it would seem as if sect. 96 gave all the necessary power. But further powers were given by sect. 66, and we cannot go against it. The court cannot construe the section otherwise than according to the ordinary rule of giving to the words used their natural meaning as applicable to the subject-matter with which the statute is dealing. Now, sect. 66 gave to County Court judges sitting in bankruptcy the powers and jurisdiction of a judge of the Court of Chancery, and a judge of the Court of Chancery had the power in question beyond doubt. Therefore, if we read the statute in its ordinary sense, it gave to a County Court judge sitting in bankruptcy this extraordinary power, so that he could bring up a witness in custody under sect. 96, and also had a cumulative power to punish the witness for not coming when first ordered to do so; for, although the witness answered when brought up, the judge might still punish him for contempt in not coming at first, and might commit him to prison. It seems a strange result that there should be such a large power, but if the Legislature has given it we must decide accordingly. I was at first under the impression that we could read the words in sect. 66, "for the purposes of this Act," as meaning for the purpose of distributing the bankrupt's estate, and that it would not follow that the judge should have power to commit for non-attendance as a witness; but, on consideration, and after discussing the case with the other members of the court, I have come to the conclusion that we must read the section in its ordinary sense, and that it gave to every local County Court judge the extraordinary power claimed and exercised in the present case. It gave them the same powers as judges of the Court of Chancery, though they are not subject to the same criticism. If I thought there was no appeal to the Chief Judge in Bankruptcy, I should think this result would be impossible; but I think there is an appeal to the Chief Judge from an order of committal made by a County Court judge. For the reasons which I have given, although I have some doubt, I think that the effect of sect. 66 of the

statute was to give to a County Court judge sitting in bankruptcy power to commit a person who had been ordered to attend as a witness under sect. 96, and had failed to comply with that order. I wish to add that I do not suggest anything as to the circumstances under which the power was exercised in the present case. The result is, that the appeal fails, and must be dismissed.

BOWEN, L.J.—I agree that the sole question is, whether a County Court judge sitting in bankruptcy had jurisdiction under sect. 66 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) to punish for a contempt which consisted of disobedience to an order to attend and give evidence under sect. 96. It turns entirely on the construction of the statute. Sect. 66 gave to every judge of a local court of bankruptcy the powers and jurisdiction of a judge of the Court of Chancery. The County Court judge was not clothed with the same authority as was conferred on the judge of the London Court of Bankruptcy by sect. 65, for he only had the power of a judge of the Court of Chancery; but a judge of that court had ample and great powers, which included the power to punish by attachment. The question is, whether the County Court judge was not clothed with the same power, and whether it extended to the power of punishing for disobedience to an order issued under sect. 96. I think it is impossible to say that the judge had not such power, provided the case comes within the limitation contained in the words "for the purposes of this Act." The principal sections of the Act, besides those already referred to, which dealt with contempt and the enforcement of orders of the court, were sects. 19, 28, 55, 56, 70, 73, 77, 93, 126. All these provisions assumed that the judge had power to punish for contempt of court, and many of the sections created statutory offences, and declared that such offences should be punishable as contempt of court. The rules made under the Act also followed the same line, for by rule 3 the judge was forbidden to delegate his power of committing for contempt to the registrar. I am also impressed with the fact that no distinction was made between different kinds of contempts, and there was no classification of contempts. Now what is the position of the appellant in the present case? An order for his attendance was made under sect. 96, which was taken from sect. 115 of the Companies Act 1862 (25 & 26 Vict. c. 89); the appellant disobeyed the order. The first question is, whether the summons was a process or order, which, if it had issued from the High Court, would have enabled a judge to issue an attachment. I am of opinion that it was. It was not a mere summons, the result of which would be that, if the person summoned did not attend, the case would proceed in his absence as if he were there; his attendance was necessary for the purposes of justice, and the proceedings could not go on without his presence. It was therefore not a mere summons, but a process on which a person could be compelled to attend just as much as on a subpoena, and unless there is something to show that other procedure was provided for the enforcement of this process, it could be enforced by attachment. It is said that we ought to apply the rule that, if complete redress is provided, we ought not to suppose that one is left at large to seek remedies elsewhere. But, in order that this contention may prevail, it is necessary to make out that the statute provided

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a complete remedy, and I am of opinion that the remedy provided by sect. 96 was not so complete as to displace the ordinary remedy by committal. When the witness was brought up under sect. 96 it might be too late for the purpose for which his attendance was required, and his neglect to attend might cause serious trouble and inconvenience in many ways. To defy a judge is treated as a contempt of court, not on account of the dignity of the judge, but because to do so is an impediment to justice, and a judge cannot carry out his duties in the administration of justice without the power of checking such conduct; that alone is the reason for the law of contempt of court. Therefore, for the purpose of the administration of justice, it is necessary that a judge should have such power; for, unless he is enabled to punish contempt of court, he has not complete means of dealing with all matters which it is his duty to deal with. But this is not the only reason for my decision. According to the practice of the Court of Chancery in cases under sect. 115 of the Companies Act 1862 (25 & 26 Vict. c. 89), the court had power to punish disobedience to its order to attend as a contempt of court. I think therefore that sect. 96 of the Bankruptcy Act 1869, which contained similar provisions, ought to be construed in the same way.

FRY, L.J.—I am of the same opinion. An order was made for the attendance of the appellant under sect. 96 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71). I say an order, because the summons issued under that section was in effect an order, being different from a summons taken out by a litigant calling on the opposite party to attend, and stating that if he does not the proceedings will go on in his absence. The order was made by the court, after judicial consideration, and was something more than a subpoena, which can be taken out by the party. Sect. 66 gave the County Court judge in bankruptcy the powers and jurisdiction of a judge of the Court of Chancery, and provided that his orders might be enforced in manner prescribed. These last words referred to the rules, but no rules were made prescribing how the orders of the judge should be enforced. The question is, had the Court of Chancery on the 1st Jan. 1870 (when the Bankruptcy Act 1869 came into operation) power to commit for disobedience to a similar order? There was a similar provision then in force, contained in sect. 115 of the Companies Act 1862 (25 & 26 Vict. c. 89). Therefore it comes to this, had the Court of Chancery power in 1869 to issue an attachment for disobedience to an order made under sect. 115 of the Companies Act 1862? I am clearly of opinion that the court had such power. I have no doubt of it, nor, indeed, was it contended that such a power did not exist. The only suggestion was that, by sect. 96 of the Bankruptcy Act, there was power to bring a person before the court; but, for the reasons given by Bowen, L.J., I think that power did not exclude the power of committal for disobedience. The remedy provided by sect. 96 might prove inadequate, and unless the power of committal also existed, the commands of the judge might be defied by an unwilling witness. The courts of common law had power to commit for disobedience to a subpoena which is taken out by the party, and therefore the Court of Chancery would naturally have power to commit for dis-

obedience to an order made by the court on consideration. Sect. 66 contained the words "for the purposes of this Act." The judge, when he made the order for committal, was sitting for the purposes of the Act. The power of committal is given, not to vindicate the personal dignity of the judge, but in order to enable him to carry into effect the duties imposed upon him. The view which I take is confirmed by reference to the other provisions of the Bankruptcy Act 1869. Sect. 19, and several other sections, declared that certain acts should be deemed to be contempt of court, and should be punished; but the statute was silent as to how any other contempt of court was punishable, unless power to punish it was given by sect. 66. I am of opinion, therefore, that it was intended to give the power of committal, and that the County Court judge in the present case had jurisdiction to commit, and the order for a prohibition was rightly discharged by the Divisional Court, and this appeal ought to be dismissed.

*Judgment affirmed.*

Solicitor for appellant, *Barfield*.

Solicitors for respondent, *Wynne-Baxter, Rance, and Mead*, for *Streeter*, Croydon.

*April 22, 23, and 28.*

(Before BRETT, M.R., BOWEN, and FRY, L.JJ.)

THE VERA CRUZ. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION (ADMIRALTY).

*Collision—Lord Campbell's Act (9 & 10 Vict. c. 93) Action in rem—Foreign ship—Jurisdiction—Admiralty Court Act (24 Vict. c. 10), s. 7—Limitation of liability—Appeal—Practice.*

*The Admiralty Division of the High Court of Justice has no jurisdiction to entertain an action in rem under Lord Campbell's Act, and hence the personal representatives of a deceased person killed by the negligence of those on board a foreign ship, in a collision between that ship and a British ship on waters within Her Majesty's dominions cannot sustain an action in rem against the owners of the foreign ship to recover damages for the loss of the deceased; but, semble (per Brett, M.R.), that, if in action for limitation of liability some of the claimants are the persons mentioned in Lord Campbell's Act, the Admiralty Division may entertain the claim.*

*Although, in consequence of the Court of Appeal being equally divided in opinion, the decision of the court below stands, yet the Court of Appeal is not bound thereby on a subsequent occasion, though, semble (per Brett, M.R.), it is otherwise in the case of the House of Lords.*

THIS was an action in rem brought under Lord Campbell's Act by Mary Seward, the widow and administratrix of William Seward deceased, late master of the British schooner *Agnes*, against the owner of the Spanish steamship *Vera Cruz*, to recover compensation for the pecuniary loss sustained by the plaintiff in consequence of William Seward's death, which was occasioned by a collision between the *Agnes* and the *Vera Cruz*, on waters within Her Majesty's dominions.

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.



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The collision took place in the Crosby Channel, at the entrance to the Mersey, between the Crosby and Formby lightships, on the 12th Aug. 1882.

An action *in rem* had previously been brought against the *Vera Cruz* by the owners of the *Agnes*, to recover damages for the loss of the *Agnes*. In that action the court had found both ships to blame.

The defendant in the present action appeared under protest, and the following petition on protest against the jurisdiction of the court was filed on their behalf:

1. The plaintiff is a British subject and is resident at or near Ulverstone in the county of Lancaster.

2. The defendant is a subject of His Majesty the King of Spain and is resident within that kingdom.

3. The defendant is the sole owner of the steamship or vessel *Vera Cruz*, which is a Spanish vessel belonging to the port of Bilbao, in Spain, and which is not registered in the United Kingdom of Great Britain.

4. On or about the 12th Aug. 1882, the *Vera Cruz* was in the Crosby Channel between the Crosby and Formby lightships, on a voyage from Liverpool to ports in Spain and elsewhere, and whilst in the prosecution of the said voyage, and when at the place aforesaid, the *Vera Cruz* came into collision with the British vessel, the schooner *Agnes*, and by reason of the said collision the *Agnes* was sunk and her master and some of her crew and passengers were drowned.

5. The *Vera Cruz* was in the port of Liverpool in the month of July 1883.

6. On or about the 13th July 1883, the *Vera Cruz* was arrested in a suit *in rem* instituted in the Admiralty Division of this honourable court by the owners of the schooner *Agnes* to recover damages sustained by the owners of the *Agnes* by reason of the aforesaid collision. The present action *in rem* was commenced by the plaintiff on the 23rd Nov. 1882, and the indorsement on the said writ is in the words and figures following: "The plaintiff as administratrix, with the will annexed of her late husband William Seward, deceased, late master of the vessel *Agnes*, claims £1000 against the owners of the ship or vessel *Vera Cruz* and her freight for damages for the loss of the said William Seward's life, occasioned by a collision which took place at the mouth of the Mersey in the month of Aug. 1882, and the sum of £33s. for costs. If the amount claimed is paid to the plaintiff or her solicitor or agents within four days from the service hereof, further proceedings will be stayed."

7. Bail was given in the said first-mentioned action and the *Vera Cruz* was thereupon released and sailed from England on or about the 17th July 1883.

8. This honourable court has no jurisdiction to entertain the said cause of damages for loss of life, and by reason thereof the service of the said writ on the *Vera Cruz* is in the circumstances stated in this petition irregular and void.

The defendants therefore pray this honourable court to pronounce against the jurisdiction of this honourable court and to dismiss this suit with damages and costs.

The allegations in the protest, with the exception of paragraph 8, were admitted by the plaintiffs.

On the petition coming on for hearing, Butt, J., being bound by the decision in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; 2 P. Div. 163), dismissed it without expressing any opinion on the subject. In *The Franconia* (*ubi sup.*), in consequence of the Court of Appeal being equally divided, the decision of Sir R. Phillimore, that the Admiralty Division had jurisdiction to entertain an action *in rem* under Lord Campbell's Act, stood.

The defendant was now appealing from Butt, J.'s decision. The following Acts of Parliament were referred to in the course of the argument:

The preamble and sect. 2 of Lord Campbell's Act:

Whereas no action at law is now maintainable against

a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

Sect. 7 of the Admiralty Court Act 1861:

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Dr. Phillimore and Bucknill for the appellant, the owner of the *Vera Cruz*.—It is submitted that the decision of Sir Robert Phillimore in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; 2 P. Div. 163) is wrong, and should be reversed. The fact that, owing to an equal division of opinion among the judges of this court, that decision stood, does not now preclude this court from reversing it. The words "damage done" in the Admiralty Court Act 1861, s. 7, do not cover a claim under Lord Campbell's Act. Notwithstanding the decisions in

*The Sylph*, 3 Mar. Law Cas. O. S. 37; 17 L. T. Rep. N. S. 519; L. Rep. 2 Ad. & Ecc. 24;

*The Explorer*, 3 Mar. Law Cas. O. S. 507; 23 L. T. Rep. N. S. 405; L. Rep. 3 Ad. & Ecc. 289;

*The Beta*, 20 L. T. Rep. N. S. 988; 2 Moo. P. C. N. S. 447;

*The Guildfaze*, 3 Mar. Law Cas. O. S. 201; 19 L. T. Rep. N. S. 748; L. Rep. 2 Ad. & Ecc. 325;

it is to be noticed that none of them are binding on this court, and moreover the Queen's Bench has decided otherwise:

*Smith v. Brown*, 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808; L. Rep. 6 Q. B. 729;

*James v. London and South-Western Railway Company*, 1 Asp. Mar. Law Cas. 428; 27 L. T. Rep. N. S. 382; L. Rep. 7 Ex. 187, 287;

*Simpson v. Blues*, 1 Asp. Mar. Law Cas. 326; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 290.

It is true that, by reason of the Merchant Shipping Acts allowing limitation of liability in cases of loss of life, claims under Lord Campbell's Act may be entertained by the Chancery and Admiralty Divisions, but that would only be so in cases where the owners of the wrongdoing ship had admitted their liability:

*The London and South-Western Railway Company v. James*, L. Rep. 8 Ch. App. 241; 1 Asp. Mar. Law Cas. 526; 38 L. T. Rep. N. S. 48;

*Glaholm v. Barker*, L. Rep. 1 Ch. App. Cas. 223; 14 L. T. Rep. N. S. 880; 2 Mar. Law Cas. O. S. 298, 380.

An English statute ought not, in the absence of



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express words, to be construed so as to impose liabilities upon foreigners for acts committed outside the territorial jurisdiction of England. The mode of assessing damages under Lord Campbell's Act is opposed to the contention that the Legislature intended that claims under that Act might be enforced by a proceeding *in rem*.

*French* for the respondent. — The words "damage done" cover personal injury and loss of life. If so, there has been damage done to the widow of the deceased, inasmuch as she, by her husband's death, has suffered pecuniary loss:

*The Beta (ubi sup.)*;

*The Ruckers*, 4 C. Rob. 73.

Foreign shipowners can limit their liability for loss of life, and claims under Lord Campbell's Act are entertained in the registry of the Admiralty Division for the purpose of determining what amount the several claimants in respect of damage to ship, life, and effects are respectively to get. If the court has no jurisdiction to entertain these claims, it will be impossible to apply limitation of liability. Again, assume the case of a ship the shares in which belong to what is known as a single ship company; assume she has occasioned loss of life by improper navigation; and assume that subsequently the company goes into liquidation and is wound-up. In order that the Chancery Division may rateably distribute the proceeds of the sale of the ship, it will be necessary that claims under Lord Campbell's Act arising from the "damage done" by the ship should be entertained. If, then, the Admiralty and Chancery Divisions have this indirect jurisdiction, why should the Admiralty Court Act 1861 be so construed as to exclude the direct jurisdiction? The advantages of construing the Act so as to bring the present claim within it are obvious. The proceeding *in rem* gives an easy and effective remedy. A proceeding *in personam*, where the wrongdoing ship belongs to a foreigner, is in many cases practically useless. It is, moreover, submitted that this court is bound by its decision in *The Franconia (ubi sup.)*. The effect of that decision was to confirm the decision of Sir Robert Phillimore. In the House of Lords, were a decision of this court to stand by reason of an equal division amongst their Lordships, they would be bound by that decision on subsequent occasions. If so, the effect of an equal division among the judges of this court has the same result.

Dr. Phillimore in reply. — There may be reasons why an equal division in the House of Lords should bind it on subsequent occasions, on the ground that it is the final and ultimate tribunal of all. In the present case the effect of the decision in *The Franconia (ubi sup.)* was not to confirm Sir Robert Phillimore's decision, but merely to leave it standing, as if there had been no appeal:

*Bright v. Hutton*, 3 H. of L. Cas. 341;

*Ridsdale v. Clifton*, 1 P. Div. 276; 34 L. T. Rep. N. S. 515;

*Thompson v. Ward*, L. Rep. 6 C. P. 327;

*Beamish v. Beamish*, 9 H. of L. Cas. 274.

*Cur. adr. vult.*

April 28. — BRETT, M.R. — In this case an action has been brought in the Admiralty Division against the owners of the Spanish steamship *Vera Cruz* to recover damages under what is

called Lord Campbell's Act; that is, to recover damages on behalf of the relatives of the master of a British ship, who had been killed in a collision between his ship and the *Vera Cruz*. The collision happened, I think, within the realm of England; it happened within the three-mile limit. So far, therefore, it is within the municipal jurisdiction of England. But the owner of the *Vera Cruz* is a foreigner resident abroad, and the manner in which he was brought before the Admiralty Court was by seizing his ship while she was in England; that is to say, by the process *in rem*, by means of the seizure of the ship. He himself was not in England, so far as I understand, after the accident, and he never was served personally with a writ, and there was nobody on his behalf who could be served personally, and he never even had notice of this suit. Upon that a protest is entered against the jurisdiction of the court, and Butt, J., without expressing any opinion of his own, felt himself bound by previous decisions of the Court of Admiralty, and overruled the protest, whereupon there is an appeal to this court. Now, here the first point taken was whether this court was bound by a previous decision in the case of *The Franconia (ubi sup.)*, where, upon an appeal on a similar point, this court was equally divided, the result being that the judgment of the Court of Admiralty, in favour of the jurisdiction, stood. It was now urged that in this court, there having been a case before in which the result of the judgment of this court was that the jurisdiction *in rem* must be in these cases allowed, this court was therefore bound by that decision. That raises the question whether in any court below the House of Lords the court is bound by a decision, either of its own, or of any other court, where that decision is given by an equal division of the judges who heard the case. As far as my experience goes, when there were three great courts in Westminster Hall, each of them, by way of comity, considered itself bound by a former decision of either of the three courts, being all courts of co-ordinate jurisdiction. But there is no law, either at common law or by statute, which says that a court is bound by the decision of another court. It was traditional comity among the judges in order to enforce uniform decisions. Hence, if a court of co-ordinate jurisdiction had come to a determination, the other courts followed it. But that was only comity among the judges. So in the same way there is no law, either at common law or by statute, by which a court is bound by a former judgment of its own. But when a court is equally divided the comity does not exist. Which of the two sides is the one which the court is bound to obey as the predominating authority? Suppose there are four judges, and they are equally divided in opinion, all of those four judges are of equal authority. There is nothing under those circumstances, as it seems to me, upon which comity can be founded. I am perfectly certain myself that, if the reports be examined, it will be found that it was invariable where either a court of co-ordinate jurisdiction or the same court had given a former decision only by equal division of its members, then the court which came afterwards had to elect and choose which of the two equal divisions they agreed with, and that it did not consider itself bound by the former decision. With regard to the House of Lords, it probably

is, and I believe is, different, but that is because it is the last and ultimate court. I am not certain that it is conclusive there, but I am inclined to think that it is. The reason for that is that, where a decision has been given by the highest tribunal of all, people must take that to be the law, and it is not to be questioned afterwards, otherwise there would be vacillation in the law. Therefore, I am clear in my own mind that we are not bound by the decision that was formerly given by this court, of which I myself was one of the four judges. I was therefore glad that two of my brother judges here were not members of that court, so that their minds might be brought, unbiassed by any former opinion, to the important question which is raised in this case. I may say for myself that, had I been now persuaded, I would, without a moment's hesitation, have altered my previous view. Now, the case depends upon this: unless jurisdiction is given by the 7th section of the Admiralty Court Act 1861, there is no jurisdiction. It is important to remember that this is not a case in which the shipowner has been personally served in England so that an action in the Queen's Bench Division might be entertained against him, and that an action has been brought in the Admiralty Division. It would then be an action over which the High Court would have jurisdiction, and the judge of the Admiralty Court, being a judge of the High Court, if other things were in conformity and other conditions were fulfilled, might try the action. It would only then be a question of removing the action from the Admiralty Division to the Queen's Bench Division. That would not be a question of jurisdiction. But here, unless the claim is within the 7th section of the Admiralty Court Act 1861, there is no jurisdiction. The answer to this question depends, it seems to me, upon this proposition: Does that section apply to the grievance for which a remedy is given in Lord Campbell's Act? The answer to that question depends upon the construction of both those Acts of Parliament. I will first of all take the Admiralty Court Act, the words of which are "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." That Act of Parliament was passed in 1861. In 1860 the case of *The Bilbao* (Lush. 149; 1 Mar. Law Cas. O. S. 5; 3 L. T. Rep. N. S. 338) came before Dr. Lushington. There damage had been done by a foreign ship to a barge either in the Thames or the Medway, and the question was whether the then existing Admiralty statutes gave the Admiralty Court jurisdiction in such a case. Dr. Lushington there pointed out that the then existing Admiralty Act did not give him jurisdiction, because it only gave jurisdiction in the case of damage done to a ship, and not damage done by a ship. In 1861 the present Act of Parliament is passed, in which the words are "any claim for damage done by any ship." In 1862 the case of *The Malvina* (Lush. 493; 1 Mar. Law Cas. O. S. 218; 6 L. T. Rep. N. S. 369), in which there had been damage done by a ship, came before Dr. Lushington. That learned judge there said that it seemed to him that the 7th section of the Admiralty Court Act of 1861 was passed for the purpose of meeting this case, the other statute applying only to damage done to a ship. Now what is the meaning of this 7th section, taking into account the former

statute. The words are, "shall have jurisdiction over any claim for damage done by any ship." Is the effect of that to give a jurisdiction in respect of any claim in the nature of an action on the case? It seems to me that the claim is for damage where the ship is the acting instrument of the damage. If you read the section in that way it comes to this: "Shall have jurisdiction over any cause of action, which cause of action is damage done physically by a ship." If that be so, the claim is for damages arising out of a cause of action, which cause of action is a physical injury done to something by the ship. I am not prepared to say that it is confined to damage done to property. I am not prepared to say that, if by mismanagement of a ship her bowsprit or some other part of her were to strike a man on his person and injure him, that would not be damage done by a ship within the meaning of this section. It clearly does not apply to damage done to a man in a ship, but to damage done by a ship, where, as I say, the ship itself is the physical instrument by which the injury is done, and where the cause of action is the physical injury. As I said before, I do not confine the section to property, but to a case where the ship is the instrument by which the damage or injury is caused. If that be the true meaning of the section, what is the cause of action which is given by Lord Campbell's Act? Is it such a cause of action? It seems to me it is not. Lord Campbell's Act was passed to meet cases where a person received what is called a personal injury, that is, injury not to his estate, but to himself as a person, in order to obviate the hardships arising from the doctrine of law that the cause of action died with the person. That was the law prior to Lord Campbell's Act, and Lord Campbell's Act has not altered that maxim or its application. A personal cause of action dies just as much now as it did before. If it be slander, the action dies. If it be personal injury such as breaking a man's arm or leg, or otherwise injuring him, it dies with him. The executor cannot bring an action as executor for the injury to the estate of the deceased. The man has been killed, and there is no right of action. His executor cannot bring an action for the benefit either of his estate or for the benefit of his devisees. What Lord Campbell's Act does is to give a right of action to an executor or administrator, not as representing the deceased, but as representing other people who before had no right of action. But to give such a right of action there must be something more than the killing of the man, and the executor or administrator is a mere instrument to maintain the action on behalf of other people who have sustained pecuniary damage by the killing of the deceased. The executor acts for these people, and not for the deceased. Now what is it that gives this cause of action? The death of the deceased caused by the negligence of the defendant is part of the cause of action; but by itself it is not the cause of action. It is necessary that there should be, owing to the death of the deceased, an injury done to those persons on whose behalf the action is brought, which injury has been held to be on the construction of the Act a pecuniary injury. Therefore the cause of action is not the death of the deceased caused by the negligence of the defendant, but, although that is a necessary part of the cause of

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action, the real cause of action under Lord Campbell's Act is the pecuniary loss to the persons defined by the Act. The cause of action therefore is not a cause of action for anything done by the ship; that is to say, the thing done by the ship is not the cause of action, and something else is. The thing done by the ship is only an ingredient in the cause of action. If so, the Admiralty Court Act does not apply to this case, and therefore does not give jurisdiction to the Admiralty Court to try directly such an action. I wish to be particular in what I am saying now—to try directly such an action. But I am not prepared to say that in no case can the Admiralty Court inquire into the amount of damage caused by the death of the deceased through the negligent management of a ship. The Court of Chancery had, and has, jurisdiction to limit the amount of liability of a shipowner to a certain sum per ton of his ship, and if there are several claimants upon the ship to distribute the regulated amount amongst them. But in that case the jurisdiction is given when the liability as to negligence is admitted. That jurisdiction has also passed to the Admiralty Court. In such a suit to distribute the regulated amount per ton amongst several claimants, if any of the claimants is the family of the deceased person, as mentioned in Lord Campbell's Act, it being necessary to distribute amongst all claimants, it may be, and I am inclined to think it is, that the Admiralty Court or the Court of Chancery, in order to fulfil that which is within their jurisdiction, must entertain claims which, but for that, are not within their direct jurisdiction. If a person had a claim against a shipowner at common law—even under Lord Campbell's Act—which claim might be maintained in any of the other divisions, when it comes indirectly before the Court of Admiralty as a necessary part of its jurisdiction, then the Court of Admiralty must, in order to fulfil that which is within its jurisdiction, entertain a claim which could not be directly but which is thus indirectly brought within its jurisdiction. I cannot lay my hand upon the case at the moment, but I remember having to argue this point before Dr. Lushington. It was not with regard to Lord Campbell's Act, but with regard to a bill of lading or charter-party under circumstances where the Admiralty Court had no direct jurisdiction, and the question came indirectly before the court in a case in which it had jurisdiction. I succeeded there in persuading Dr. Lushington of the truth of the proposition which I am now endeavouring to enunciate, viz., that though the court has not direct jurisdiction, yet, if a matter is brought before it indirectly as a necessary part of its jurisdiction, it must, in order to fulfil the jurisdiction which it has, entertain that which otherwise it would not have the jurisdiction to entertain. In that way a claim under Lord Campbell's Act for personal injury done by a ship would, in my opinion, come before the Admiralty Court in a suit where that suit was brought for the purpose of limiting the liability, of the shipowner according to the tonnage of his ship, and where it was necessary for the Admiralty Court, in order to apportion the regulated amount amongst the claimants, to know the particular claim of the parties who were claiming under Lord Campbell's Act. For these reasons I maintain my former opinion, in which

Lord Bramwell concurred with me, that the Admiralty Court has not, when a claim under Lord Campbell's Act is brought directly before it, any jurisdiction under the Admiralty Court Act 1861, and if it has no jurisdiction under that Act then it has no jurisdiction at all. I am of opinion, therefore, that the decision of Butt, J., which, as I have before said, is no decision of his must be overruled and this appeal allowed.

BOWEN, L.J.—I also think, for the reason given by the Master of the Rolls, that this is a case which is still open to our consideration, notwithstanding the decision in *The Franconia* (*ubi sup.*). Now passing to the main point, I feel satisfied that the Act of 1861 did not give the necessary jurisdiction to the Admiralty Court to enable it to entertain this claim for personal injuries under Lord Campbell's Act, and I therefore agree with the views expressed by Lord Bramwell and the Master of the Rolls in *The Franconia* (*ubi sup.*). Shortly the question is, whether this is a claim for "damage done by a ship." Looking to the history of the legislation on this point, it shows that it is not, and apart from that consideration the obvious meaning of the section is such as to lead me to the same conclusion. The Act gives a right to compensation for "damage done by any ship." That then, and that only, is the cause of action. Now what does "damage done by any ship" mean? It means damage done by a ship as the noxious instrument, or more correctly speaking, by those in charge of her. But the plaintiff is in this dilemma, that the claim here must be either for the killing of the deceased, or the injury done thereby to his family. But the killing of the deceased *per se* gives the plaintiff no right of action at all, either at law or under Lord Campbell's Act. If then, to escape this horn of the dilemma, the respondent says her claim is for the injury done to the interests of the dead man's family, the claim is not for something done by the ship, but it arises partly from the death which the ship causes, and partly from a combination of circumstances pecuniary and otherwise with which the ship has nothing to do. The injury done to the family cannot therefore be said to be done by the ship.

FRY, L.J.—I concur with the views expressed by the Master of the Rolls and Bowen, L.J. I think that, notwithstanding the case of *The Franconia*, the question raised in this case is still open to us. Bearing in mind the observations of Lord Truro in *Bright v. Hutton* (*ubi sup.*), and of Lord Cairns in *Ridsdale v. Clifton* (*ubi sup.*), there can be no doubt but that we are at liberty to consider this case, and that we are not bound by *The Franconia*, which only bound the persons who were parties to that action. Now on the point as to jurisdiction, the words in the Admiralty Court Act 1861 are "damages done by any ship." Do those words include injury to the person? I have come to the conclusion that they do, and I concur with James and Baggallay, L.JJ. as to the meaning of the word damages. Secondly, assuming injury to the person is within the meaning of the section, is it sufficiently wide to embrace an action under Lord Campbell's Act? I think not. Take for instance damage done to a barge in the Thames by the bowsprit of a ship, and a person killed by the same thing. In the first case, the injury which is the cause of action is directly caused by the ship. In the second the

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cause of action is pecuniary injury to the relatives of the deceased, which injury results from the damage done to the deceased by the ship. And it must be admitted even by the plaintiff that this is not an action for "damage done" by the ship, but for pecuniary loss arising out of such damage. In this view I am confirmed by observing the convenience of such a construction, which not only avoids the difficulty as to a trial by jury, but further the conflict between the common law and Admiralty Court rule as to negligence.

*Appeal allowed.*

Solicitors for plaintiff, *Jackson and Evans*.  
Solicitors for defendant, *Gregory, Rowcliffes, and Co.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Friday, June 13.*

(Before BACON, V.C.)

*Re* SEVENTH EAST CENTRAL BUILDING SOCIETY. (a)  
*Practice*—Security for costs—Summons by official liquidator in the name of a building society under the 165th section of the Companies Act 1862 against the manager of the society—Companies Act 1862, ss. 69 and 165.

*Where a building society, formed in accordance with the provisions of 6 & 7 Will. 4, c. 32, was being wound-up, and a summons was brought two years ago by the official liquidator, under sect. 165 of the Companies Act 1862, against the manager:*

*On a summons by the manager, under sect. 69 of the Act 1862, for security for costs on the ground of delay, and that the assets of the society were insufficient to pay the costs of the first summons:*

*Held, that the court had general jurisdiction to order the official liquidator to give security for costs before any further proceedings were taken in the matter.*

On the 19th Dec. 1882 Mr. Walter Winder Feast, the official liquidator of the Seventh East Central Building Society, applied by summons under sect. 165 of the Companies Act 1862, that "Mr. John Emmore Jones, the manager of the society, be ordered to pay 3534*l.* 7*s.* 2*d.*, and a further unascertained amount, being money of the said society for which he is liable."

The chief clerk dismissed the summons, but, at the request of the official liquidator, it was adjourned into court on the 29th Jan. 1884.

On the 8th March 1884 J. E. Jones, the manager, applied by summons, under sect. 69 of the Companies Act 1862, that, "W. W. Feast, the official liquidator, do give security in the sum of 50*l.* to answer the costs, charges, and expenses of the applicant incurred in resisting the claim of the official liquidator against the applicant, and which has been adjourned into court, and also the further costs of such adjournment into court."

The chief clerk, on the return of the summons, made the order asked for so far as the future costs of the applicant were concerned, but, at the request of the respondents, adjourned the same into court.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Sect. 69 of the Companies Act 1862 provides that

Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

Mr. J. E. Jones, manager of the society, appeared in person, and asked that the liquidator should be ordered to give security for costs in the terms of the summons.

Glenn for the official liquidator.—The building society is not a limited company within the meaning of sect. 69 of the Act of 1862; it was formed according to the provisions of 6 & 7 Will. 4, c. 32:

*Re Professional Benefit Building Society*, 25 L. T. Rep. N. S. 397; L. Rep. 6 Ch. App. 856;

*Davis on Friendly Societies*;

*Scratchley on Building Societies*;

*United Ports and General Insurance Company v. Hill*, 23 L. T. Rep. N. S. 14; L. Rep. 5 Q. B. 395.

Then the liquidator is not a "plaintiff or pursuer" within the terms of sect. 69, and security is never ordered in matters arising in the liquidation, only in matters outside the liquidation, such as an action by the liquidator.

BACON, V.C.—Here is an utterly insolvent company, the official liquidator of which brings a charge against the applicant under the 165th section of the Companies Act 1862. The case was gone into fully before the chief clerk, and the official liquidator's application was dismissed, but adjourned into court. The present applicant asks the court to protect him against future litigation. I am bound to order the official liquidator to give security for costs before any further proceedings are taken in the matter. The matter is costly. If I did not make the order, I should encourage the official liquidator to harass the applicant. I make an order that the official liquidator do give security for costs before any further proceedings are taken; I have general jurisdiction under the Companies Act 1862.

Solicitors: *Elborough and Dean*.

*Friday, June 13.*

(Before BACON, V.C.)

DAMES TO WOOD. (a)

*Vendor and purchaser*—Conditions of sale—Right to rescind.

*A sale took place under a condition providing, that, if the purchaser shall take any objection or make any requisition as to the title, evidence or commencement of title, conveyance or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale.*

*The purchasers made fourteen requisitions. The vendor answered them. The purchasers considered several of such answers insufficient, and insisted on the requisitions. The vendor gave notice that he rescinded the contract. The purchasers then waived the requisitions, and, on the*

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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*vendor neglecting to complete the contract, applied by summons for a declaration that they were entitled to a conveyance of the property.*

*Held, that the vendor had expressed his inability or unwillingness, but the purchasers had insisted on their requisitions; that "unwillingness" meant unwillingness to go to the trouble and expense of removing or complying with requisitions; and that the vendor had a right to rescind the contract at any time without giving his reasons.*

THIS was a summons taken out under the Vendor and Purchaser Act, 1874 on behalf of the purchasers of certain property at Whitechapel, and was in the following terms:

That it may be declared that the purchasers are entitled to have conveyed to them by the vendor and other necessary parties the hereditaments comprised in a certain contract for sale, on payment of the balance of the purchase money payable under such contract, the purchasers having withdrawn all objections and requisitions on the title to the said hereditaments which the vendor was unwilling to remove or comply with, and that the vendor may be ordered to pay the costs of the application.

On the 7th Aug. 1883 Richard Dames, by his auctioneers and agents, Messrs. Sainsbury, Gilbert, and Co., entered into a contract for the sale to Henry Wood, as agent for Sir Julian Goldsmid, Frederic David Mocatta, Walter Josephs, Louis Nathan, and Lionel Vanoven, the trustees of the Jews' Infant School, of freehold hereditaments, 84, Leman-street, and 18, Tenter-street East, Whitechapel, for the sum of 2000*l.*, and subject to certain conditions of sale annexed and referred to in the contract, and Henry Wood paid to the auctioneers 200*l.* as a deposit.

The 11th of the said conditions of sale provides as follows:

The purchaser is within seven days after delivery of the abstract, to send to the vendor's solicitors a statement in writing of all objections to, and requisitions as to the title, or evidence of title, or the abstract, and subject thereto the title is to be deemed accepted, and all objections and requisitions not included in any statement sent within the time aforesaid are to be deemed waived, and an answer to any objection or requisition is to be replied to in writing within four days after the delivery thereof, and if not so replied to is to be considered satisfactory, and time is to be considered in all respects as of the essence of this condition. If the purchaser shall take any objection, or make any requisition as to the title, evidence, or commencement of title, conveyance, or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may, by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale, and the vendor is, within one week after such notice, to repay the purchaser his deposit money, but without any interest thereon, which is to be accepted by him in satisfaction of all claims on any account whatever, and the purchaser is to return forthwith all abstracts and papers in his possession belonging to the vendor.

On the 8th Aug. 1883 Messrs. Brook and Chapman delivered to Henry Wood an abstract of title of the hereditaments.

On the 15th Aug. 1883, Messrs. Emanuel and Simmonds delivered to Brook and Chapman a statement in writing of their objections to and requisitions as to the title.

On the 8th Sept. 1883 Brook and Chapman delivered to Emanuel and Simmonds answers to the objections and requisitions.

On the 10th Sept. 1883 some of such answers not being satisfactory, Emanuel and Simmonds sent to Brook and Chapman some observations on such answers.

No replies were made to the observations, and on the 20th Nov. 1883 Brook and Chapman sent to Emanuel and Simmonds a notice to rescind the contract for sale in the following terms:

I, the undersigned Richard Dames, do hereby give you notice, that being unable or unwilling to remove or comply with the objections and requisitions stated and made by you as to the title of No. 84, Leman-street, contracted to be purchased by you of me, I do, in the exercise of the power for that purpose reserved to me by the eleventh condition of sale, hereby rescind the said contract for sale to you, and that I am ready and willing and hereby offer to repay to you the deposit money paid in respect of such purchase.

On the 23rd Nov. 1883, Emanuel and Simmonds write to Brook and Chapman:

Dear Sirs,—We are in receipt of your letter of the 20th instant, with accompanying notice. We deny the vendor's right to rescind the contract for sale herein. It is his duty to give us such information as is in his possession or in that of his solicitors or agents as to the matters referred to in our requisitions, so far as they are subsequent to the date of the commencement of the title, and such title to 18, Tenter-street, whether by possession or otherwise, as he can show; but as we infer from your notice that the vendor is either unable or unwilling to comply with the objections and requisitions as to the title, which remain unsatisfied, we hereby intimate to you that our client withdraws all such objections and requisitions, and that he is willing to complete the purchase. We will send you the draft conveyance in due course for approval. —We are, dear Sirs, yours truly, EMANUEL and SIMMONDS.

On the 7th Dec. 1883, Emanuel and Simmonds sent a draft conveyance to Brook and Chapman for approval, but the draft was never returned approved.

The requisitions insisted upon were in effect as follows:

No. 1 required the production of a receipt showing that legacy duty had been paid.

No. 2 related to a legacy of 18,000*l.*, and the debts of a former owner of the property, the purchasers requiring proof that the money had been set aside to meet the legacy, and that the debts had been paid.

No. 4 referred to dower.

No. 5 required evidence of the payment of the debts of another owner of the property.

No. 9 required an abstract of a will, settlement, and conveyance.

No. 10 required a title to be shown to No. 18, Tenter-street, the purchasers declining to accept the vendor's answer that No. 18, Tenter-street and No. 84, Leman-street are parts of the same building and the title the same.

No. 13 required evidence as to thirteen windows, which the owners of the property had allowed the adjoining owners to open, the purchasers declining to accept as sufficient the answer of the vendor that the windows had been bricked up prior to the sale.

The summons was adjourned into court.

J. M. Solomon for the purchasers.—The sale is by private contract under conditions. The question is, whether the vendor had a right to rescind the contract, and whether he has in fact rescinded. He gave us no intimation of what conditions he could not comply with. It is necessary that unwillingness or inability should exist. Unwillingness means reasonable unwillingness on the ground of trouble or expense. The purchaser may waive the requisitions. The vendor ought to give us notice to give us an opportunity of withdrawing the requisitions. He cited

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*Roberts v. Wyatt*, 2 Taunt. 268;  
*Page v. Adam*, 4 Beav. 269;  
*Greaves v. Wilson*, 25 Beav. 290;  
*Turpin v. Chambers*, 29 Beav. 104;  
*Duddell v. Simpson*, 15 L. T. Rep. N. S. 305; L. Rep.  
 2 Ch. App. 102.

We have waived the requisitions, and are entitled to a conveyance.

*Russell Roberts* for the vendor.—We gave a valid notice under the 11th condition of sale; it was not until four onerous requisitions were insisted upon after reply that we gave notice to rescind the contract. [BACON, V.C.—The question turns on the construction of the 11th condition.] The purchaser insisted on the requisitions. Their waiver was too late. The contract once rescinded could not be set up again by any subsequent acts of the purchasers. He commented on the cases cited by Solomon.

*Solomon* in reply.—The requisitions were not frivolous, the replies do not state any inability to answer the requisitions.

BACON, V.C.—The point no doubt is one of some importance. It is beneficial for vendors and purchasers to have their disputes settled in a summary way. But what is the contract? A man has an estate to sell; he takes care to stipulate in the conditions of sale that if the purchaser shall take any objection or make any requisition which he is unable or unwilling to remove or comply with, he may by notice in writing deliver to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale. What is the meaning of the words unable or unwilling? The vendor very well knew that unreasonable and improper requisitions might be tendered to him, and accordingly protects himself on two grounds, inability and unwillingness. He says, "I may be unable to answer these requisitions, or, though able, I may be put to great trouble and expense." Unwillingness means an intention to protect himself against the trouble and expense of answering requisitions. "I am unwilling to pay the money or take the trouble. I guard myself against both possibilities by saying, if I get a purchaser who gives me trouble, if I am either unable or unwilling to remove or comply with any of the requisitions, I will rescind the sale, and upon that rescission there is an end of the contract. If I comply with your requests, I shall have to go here and there, so I protect myself." There is a plain stipulation: the vendor at any time may say, I am unwilling to go on. Nobody has a right to inquire why he is unwilling; he is not bound to give his reasons. That is the plain sense of the contract. But the case does not depend upon mere construction. In *Duddell v. Simpson*, Turner, L.J. minutely treats the grounds upon which a vendor may fairly rescind. There comes a time when the purchaser insists, and the vendor is unable or unwilling to remove or comply with the requisitions, the purchaser still insists, what is the vendor to do? Since you will insist on these requisitions, I exercise my right. What is the right of the vendor? His right is to put an end to the contract. He says, "Since you are so obstinate and so persistent, I put an end to the contract." On the 20th Dec. 1883 the vendor sent a notice to rescind the contract; since then there is no contract. Persistence in requisitions is a thing not to be encouraged. I will not enter into the

questions as to the captions nature of the requisitions, as to which, if necessary, much might have been said. Upon the plain terms of the contract contained in the conditions of sale the vendor reserved to himself a right in a certain case to rescind, and he did so. The summons must be dismissed with costs.

Solicitors: *Emanuel and Simmonds* for the applicants; *Brook and Chapman* for the respondent.

Friday, June 13.

(Before KAY, J.)

Re MATHESON BROTHERS AND CO. LIMITED. (a)

*Company*—Winding-up—Jurisdiction—Foreign company, with branch office, business, &c., in England—Pending foreign liquidation—Companies Act 1862 (25 & 26 Vict. c. 89), s. 199.

A petition was presented by a creditor to wind-up a company which was registered under the Companies Act 1882 of the Legislature of New Zealand. The registered office of the company was in New Zealand, and the objects for which it was formed were primarily to carry on business there.

The company had, however, a branch office and a manager in London, and had contracted liabilities there. It had also assets in London, but of very small amount.

The company had traded in England, but only as a colonial company, and its transactions in England formed but a small proportion of the business it had done since its registration.

The petitioner's debt was in respect of goods supplied by him to the company pursuant to an order in writing, which came from the London office.

Proceedings to wind-up the company were pending in New Zealand, and liquidators had been appointed there, but no authority to act in their name had been received by the London manager.

Held, that the company was an unregistered company within the provisions of sect. 199 of the Companies Act 1862, and the court had jurisdiction to make a winding-up order; that, as no proceedings had been commenced to secure the English assets, the court was justified in taking steps to secure them until proceedings were adopted by the liquidators in New Zealand to make those assets available for the English creditors *pari passu* with the creditors in New Zealand; but that upon an undertaking by the London manager's solicitors that the English assets should remain in statu quo and undistributed until the further order of the court, the petition should be directed to stand over.

THIS was a petition, presented by a creditor under sect. 199 of the Companies Act 1862, to wind-up the above-named company, which was a company registered under the Companies Act 1882 of the Legislature of New Zealand.

The registered office of the company was at Dunedin, New Zealand. The objects for which it was formed were primarily to carry on business at Dunedin and elsewhere in New Zealand, and its principal business had been carried on in Dunedin.

The capital of the company consisted of 50,000l. in 1000 shares of 50l. each, and a very large pro-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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portion, if not the whole, of the shareholders were persons resident in New Zealand.

The company had, however, a branch office in London, for the purpose of transacting its agency business, where Maurice John Hart was the managing director and agent.

The company had traded in England, but only as a colonial company, and its transactions in England formed but a small proportion of the business it had done since its registration.

The assets of the company in New Zealand were stated to amount to about 38,000*l.*, and the liabilities there to about 28,000*l.*, whilst the assets in England consisted only of a sum of 150*l.* in the bank and office furniture.

In Oct. 1883 the petitioner, Moriz Fischer, who carried on business in London as a dealer in brushes, &c., received an order in writing from the branch office of the company, signed Matheson Brothers and Co. Limited, per E. J. Smythe, for a supply of brushes. The petitioner, believing that the company was one registered in England, supplied and delivered the brushes, in pursuance of such order, the cost of which amounted to 28*l.* 13*s.* 6*d.* He received, on account of the payment thereof, a bill, dated the 10th Dec. 1883, payable three months after date, and such bill was accepted in the name of the company.

The bill was duly presented, but was not met at maturity, and the sum of 28*l.* 13*s.* 6*d.* remained owing to the petitioner, which fact the company did not dispute.

It appeared that proceedings had been taken in New Zealand for the liquidation of the company so far as regarded New Zealand, and liquidators had been appointed there, but no authority to act in their name had been received by M. J. Hart.

The petitioner asked for the usual winding-up order, and the appointment of a provisional liquidator.

The petition now came on for argument.

Graham Hastings, Q.C. and Seward Brice for the petitioner.—The court has jurisdiction to make a winding-up order upon this petition:

*Re Commercial Bank of India*, L. Rep. 6 Eq. 517.

They referred also to

*Re Union Bank of Calcutta*, 3 De G. & Sm. 253.

Kekewich, Q.C. and Haldane for M. J. Hart.—The case of *Re Commercial Bank of India* (*ubi sup.*) was very peculiar. The facts there were quite different from those of the present case. [KAY, J. referred to *Re Orr Ewing*; *Orr Ewing v. Orr Ewing* (48 L. T. Rep. N. S. 555; 22 Ch. Div. 456.) We contend that there is no jurisdiction, under the Companies Act 1862, to wind-up a foreign company; but supposing that the court has the power, this is not a case in which it ought to be exercised. [KAY, J. referred to *Re Imperial Anglo-German Bank* (25 L. T. Rep. N. S. 895; 26 L. T. Rep. N. S. 229; W. N. 1872, pp. 3, 40) and *Re Madrid and Valencia Railway Company* (3 De G. & Sm. 127; 2 Mac. & G. 169.) In Lindley on Partnership (4th edit. vol. 2, p. 1486) it is stated that, "a foreign company cannot be registered as an existing company under the Companies Act 1862; and it is very questionable whether a foreign, as distinguished from an English company, can be wound-up under the Companies Act 1862. Practically it would be impossible to wind it up; and if it were a corporation there would be no jurisdiction to dissolve it." The case of *Bulkeley v. Schutz* (L. Rep. 3 P. C. 764)

is referred to there. In that case James, L.J. observed: "Their Lordships are clearly of opinion that Act never contemplated that a foreign partnership, actually complete and existing in a foreign country, could be brought within the purview of the English Act of Parliament, the English Legislature having no power over the shareholders of such a company." In *Re Orr Ewing*; *Orr Ewing v. Orr Ewing* (48 L. T. Rep. N. S. 555, 559; 22 Ch. Div. 456, 469) Cotton, L.J. said: "So if, in working out the decree now to be made, a question should arise turning on Scotch law about which there is any substantial doubt, undoubtedly the court, if there were a suit there, would wait until that suit had decided the question, or, if there were no such suit, would send the question to be decided by the Scotch court." The principles laid down in bankruptcy by analogy can be made to apply to the liquidation of companies. In Buckley on the Companies Acts (4th edit. p. 566) it is said in a note to rule 3 of the General Order 1862, that "The order, probably by an oversight, fails to provide for the service of a petition for a compulsory order on the liquidator acting in a voluntary winding-up, or a winding-up under supervision. Such service, no doubt, ought to be made." We say that the petition should have been served on the liquidators, as being the only persons who represent the company. In this case, as there are proper proceedings for winding-up the company in New Zealand, the court should refuse to make a second winding-up order here. They referred also to

*Companies Act 1862*, s. 199, sub-sect. 3 (a);

*Dacey on Domicil*, p. 278;

*Robson on Bankruptcy*, 6th edit. p. 503.

Hastings, in his reply, stated, in answer to an inquiry of Kay, J., that the petitioner would accept an undertaking of Mr. Hart's solicitors that the assets of the company in England should remain *in statu quo*.

KAY, J.—I think that the court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there could be no means by which the creditors could obtain payment of their debts. In my opinion, this company comes within the provisions of the 199th section of the Companies Act 1862. That section provides that, subject as therein mentioned, any company, except railway companies incorporated by Act of Parliament, consisting of more than seven members and not registered under that Act, and thereafter included under the term unregistered company, may be wound-up under that Act. And sub-sect. 1 of the same section provides that an unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate. Now I have here a company incorporated, or at any rate formed, in New Zealand, consisting of more than seven members, and not registered under that Act. Applying the test in the section, is this an unregistered company which can be wound-up under the Act? I find it has a place of business in London, where it has put up its name as a joint-stock company, has carried on business, contracted debts to the amount of 5000*l.*, and has assets. Its assets here are no doubt very small—very much less than 5000*l.* But putting aside



any question which may arise by reason of the winding-up order made in New Zealand, is it to be said that a company, formed in a foreign country, which chooses to carry on business, have assets, and contract debts in this country, does not come within the spirit, as it clearly comes within the letter, of the 199th section? It is argued that this is a company which cannot be dissolved, and reference has been made to sect. 111 of the same Act, which provides that when the affairs of the company have been completely wound-up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly, and the contention is, that no company is within the scope of this Act unless the court has jurisdiction to dissolve it. But the dissolution of a company does not result *ipso facto* from the completion of the winding-up, but is brought about by a separate order of the court, and it by no means follows that, because the court has no power to make an order to dissolve a company, it has no power to make an order to wind it up. As a matter of fact, wound-up companies very seldom are dissolved, and the 199th section of the Act is large enough in its terms to include such a company as this. Let us take for example the case I put during the argument. Suppose a joint-stock company formed in a foreign country for the purpose of working a series of patents, one of which is an English patent, and suppose that after a while all the business of the company came to be carried on in this country, all its debts and assets came to be localised here, and its only remaining place of business came to be situate in England. Could it be said that the court would have no jurisdiction to wind-up such a company under the 199th section? Mr. Kekewich very frankly answered that there would be no jurisdiction; but what a most inconvenient result it would be if all the assets, all the business, and it may be all the shareholders of a company were locally situated here, and yet that company did not come within the Act. That would be a very singular construction to put upon a section which is amply wide enough to include the company in letter and in spirit as well. Had it not been then for the fact of a winding-up order existing in New Zealand, this court would have had jurisdiction to wind-up this New Zealand company, having an office and carrying on part of its business here, as an unregistered company within the terms of the 199th section. This being the case, what is the effect of the winding-up order which it has been said has been made in New Zealand? This court, upon principles of international comity, would no doubt have great regard to that winding-up order, and would be influenced thereby, but the question of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign court does not take away the right of the courts of this country to make a winding-up order here, though it would no doubt exercise an influence upon this court in making the order. Now, at this moment, there are no proceedings pending to secure the assets here, nor has any application been made to the courts of this country for that purpose, and in the meantime, however ready this court may be to show courtesy to the courts of New Zealand, it does seem proper to interfere, and that sufficient reason exists for taking proceedings

in order to secure the English assets. Having, therefore, jurisdiction to make a winding-up order, I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. Hart. I have said thus much as to my own opinion upon the effect of the Act. But there is the authority of *Re Commercial Bank of India* (L. Rep. 6 Eq. 517), in which counsel of eminence were engaged on both sides, Mr. Southgate, Q.C., Mr. Bristowe and Mr. (now Lord Justice) Lindley, being for the petitioner, and Mr. (now Lord Justice) Baggallay, and Mr. Kekewich for the official liquidator of the new company. There, a joint-stock company formed in India, registered under Indian law, and having its principal place of business in India, with an agent at a branch office in England, was ordered to be wound-up under the Companies Act 1862; and Romilly, M.R. said: "I think I have jurisdiction to make the order; if the company is not wound-up here these persons will not be able to get their money." That case was decided in 1868, and no authority against it has been cited. Certain *obiter dicta*, in a case in which the present point did not arise, and an observation in Lord Justice Lindley's book on Partnership have been referred to, but nothing amounting to this, that the case of *Re Commercial Bank of India* was wrongly decided. That decision is one which I should be disposed to follow even if, as is not the case, my own opinion had been the other way. I shall accordingly hold that the court has sufficient jurisdiction to sanction the acceptance of the undertaking, and if the undertaking had not been given, that it had sufficient jurisdiction to appoint the provisional liquidator, for I consider that I am justified in taking steps to secure the English assets until I see that proceedings are taken on the New Zealand liquidation to secure the English assets to the English creditors here *pari passu* with the creditors in New Zealand. The solicitors of Mr. Hart undertaking that the assets here shall remain *in statu quo* and undistributed until the further order of the court, I shall direct the petition to stand over generally, with liberty to apply.

Solicitor for the petitioner, Walter Barnett Styer.

Solicitors for M. J. Hart, George Wright and Co.

Friday, June 20.

(Before KAY, J.)

Re COOPER; COOPER v. SLIGHT. (a)

*Power of advancement with consent of tenant for life—Bankruptcy of tenant for life—Exercise of power—Sanction of trustee in bankruptcy—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-sect. 2.*

*A testatrix, who died in 1884, by her will, dated in 1883, gave to her trustees all her property upon trusts for conversion and investment, and she directed her trustees to stand possessed of the investments, as to one moiety thereof, in trust to pay the income of such moiety to her son J. C., during his lifetime, and so that he should not have power of anticipation, and after the decease of J. C. in trust for W. J., the putative child of J. C.; and the testatrix declared that her trustees*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

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*might raise any part or parts, not exceeding one-half, of the share of W. J., and apply the same for his advancement and benefit, subject to the consent in writing of J. C. during his life.*

*J. C. was adjudicated a bankrupt in 1882, and was still undischarged. W. J. was an infant of about seven years of age.*

*Neither J. C. nor the infant's mother had means sufficient to support the infant.*

*J. C. stated that he was personally willing that the trustees should exercise the power of advancement contained in the will in favour of the infant.*

*The sole question was whether J. C., being an undischarged bankrupt, could give his consent to the exercise of a power of advancement in a fund in which he had a life interest, and thus defeat his creditors.*

*Held, that the power of J. C. to consent to an appointment by way of advance by the trustees of the will had not been extinguished by the bankruptcy; but that such power of consenting could not be exercised without the sanction of the trustee in bankruptcy, acting under the direction of the Court of Bankruptcy.*

ELIZA COOPER, by her will dated the 23rd Nov. 1883, appointed George Slight and John Crook executors and trustees thereof, and she gave to her trustees all her property in trust to convert the same into money, at such times and in such manner as they should think proper, and to invest the proceeds, after payment of her debts, funeral and testamentary expenses, in or upon any of the securities therein mentioned; and she directed that her trustees should stand possessed of the same and the investments for the time being representing the same, upon the trusts following, that was to say, as to one moiety thereof, in trust to pay the income of such moiety to her son James Cooper during his lifetime, and so that he should not have power of anticipation, and after the decease of James Cooper, in trust for William James, the putative child of James Cooper by Mary James, then living with him as his wife; and as to the other moiety thereof, in trust for Albert George Cooper Thomas, the reputed son of her late son George Cooper, on his attaining the age of twenty-one years; and the testatrix declared that her trustees might raise any part or parts not exceeding one-half of the shares of William James and Albert James Cooper Thomas, under the trusts thereinbefore declared, and apply the same for their advancement or benefit, subject, as to the share of William James, to the consent in writing of James Cooper during his life.

The testatrix died on the 19th Jan. 1884.

James Cooper was the only surviving child of the testatrix, and her sole next of kin. He had cohabited for upwards of ten years with Mary James. He was adjudicated a bankrupt in Feb. 1882, and was still undischarged. His trustee in bankruptcy was one Thomas Craddock.

The two illegitimate children named in the will were infants.

William James (or Cooper) was born on the 3rd Nov. 1876.

Two originating summonses were taken out: one, dated the 5th March 1884, by Thomas Craddock on behalf of James Cooper, and also as next friend of the infant William James, asking for an order for the administration of the real and per-

sonal estate of the testatrix; the other, dated the 10th March 1884, by Mary James, the infant's mother, and as his next friend, asking for an order for the administration of the real and personal estate of the testatrix, for the appointment of a guardian of the infant, and for maintenance, and, if necessary, a receiver.

The defendant, George Slight, was sued as the sole acting executor and trustee of the testatrix.

Neither James Cooper nor Mary James had means sufficient to support the infant, and James Cooper stated that he was personally willing that the trustee should exercise the power contained in the will to raise any part or parts, not exceeding one-half of the share of the infant, and to apply the same for his advancement or benefit.

The only question was whether James Cooper, being an undischarged bankrupt, could give his consent to the exercise of a power of advancement for the benefit of his child in a fund in which he had a life interest, and thus defeat his creditors.

The summonses were adjourned into court, and now came on to be heard.

*Chadwyck Healey* for Thomas Craddock.—The tenant for life having become bankrupt, the question is whether he has not lost his right of consenting to the exercise of the power of advancement. [KAY, J. referred to *Badham v. Mee*, 7 Bing. 695; and *Hole v. Escott*, 4 My. & Cr. 187.] I say that the consent of the tenant for life alone is not sufficient. He must obtain the concurrence of his trustee in bankruptcy:

*Holdsworth v. Goose*, 4 L. T. Rep. N. S. 196; 29 Beav. 111;

*Eisdell v. Hammersley*, 6 L. T. Rep. N. S. 706; 31 Beav. 255.

In *Hole v. Escott* (*ubi sup.*) it was held that where a bankrupt has a power of appointment over an estate, he cannot exercise it so as to defeat the right of his assignees, in whom the estate is vested by the bankruptcy. The tenant for life here ought not to be allowed, by consenting to the advancement, to defeat his creditors. He cannot go behind the back of his trustee in bankruptcy and give his consent, and thus, by a circuitous method, possibly put money into his own pocket. [KAY, J.—Have you any case in which the doctrine has been applied to advancement?] No, there is no case. Those I have referred to were cases turning upon the exercise of a power of sale or appointment, but I submit that the same principles apply. By sect. 44, sub-sect. 2 (ii.) of the Bankruptcy Act 1883 it is provided that the property of a bankrupt divisible amongst his creditors shall comprise the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy, or before his discharge.

*Hugh Humphry* for the trustee of the will.—The trustee is quite ready to make the advancement when the proper time arrives, and he merely wants the authority to do so.

*Sir Arthur Watson* for Mary James.—The Bankruptcy Act 1883, s. 44, sub-sect. 2 (ii.), only transfers to the trustee in bankruptcy the right to exercise a power which could have been exercised by the bankrupt for his own benefit. The power here is not such a power, because, if the bankrupt gave his consent, he would not be exercising a power

given him for his own benefit, but for that of the infant. The infant cannot be prejudiced by the fact of James Cooper's bankruptcy. If the power is not exercisable because of the father's bankruptcy, the effect would be to take away something in the shape of property belonging to the infant. The infant's parents have not sufficient means to maintain him, and this is a case in which, if the power can be exercised, it certainly ought to be. [KAR, J. referred to *Alexander v. Mills*, 24 L. T. Rep. N. S. 206; L. Rep. 6 Ch. App. 124.] Here the infant's share is not simply reversionary, but half of it may be advanced to him during the lifetime of his father. The trustee in bankruptcy merely takes the life interest of the father, subject to the right given to the trustee of the will to raise half of the infant's share, with the consent of the father during his life. He referred also to

*Sugden on Powers*, 8th edit. p. 75;  
*Re Jakeman's Trusts*, 23 Ch. Div. 344;  
*Cooper v. Macdonald*, 38 L. T. Rep. N. S. 191; 7 Ch. Div. 288.

No reply was called for.

KAR, J.—I think that the law on this subject is pretty clear. In *Badham v. Mee* (7 Bing. 695) the learned judges who had to decide that case gave a certificate without expressing any opinion on the case. Their certificate was as follows: "We have heard the case argued by counsel, and have considered the same, and we are of opinion that, from and after the execution of the deed of appointment of the 2nd Jan. 1819, Richard Mee, the son, did not take any estate in the lands and hereditaments mentioned in the case under the said deed of appointment; but under the deeds of the 24th and 25th April 1794 took an estate tail in remainder expectant on the determination of the life estate of his father." The decision itself is stated in the marginal note to the report of the case, whence it appears that by a marriage settlement the husband took an estate for life, with power of appointment to children, remainder to trustees to preserve, &c., remainder to children in tail in default of appointment, remainder to husband in fee in default of issue. The husband became bankrupt, conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee after his own life estate. The assignees sold the life estate to the bankrupt's mother. It was held that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement. The grounds for the judgment of the Court of Common Pleas are not given in the report. In *Hole v. Escott* (4 My. & Cr. 187) the facts were as follows: A husband upon marriage settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of trustees for a term of years to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or, in default of a joint appointment, the survivor of them should appoint, with remainder, in default of such appointment, to the children of the marriage equally, with remainder to the right heirs of the husband. The husband became bankrupt, and after his bankruptcy he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill

having been subsequently filed by a person claiming under the bankruptcy for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favour of the same children, which she stated in her answer. The Lord Chancellor (Lord Cottenham) said: "The objections made to the two appointments upon which the title of the children rested are totally distinct. To the joint appointment by the father and mother, after the father's bankruptcy, two objections are made: first, that the power was extinguished by the bankruptcy; secondly, that if not extinguished no title could be obtained under the execution of it, inasmuch as the bankrupt could not be permitted to destroy the title of his assignees. Upon the first point I do not propose to express any opinion. It is not necessary that I should do so for the purpose of the judgment which I propose to pronounce; and, considering the doubt that exists as to the grounds of the opinion of the Court of Common Pleas in the case of *Badham v. Mee*, I think it inexpedient and unnecessary to discuss the question." In a later case of *Holdsworth v. Goose* (4 L. T. Rep. N. S. 196; 29 Beav. 111) a power of sale over a settled estate was given to trustees, at the request and by the direction of the tenant for life. The tenant for life became bankrupt, and it was held that the power was not extinguished, but that, with the assent of the tenant for life and his assignees, a perfect title could be made under the power, thus determining the very point which was left uncertain in *Badham v. Mee* (*ubi sup.*) and *Hole v. Escott* (*ubi sup.*). Then in the case of *Eisdell v. Hammersley* (6 L. T. Rep. N. S. 706; 31 Beav. 255) a power given to trustees to sell realty with the consent of the tenant for life was held exercisable, after his bankruptcy, with the consent of the tenant for life and of all persons who had become interested in his estate. In the later case of *Alexander v. Mills* (24 L. T. Rep. N. S. 206; L. Rep. 6 Ch. App. 124), where the trustees of a settled estate had a power of sale, to be exercised at the request and direction of a tenant for life, who was also entitled to the ultimate reversion in fee, and who had made an absolute conveyance of all his interest for value, it was held by the Court of Appeal (reversing the decision of Romilly, M.R.) that the power of the tenant for life to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee. In that case the learned judge who delivered the judgment of the Court of Appeal referred with approval to *Holdsworth v. Goose* (*ubi sup.*) and *Eisdell v. Hammersley* (*ubi sup.*), the court thus preferring the earlier decisions of Romilly, M.R. to that which they had then under review. I must take it now as well settled that where the tenancy for life and ultimate reversion are vested in one and the same person, there being intervening interests or limitations, and there is a power of appointment given to that person which might defeat his own interest, then, if he becomes bankrupt, or assigns his property for the benefit of his creditors, that power is not extinguished, but he is not allowed to exercise it so as to defeat the interest of his trustee in bankruptcy, or of his assignee. So that, the power not being extinguished, if the trustee in bankruptcy or the assignee chooses to say, "I do not object to the exercise of your

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power," it may be exercised. If he does object, then he has the right to say, "You shall not exercise it." But if he waives his right to object, the power remains and may be exercised. Of course the trustee in bankruptcy could not give his consent without the sanction of the Court of Bankruptcy. It appears that the property of James Cooper is all now vested in his trustee in bankruptcy for the benefit of creditors. If the power of advancement to children is exercised, it would destroy the estate so vested in the trustee in bankruptcy. I am clear that, although the exercise of the power would be for the benefit of the child, who has nothing whatever to do with the bankruptcy proceedings, yet, without the consent of the trustee in bankruptcy acting with the sanction of the Court of Bankruptcy, the trustee of the will cannot be allowed to exercise that power. No case can be found to warrant the assumption that he has any such right.

His Lordship made a declaration that the power of James Cooper to consent to an appointment by way of advance by the trustee to the infant William James had not been extinguished by his bankruptcy; but that such power of consenting could not be exercised without the sanction of the trustee in bankruptcy; and appointed Mary James guardian of the infant. One order upon both summonses. Costs of all parties to come out of the estate.

Solicitors for Thomas Craddock, *Sidney, Steadman, and Co.*

Solicitors for Mary James, *Hicks and Arnold.*

Solicitors for the trustee of the will, *Mott and Dent.*

Friday, June 27.

(Before KAY, J.)

Re BENYON; BENYON v. GRIEVE. (a)

Will—Construction—Legacy—Condition.

*A testator, who died in 1883, by his will, dated in 1876, gave legacies to his servants in the following terms: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages, in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition."*

*In 1880 Peter Grieve, who had been in the testator's service for over thirty years, relinquished his situation, and when he did so the testator sent him 100*l.**

*The question was whether Peter Grieve was entitled to the legacy of 300*l.**

*Held, that the words "and to my gardener," &c., were governed by the condition that the servant should have been in the testator's service during twelve months preceding the testator's death, and as Peter Grieve had not fulfilled that condition he was not entitled to the legacy.*

THE Rev. Richard Edward Benyon, by his will, dated the 23rd Nov. 1876, gave legacies to his servants in the following terms:

*To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition.*

The testator died on the 7th July 1883.

In Aug. 1880 Peter Grieve, who had been in

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

the testator's service for over thirty years, relinquished his situation, and when he did so the testator sent him a letter inclosing a cheque for 100*l.*

The question was whether, under the circumstances, Peter Grieve was entitled to the legacy of 300*l.*

On the 21st May 1884 an originating summons, under Order LV., r. 3, of the Rules of Court 1883, was taken out by Richard Benyon, the sole acting executor, to obtain the opinion of the court upon the point.

The summons was adjourned into court, and now came on to be heard.

*Grosvenor Woods* for the applicant.

*Jason Smith* for Peter Grieve.—The testator intended to give his gardener this sum of 300*l.* because he had been in the testator's service for so many years, and he is entitled to the legacy. In *Jarman on Wills* (4th edit. vol. 2, p. 185) it is said that it is often a question whether a legacy bequeathed by a codicil is subject to the same restrictions as a legacy bequeathed to the same person by the will; and that the affirmative construction prevails where the legacy by codicil is expressed to be in addition to, or in substitution for, the legacy given by the will. But I submit that this is not so where the second gift is by the same instrument as the first, as in the present case. The gift of a share "in addition" was held in *King v. Tootel* (25 Beav. 237) not liable to the same contingency as the original share. Romilly, M.R. there said: "No doubt a substituted and additional legacy is usually given on the same terms as the original one. But that must be taken with this qualification—that it is consistent with the terms of the gift and the scope of the rest of the will." The description of "my gardener" does not import that Peter Grieve should continue in the position of gardener to the time of the testator's death:

*Parker v. Marchant*, 1 Y. & Coll. Ch. Cas. 290.

No reply was called for.

KAY, J.—I really cannot accede to the argument on behalf of Peter Grieve. I do not follow it, and indeed I should be doing violence to the express intention of the testator if I were to accede to it. It is no use trying to construe this will by the words of other wills. The testator uses these words, which are the only words in the will, as I am told, that touch the question at all: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages in addition to anything owing by me, and to my gardener, Peter Grieve, 300*l.* in addition." Now, I strike out for the moment the middle words "in addition to anything owing by me," and let the words run thus: "To each of my servants, who shall at my death have been in my service twelve calendar months, or longer, one year's wages, and to my gardener, Peter Grieve, 300*l.* in addition." Can there be any reasonable doubt as to the meaning of those words? I should say it is impossible to doubt their meaning. They are all preceded by a condition that the servants shall have been in his service twelve calendar months, or longer, at the time of his death. Do the words which are introduced into the middle of that sentence make it more difficult? The legacy is to be given in addition to anything

the testator may owe his servants. He does not give by his will what he owes them. He means this: "Besides anything I owe them, I make them a present, by this will, of a legacy of a year's wages each, and to my gardener 300*l.* in addition. In addition to what? In addition to that which he gives by his will, in addition to the year's wages. But the year's wages are only given upon the condition that Peter Grieve shall, at the time of the testator's death, be in his service, and shall have been in his service for a year, or longer. How that which is given in addition to the year's wages by this sentence can be treated as given on any other terms, I am not able to see. It seems to me that the language is too plain. I do not treat myself as governed by anything decided in any other case. I say that, by this will, the testator has expressed himself, almost as plainly as words can, that he gives to Peter Grieve—if Peter Grieve shall be in his service at the time of his death—a year's wages plus 300*l.*, and the condition applies to both. The fact was that Peter Grieve was not in the testator's service at the time of his death. He had left his service. The testator, it seems—though I do not rely on that as a mode of construing the will—had made Peter Grieve a handsome present when he did leave. He cannot say that he is entitled to the year's wages, but he comes and asks for the 300*l.* I think the preceding condition applies to both legacies, and that he is not entitled to either. The costs of both parties will come out of the residue.

Solicitors for the applicant, *Lake, Beaumont, and Lake.*

Solicitor for Peter Grieve, *Gilbert Robins*, agent for *Salmon and Son*, Bury St. Edmunds.

May 17 and 19.

(Before PEARSON, J.)

HERNANDO Y HORCAJO v. SAWTELL. (a)

*Domicile—Marriage between Englishwoman and Spaniard—Separate use—Settlement of English property—Death of wife without issue—Will—Spanish law of inheritance.*

*Upon marriage with a Spaniard, an Englishwoman can, with his concurrence, so settle property of hers in England as, notwithstanding the Spanish domicile which she acquires on such marriage, to be free to dispose of the property as she pleases; and, in the event of there being no children of the marriage, to defeat by her will her parents' indefeasible right under Spanish law to two-thirds of her immovable property.*

*Is a settlement made upon such a marriage, and in English form, a limitation of the wife's property upon such trusts as she shall appoint, and, in default of appointment, to her separate use without power of anticipation, means "separate use" according to English law.*

In Dec. 1881 Mrs. Edith Slater, a widow lady, English by birth and domicile (hereinafter referred to as "the wife") was married in England to the plaintiff, Don Faustino Hernando y Horcajo, a Spaniard (hereinafter referred to as "the husband"), and thereby acquired a Spanish domicile.

Before the marriage Mrs. Slater executed an

instrument renouncing any right which she would otherwise have acquired by such marriage in respect of the property of her intended husband according to the laws of Spain.

The settlement made upon the marriage was effected by two indentures, both executed in England and made in English form. The property comprised in them consisted of (a) a life interest in certain profits in coal mines in England, while the same should continue to be worked, which Mrs. Slater took under her late husband's will; (b) some leasehold estates at Walworth, subject to certain mortgages; and (c) freeholds at Hampstead. The coal profits were treated by his Lordship as personal property.

By one of these indentures, dated the 20th Dec. 1881 (hereinafter referred to as the "Walworth settlement"), the coal profits and the Walworth leaseholds, "in consideration of the intended marriage, "and with the approbation of the said [husband], given in consideration of the renunciation this day executed by the said [wife] of any right which she would otherwise have acquired by her marriage in respect of the property of her intended husband according to the laws of Spain (testified by his executing these presents)" were assigned by the wife, with the approbation of the husband (who was a party to the deed) to the defendants Sawtell and Tuke in trust for herself until the marriage, and afterwards in trust to pay off the mortgages, and subject to such payment to hold the premises "upon and for such trusts and purposes, subject to such powers, and generally in such manner as she should notwithstanding her coverture at any time after the expiration of six years from the 25th March then next, or such earlier period as the mortgages affecting all the leasehold houses should have been fully discharged, by deed or writing, with or without power of revocation, or by will or codicil, from time to time or at any time appoint, and subject as aforesaid in trust for her, for her sole and separate use, but so that she should not have power to dispose of the same or the income thereof, or of any part thereof, by anticipation otherwise than by deed or writing executed in manner thereinbefore specified." And it was thereby declared that the deed should take effect and be construed according to the law of England.

By the other indenture, which was of even date, and is hereinafter referred to as "the Hampstead settlement," the Hampstead freeholds were (with the approbation of the husband recited in the same form as in the Walworth settlement) granted to the defendant Sawtell, his heirs and assigns, "to such uses, upon and for such trusts and purposes, subject to such powers, and generally in such manner as the wife should, notwithstanding her coverture, and whether covert or sole, by deed or writing" (executed and acknowledged as therein mentioned), "without power of revocation and new appointment, or by will or codicil, from time to time or at any time appoint, and subject as aforesaid, to the use of the wife, her heirs and assigns, for her sole and separate use, but so that she should not have power to dispose of the same premises or of the rents and profits thereof, or any part thereof respectively, by anticipation otherwise than by deed or writing executed and acknowledged as therein mentioned." This indenture also declared "that the deed should take

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

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effect and be construed according to the law of England."

By a deed-poll, dated the 23rd Feb. 1882 and duly executed and attested, the wife, in exercise of the power given her by the Hampstead settlement, appointed that the Hampstead property should immediately after the execution of the deed-poll "go, remain, and be to the use of herself, her heirs and assigns, for her sole and separate use and benefit, freed and discharged from the debts, control, and engagements of her husband, and so that she should have full power to dispose of the same by deed, will, or otherwise as she might think fit, and so that she might manage and direct the management thereof as if she were a *feme sole*."

By an indenture of the 23rd Feb. 1882, made between the wife of the first part, the husband of the second part, and the defendant Wynne, as trustee, of the third part, the Hampstead property was appointed and conveyed by the wife as beneficial owner and with the consent of her husband, to Wynne upon trust for sale, and out of the net proceeds to pay the mortgages then charged upon the Walworth property and interest; "and subject thereto in trust for such person or persons, and in such manner as [the wife] should at any time or times thereafter, whether under coverture or not, by any writing or writings from time to time appoint, and in default of and until any such appointment, and in the meantime, subject thereto, in trust for [the wife], her executors, administrators, and assigns, for her sole and separate use and benefit, free from the debts, control, and engagements of [the husband]," with power of revocation and new appointment.

The Hampstead property was all duly sold by Wynne, and all the mortgages of the Walworth property paid off, leaving a balance of sale moneys still in hand.

On the 8th June 1882 the wife died without issue, having on the 21st Dec. 1881 duly made her will (which she executed in England, in English form, and declared to be a will made in exercise of the powers reserved to her by her marriage settlement, and of all other powers in anywise enabling her in that behalf). By it she directed, appointed, and declared that the real and personal estate over which she had any disposing power at the time of her death should be held and applied as follows: First, she gave the sum of 50*l.* each to certain named persons, and she thereby directed that such legacies should be payable out of the one-fifth of her entire property which she had been advised that she could by the law of Spain dispose of in any case, and she further directed that out of the said one-fifth of her property an annuity of 100*l.* payable quarterly should be payable to each of her parents, or to such one of them as should survive her, for the term of his or her natural life respectively, and subject as aforesaid she directed that the said one-fifth of her estate should be the absolute property of her husband in case there should be children of her marriage, and she gave the remaining four-fifths of her real and personal estate to her children in equal shares, and so far as she lawfully could or might she appointed her husband to receive during their minority the income of the said shares to be applied towards their maintenance and education, without account, until he should marry again; but should

she leave no children the said testatrix gave four-fifths of her real and personal estate to her husband absolutely, and she gave the remaining one-fifth of her property, charged with the before-mentioned annuities, and with certain legacies thereinbefore mentioned, to her brother and sisters or their children as therein mentioned. And she appointed the defendants Tuke and Sawtell to be executors and original trustees of her said will.

The law of Spain being that in the event of a Spanish woman dying without issue two-thirds of her property movable and immovable go to her parents, whether she has made a will otherwise disposing of it or not or has died intestate, the father and mother of the wife claimed to be entitled to that proportion of her estate.

In Nov. 1882, other questions having arisen with regard to the estate, the husband commenced the present action against Sawtell, Tuke, and Wynne, claiming administration of the estate; that the trusts of the Walworth settlement and of the indenture of the 23rd Feb. 1882 might be carried into execution; that the rights and interests of all persons interested under the will and the said two indentures might be ascertained and declared; and that, if necessary, a partition or sale of the Walworth estate might be made by the court.

On the 15th Dec. 1882 the trusts of the will and the two indentures were accordingly ordered to be carried into execution, and certain inquiries and accounts to be taken.

On the 23rd April 1884 the chief clerk certified (among other things) (a) that the wife's domicile became Spanish upon her marriage, and so remained down to her death; (b) that (referring to the opinion of a Spanish legal authority) according to Spanish law the bequests and directions contained in the will of property other than immovable property in England were valid, and must be fulfilled, with such proportional reduction as might be necessary so as to arrive at the two-thirds of the whole estate, the parents alone being entitled to impugn the will in this respect, which they were bound to do within the testamentary proceedings, and in no way by intestacy proceedings; (c) that the wife did by her will exercise or purport to exercise the power of appointment in the Walworth settlement, and by the deed-poll and indenture of the 23rd Feb. 1882 exercise or purport to exercise the power of appointment contained in the Hampstead settlement.

The certificate further submitted to the court whether the above appointments were valid, and if so to what extent, having regard to the testatrix's domicile, the law of Spain, and the circumstances of the case; whether (having regard to the same points) the power of appointment contained in the indenture of the 23rd Feb. 1882 was or was not exercised by the will; and whether the Walworth property and the proceeds of sale of the Hampstead property were or were not undisposed of; the certificate submitting that, if not undisposed of, they would be held in trust to be dealt with according to Spanish law.

It having been found impossible to proceed further with the accounts and inquiries until the questions reserved by the certificate should have been decided, it was arranged that the matters

thereby reserved should be brought before the court on petition.

The present petition was accordingly presented by the husband, the plaintiff, asking (1) a declaration that the will was a valid execution of the power contained in the Walworth settlement, and that the Walworth property passed accordingly, notwithstanding the Spanish domicile of the testatrix, to the persons entitled under the will; (2) a declaration that the deed-poll and indenture of the 23rd Feb. 1882 were valid executions (or that one, and which of them, was a valid execution) of the power contained in the Hampstead settlement; and that the will was a valid exercise of the power contained in the said indenture of the 23rd Feb. 1882, and that the clear proceeds of sale of the Hampstead estate passed accordingly, notwithstanding the Spanish domicile, to the persons entitled under the will.

The petition now came on for hearing.

*Cozens-Hardy*, Q.C. *Underdown*, and *Methold* for the petitioner.—The settlement is valid, and the wife, under it, retained the power of disposing of her property by will notwithstanding the law of Spain:

*Esté v. Smyth*, 18 Beav. 112;

*Van Grutten v. Digby*, 7 L. T. Rep. N. S. 455; 31 Beav. 561.

The immovable property is of course governed by English law. The will is a good exercise of the power reserved by the deed-poll, though made before such power was created:

*Boyes v. Cook*, 42 L. T. Rep. N. S. 556; 14 Ch. Div. 53.

At any rate it is a good exercise of the powers reserved by the settlement, or it is a valid disposition as dealing with property to which she was entitled to her separate use.

*H. A. Giffard*, Q.C. and *Stirling* for the father and mother of the wife.—The will is not a valid execution of any of the powers:

*Taylor v. Meads*, 12 L. T. Rep. N. S. 6; 4 De G. J. & Sm. 597.

The property, therefore, remains simply property held by the wife to her separate use. As such, it is, as regards immovables, governed by the law of England; as regards movables, however, it is governed by the law of Spain, the country of her domicile:

*Enoch v. Wylie*, 6 L. T. Rep. N. S. 263; 10 H. L. Cas. 1.

[PEARSON, J. referred to *Studd v. Cook*, 8 App. Cas. 577.] The law of the domicile of a deceased person governs the succession to his personal estate wherever situated:

*Preston v. Lord Melville*, 8 Cl. & Fin. 1.

The stipulation as to "separate use" was only directed against the husband. The effect of the change of domicile was left to operate as usual.

*Dibdin* for the trustees of the settlement.

*D'Arcy Todd* for Wynne.

*Cozens-Hardy*, Q.C. in reply (as to the Hampstead property only).—*Taylor v. Meads* is not in point as to the will being a non-exercise of the power; but it proves that the wife had a right of disposition by will by virtue of her separate estate, which is my second point.

PEARSON, J., after stating the facts as to the

Walworth settlement, continued:—The first question which I have to determine with regard to this, the Walworth property, is this—Does or does not that will dispose of this property? First of all, it is said that the will could only be made at the expiration of six years after the 25th March next after the 20th Dec. 1881, or at such earlier period as the mortgages affecting all the leasehold houses should have been fully discharged, and that this will having been made on the day after the marriage, it was impossible to make it under the power, and that under the power it was bad. I demur to that construction of this clause entirely. To my mind it would be absurd to say that the lady was to be restrained from making a will until six years after her marriage; because it is plain that the mortgages might not have been discharged until that period had expired, and I am justified therefore in taking the longer period as the period during which she might be restrained at all events from making a will. It would be so absurd that, unless I find the words so strong that I could not by any possibility put any other construction upon them, I should certainly hesitate to put that interpretation upon them. But to my mind the words are perfectly intelligible and can be read grammatically so as to mean that which seems to me to be reasonable. I have no hesitation in saying that that limitation of time applies only to deeds *inter vivos*, and does not apply to any testamentary instrument. If you take them as they occur and read them simply as they are written, I do not think any layman would imagine that the six years' limitation applied to the will, and inasmuch as they read perfectly grammatically without implying any restraint during the six years upon the power of making the will; I read them in that way, and I think that is the proper way in which they ought to be read. I do not mean to rely upon it as anything that would bind me in the construction of this will, but it is not to be forgotten that the construction put upon this will by the parties themselves is that which I put upon it, because the very next day after their marriage the lady made her will, certainly not imagining at that time that she had no power to make a will for six years. Then it is said the next clause controls the testamentary power altogether. It is given to her upon trust for her separate use, but so that she should not have power to dispose of the same or the income thereof, or any part, by anticipation otherwise than by a deed or writing executed by her and attested in manner aforesaid. I am of opinion that that undoubtedly applied to alienation *inter vivos*, and that she was restrained from anticipation which could only be during her lifetime except by deed or writing in manner thereinbefore mentioned. That has no application, to my mind, to a testamentary disposition, because it would have no effect whatever until after her death. I come, therefore, to the conclusion that, so far as relates to the will in this case, this will was a proper and complete execution of the power contained in this deed, and under this will, as I understand, she has disposed of the coal profits, and the Walworth property must go according to the dispositions of the will. The Hampstead property stands in a different position. The Hampstead property was conveyed by a contemporaneous deed, and the six years' limitation is left out. [His Lordship stated the effect of the Walworth



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settlement, and continued:] Then the next thing the lady did was in the following year, which was this: [His Lordship stated the effect of the deed-poll and indenture of the 23rd Feb. 1882, and continued:] The property has been sold. It has all been converted into money. Mr. Wynne, as I understand, holds the money in trust for her according to this deed, and the question is what is to become of that money. It is said that, inasmuch as that money was to be held for her separate use, it was her separate use as the wife of a Spanish gentleman—the separate use of a lady who was by virtue of her marriage domiciled in Spain, and accordingly it can only be disposed of subject to the law of Spain with regard to the rights of married women to dispose of their property. And if the law of Spain takes effect, then it is found that according to the law of Spain she had only the right to dispose, I think, of one-third of it, and the other two-thirds go to her father and mother. On the other hand it is said that, in the first place, the will which she made on the 21st Dec. 1881 disposes of this property under the power contained in this deed; and secondly, that if it does not, then, inasmuch as this was given to her for her separate use, that must be construed according to the law of England, and according to the law of England, by virtue of a settlement to her absolute use, she would have a right to make a will, and it would then pass under the will of the 21st Dec. It was agreed also on behalf of her father and mother that the effect of that appointment to Mr. Wynne was to take the property out of the original settlement, and to make a new settlement of it, and that, although the original settlement was to be construed by the law of England, it does not follow that the later settlement is to be construed by the law of England. But it is to be borne in mind that when she takes for her separate use she is a Spanish woman, and that the law of her domicile now that she is dead will decide the disposition of her property, and that it must be construed therefore according to the law of Spain. Now the first observation I have to make is this: that when I look at these settlements, and more especially when I consider that recital in the marriage settlement that she had renounced all her rights to her husband's property, and that that was a part of the consideration for the making of the settlement, and that that original settlement was an English settlement, I confess that the conclusion at which I arrive is this—that the subsequent dealings with this property were meant to bear the same character as the original settlement bore, and that the lady was intended to have the power of dealing with all this property as an Englishwoman, as if she remained an Englishwoman with all the rights that an Englishwoman would have, and that to take these subsequent settlements and treat them as anything but the settlement of an Englishwoman dealing with English property would, to my mind, be derogating entirely from the agreement which was made on the marriage between the husband and the wife, which to my mind was, that the wife's property should remain her property as an Englishwoman, that the husband's property should remain his property as a Spanish gentleman, that the husband was to be excluded from the wife's property as the wife was to be excluded

from the husband's property; and if I were to resort simply to that ground I should, upon that ground, hold that I must construe these settlements as settlements dealing entirely with the property of an Englishwoman. But I have still further to consider what is the meaning of these settlements? The settlements, I say, were necessarily settlements that must have been made according to the law of England. There could have been no dealing with the Hampstead property except by deeds duly executed and valid according to the law of this country, and accordingly two deeds are executed, properly and strictly according to the law of this country. They are English deeds, and the subject-matter is English. It is perfectly true that the lady herself acquired a Spanish domicile. So far as regarded the real property, until it was converted into money it would be the real property of a lady originally an Englishwoman, which was originally settled according to English law—real property which was necessarily dealt with all through according to English forms. And I apprehend I should be wrong if I did not give these deeds the proper construction which they ought to have according to English law. When I come, therefore, to the clause which gives the lady the separate use, I think I cannot do otherwise than construe that according to English law, and the meaning of giving it for her separate use is, as we all know (and that is not disputed), to make her as regards that a *feme sole* entirely, and to give her the power of dealing with that so as to exclude her husband after her death, if by the terms of the instrument he is excluded during her life. I hold, therefore, that, at all events, under that separate use she had the power of dealing with this property as she pleased. It is perfectly immaterial that there was a power of appointment before. Whether that power of appointment was ignored or imperfectly executed or not is of no consequence at all. If it was imperfectly executed, or forgotten, and if she chose to act under the power which the separate use gave her, she had a perfect right to do so, and under those circumstances I need not inquire whether, under the power, the will would pass the property or not, because, if it did not pass it under the power, it passed it under the separate power she had, and which the separate use gave her. I confess it is very difficult for me to read the case of *Boyes v. Cook* and then to say that this power would not be executed by the will of the 21st Dec. It is perfectly true that the power was as she should thereafter appoint. It is said that, inasmuch as she was to appoint thereafter, therefore it could not by any possibility be executed by a will made before. In the case of *Boyes v. Cook* the power itself was created after the will was made. There it could only, therefore, refer to a subsequent appointment, and, as the appointment by the former will was held to execute that power, I do not see why the will should not execute this power. But I do not mean to decide the case simply upon that, because I say that, if the will was inoperative under the power, at all events under the separate use she had the right to dispose of this property, and has disposed of it, because the will undoubtedly is an execution of the power which she had as a *feme sole*, with the separate use absolutely as to this property. Accordingly, I decide that at all events the will is a good will; and the will, therefore,

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passes the property. The result will be that the will passes all the property, and those who take under the will will take.

*Declaration that the will of 21st Dec. 1881 was a valid disposition of the property comprised in the two indentures of settlement. Costs of all parties costs in the action.*

Solicitors for petitioner, *Wynne and Son.*

Solicitors for other parties, *Clarke, Woodcock, and Ryland, for Kinneir and Tombs, Swindon; Bridges, Sawtell, and Co.; Arthur Tyler.*

QUEEN'S BENCH DIVISION.

Dec. 18 and 19, 1883.

(Before Lord COLERIDGE, C.J., STEPHEN and MATHEW, JJ.)

REG. v. MANNING AND ANOTHER. (a)

*Criminal law — Conspiracy — Joint indictment against two — Conviction of one only — New trial.*

*On an indictment against two persons jointly for conspiring together, they must both of them, if tried together, be either convicted or acquitted; and where one of them only was convicted, and the jury, being unable to agree as to the other, were discharged from giving a verdict, the Court, on the application of the convicted defendant, made absolute a rule for a new trial as to both.*

In this case a rule was obtained on behalf of the defendant Manning, calling upon the prosecutor to show cause why the verdict found for the Crown should not be set aside, and a new trial had under the following circumstances:—

An indictment having been preferred against the two defendants, Manning and Hannam, jointly for conspiracy to cheat and defraud the prosecutor, the case was removed by *certiorari* and tried on the civil side of the court, before Lord Coleridge, C.J. and a special jury, at the last summer assizes at Winchester. The facts of the case as bearing against the two defendants were, that the defendant Hannam, having bought certain cattle of the prosecutor, the owner, and given him a cheque in payment of the amount of the price (which cheque, however, was not afterwards paid), subsequently sold the cattle and paid the proceeds of such sale to the other defendant, Manning, and the cheque given to the prosecutor by Hannam was returned, marked "no assets." The case against Hannam rested, and was proved against him, mainly upon his own admission or confession, which was deemed to make the case almost conclusive against him. He however defended himself very vigorously and threw the blame of the transaction entirely upon his co-defendant Manning. The Lord Chief Justice told the jury that the confession or admission of Hannam was evidence only against him, and was not evidence against the defendant Manning; and, in answer to a question by one of the jury, his Lordship also told them that the evidence might satisfy them as to one prisoner and not as to the other, and that they might on the present indictment find one of the defendants guilty and acquit the other. Thereupon the jury returned a verdict of guilty against the defendant Manning and, being unable to agree as to

the other defendant, Hannam, were discharged from giving a verdict in his case. Thereupon Hannam's trial was postponed, and the defendant Manning was bound under recognisances to surrender for judgment in the Queen's Bench Division. Subsequently the above rule was moved for and obtained on his behalf on the ground of misdirection, on the ground that one of two persons jointly charged with conspiracy, the one with the other, and both being tried together, could not be convicted alone and without the conviction of the other, and against that rule,

*C. W. Mathews and B. Coleridge*, for the prosecution, now showed cause.—This application is at all events premature. Hannam, the other defendant, has not been acquitted, but has yet to be tried, and may on trial be found guilty, and then the verdict against the present defendant would be perfectly good. [*Charles*, Q.C. for the defendant.—But Manning claims to be tried again with Hannam.] The direction of the learned Lord Chief Justice was right, the question really being, was the defendant guilty or not guilty upon the evidence adduced against him? No doubt it was a joint offence, but the evidence against each defendant was separate, and might be sufficient proof of the guilt of one and yet not so of the other defendant. The confession of one prisoner may be good evidence on which to convict him, but not being evidence against the other, the latter, if there be no other evidence against him, must be acquitted. That principle has been fully recognised and acted on in the Divorce Court in two very remarkable cases. In one of them, that of *Robinson v. Robinson and Lane* (1 Sw. & Tr. 362; 29 L. J. 178, P. M. & A.) the diary of the wife containing entries relating to her adultery with the co-respondent were held to be evidence of guilt against her, but not against him. [STEPHEN, J.—That is, that she might be guilty of adultery with him, though he was not guilty of adultery with her.] That is what was there held, and the case is one of very strong authority, having been decided by the Judge Ordinary Sir C. Cresswell, Cockburn, C.J., and Wightman, J. That case was followed by *Stone v. Stone and Appleton* (11 L. T. Rep. N. S. 515; 3 Sw. & Tr. 608; 34 L. J. 33, P. M. & A.) by the learned president of the Divorce Court, Hannen, J., in which the co-respondent was convicted on his own confession of adultery with the wife, and 1000*l.* damages given against him, whilst she was discharged. These cases are strong authorities in favour of the direction in this case. Where two persons are indicted for conspiracy, if one only appears at the trial, he may be convicted in the absence of the other who has not pleaded:

*Rex v. Kinnerly*, 1 Str. 193;

*Rex v. Nichols*, 13 East, 412, n.; 2 Str. 1227;

*Reg. v. Ahearns*, 6 Cox Cr. Cas. 6;

*Reg. v. Kenrick*, 5 Q. B. Rep. 49; 12 L. J. 135, M. C.

In the case of *Rex v. Cooke* (5 B. & C. 538) four persons were indicted for conspiracy, when two pleaded not guilty, one pleaded in abatement, to which plea there was a demurrer, and the fourth man never appeared. Before the argument of the demurrer the record went down for trial, when one of the two who had pleaded not guilty was acquitted, and the other was found "guilty of conspiracy with him who had pleaded in abatement." The demurrer was afterwards argued,

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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and judgment of *respondens oster* given, whereupon a plea of not guilty was pleaded, and it was held that the court might, before the trial of that defendant, pronounce judgment upon the one that had been found guilty. No doubt in the judgment in that case Littledale, J. said, at p. 545, "If the other defendant shall hereafter be acquitted perhaps this judgment may be reversed;" but to this there is, in Russell on Crimes (vol. 2, 3rd edit. p. 691; vol. 3, 4th edit. p. 146), the following note by the learned editor, Mr. Greaves: "*Sed quære*, for such acquittal would not necessarily show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined at the former trial, or the one defendant might have been convicted on his own confession, which would not be admissible against the other defendant." In *Reg. v. Thompson* (16 Q. B. 832) Erle, J. said: "According to the rules of pleading the charge of conspiracy as to each individual must be construed as if he were charged solely," which strongly supports the argument on behalf of the prosecution in the present case.

A. Charles, Q.C. and Warry, for the defendant Manning, supported their rule.—The direction of the Lord Chief Justice is wrong on both principle and authority, and the defendant is entitled to a new trial, the application for which is not premature. There was no count here of conspiring with a third person to the jurors unknown. On this indictment, charging the two defendants with conspiring together, the jury were bound to find both guilty or to acquit them both. The facts in proof of the conspiracy and the overt act proved may be different in each case, but one common design between the two must be proved. In *Reg. v. Ahearn* (*ubi sup.*) the proof was that the prisoner and another conspired, and so the judgment was affirmed. The very essence of the offence of conspiracy is an agreement between two or more persons, it being impossible for one person to conspire by himself:

Hawk. P.C. c. 27, s. 8, 8th edit. by Curwood, p. 448;

*Harrison v. Errington*, Poph. 202.

[STEPHEN, J.—The old reports are often very imperfect, and the reason of the decision is frequently left in some doubt.] A riot is an analogous case:

*Reg. v. Sudbury*, 12 Mod. 262, Case 473.

Though a person may be alone indicted for a conspiracy, as he may conspire with a person unknown, yet it must be proved to the jury's satisfaction that the unknown person conspired with the defendant before the latter can be convicted. The record here is repugnant, and my Lord's direction might lead to repugnant verdicts against the two defendants, but there was no repugnancy in the record in *Reg. v. Cooke* (*ubi sup.*). It is laid down in 3 Chitty's Criminal Law, p. 1141, that, "If all the defendants in an indictment for conspiracy, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed on him." That applies here, and shows that Manning could not be convicted without Hannam. The difference between Erle, J. and the majority of the court in *Reg. v. Thompson* (*ubi sup.*) rested simply on a point of

pleading; the authority of that case, as directly in point in favour of the present defendant, is by no means lessened by that difference. The principle underlying the decision of *O'Connell v. The Queen* in the House of Lords (11 Cl. & Fin. 165) underlies the present case, and the decision in that case is this, that where a count in an indictment against eight individuals charges one conspiracy against them to effect certain objects, a finding that three of the defendants are guilty of conspiracy to effect some of the objects, and not guilty as to the residue of those objects, is bad in law and repugnant.

MATHEW, J.—It is only after considerable doubt, and I am bound to say with much reluctance, that I have come to the conclusion that the verdict in this case cannot be supported, and therefore that there must be a new trial. It is, as I have said, with reluctance and regret that I have arrived at that conclusion, for there is no doubt that the defendant had a very fair trial, with a summing-up distinctly favourable to him, and with every care that could possibly be taken to prevent any evidence which could not legitimately be used against him being acted upon by the jury. Mr. Charles's argument, however, and the authorities cited by him in the course of them, have satisfied me of the existence of an imperative rule of law against the jury being told, as they were in this case, that it was competent for them, if the evidence satisfied them in that respect, to convict the one and to acquit the other of the two defendants. That rule of law I take to be this, that in a case like the present, where there is a charge of conspiracy against two persons jointly indicted and tried together, the issue raised and the question for the jury is, whether both of them are or are not guilty; and that if the jury are not satisfied as to the guilt of both of them, then both must be acquitted, it being impossible on such a charge to convict one of them and to acquit the other as was done here. The existence of that rule was taken for granted by the Court of King's Bench in the case of *Reg. v. Cooke* (*ubi sup.*) in Lord Tenterden's time; for, if it had not been, the judgment in that case could not have been pronounced. So again in the time of Lord Campbell, the Court of Queen's Bench treated the rule in question as an existing rule in the case of *Reg. v. Thompson* (*ubi sup.*); and all the four judges held in that case that a failure to convict both the defendants on a charge of conspiracy would be fatal to the prosecution. Moreover, in addition to these authorities, the rule is treated as perfectly clear in the judgment in the case in the Divorce Court of *Robinson v. Robinson and Lane* (*ubi sup.*); and finally, there are the opinions of the judges delivered in the House of Lords in the case of *O'Connell v. The Queen* (*ubi sup.*), clearly implying and distinctly illustrating the existence and application of that rule. That being so, there was, in my opinion, a misdirection in the present case in my Lord's telling the jury that they might convict one of these defendants without the other, and therefore the rule for a new trial should be made absolute.

STEPHEN, J.—With the greatest possible reluctance I also have come to the same conclusion, and entirely upon the authority of the opinions of the judges in *O'Connell v. The Queen* (*ubi sup.*), affirmed by the House of Lords. I see no possible

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escape from the decision in that case, which is one of the highest authority, and one which shows it to be legally impossible, where two or more persons are jointly indicted and tried together for a conspiracy, that some of them should be found guilty of one conspiracy and some of another, or that some should be convicted of the whole of a conspiracy, and others as guilty in a less degree; the rule of law being definite and positive that, on such a charge, all the defendants must be convicted or acquitted of one and the same conspiracy. As to the cases of *Rex v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*), they are not, in my opinion, so decisive of the question here as my brother Mathew seems to think them, for they seem to me to leave open the very point of the present case which *O'Connell's case*, I think, decided. With regard to the case of *Robinson v. Robinson and Lane* (*ubi sup.*), in the Divorce Court, which has been referred to, I think that as much of the judgment there as relates to criminal law is merely a dictum; but, as applicable to divorce cases, the rule seems to me to be founded on common sense, and on general principles it might be said to support the contention of the prosecution in the present case. I feel, however, that no answer can be given to the decision in the House of Lords, and fail to see any distinction between the rule in that case and that which is applicable to the present one, and yielding to that high authority I am of opinion that the jury here were misdirected, and that there must be a new trial.

Lord COLERIDGE, C.J.—During the argument of this case I have come to the conclusion that I misdirected the jury upon the point in question. The cases which have been cited before us to-day of *Rex v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*), and which I confess I think to be more directly in point, and to have more weight upon the question now at issue than my brother Stephen does, were not before me at the trial. I had then in my mind the two cases in the Divorce Court of *Robinson v. Robinson and Lane* (*ubi sup.*) and *Stone v. Stone and Appleton* (*ubi sup.*), and it seemed to me, at the moment, difficult to recognise any distinction in principle between the rule applicable to the present case and the rule of practice that had been established and prevailed in that court; and which rule is based on the fact that the court could proceed only on evidence, and that what is evidence against one party is by no means of necessity legal evidence against another, and that there might be evidence against one defendant sufficient to convict him, yet not sufficient to convict the other of them; for though it was a joint offence it must be separately proved against each of the defendants. I must say that it seems to me that the principle of the practice of the Divorce Court in this respect is sound; and I am by no means prepared to say that if this matter had been *res integra*, and even as it is if there could have been an appeal from the decision of this court to some other tribunal, I might not have adhered to my view, and left the point to be settled by a higher authority; but in a criminal case, with no appeal from our decision, I feel bound by the cases that have been cited, and by what I understand to be the established rule of practice. The older cases are stated shortly, and without much detail; and it is possible that if all the facts of them were before us they might

prove to be less in point than they now appear to be; but still from the time of *Thody's case* (Year Book, 14 H. 6, 25 b.; 1 Vent. 234—see note to *Rex v. Cooke*, 5 B. & C. p. 541) it has been taken for granted, and laid down by the judges, that in cases of conspiracy, where two persons are jointly indicted and tried together (for different considerations would arise if they are not tried together) the inflexible rule is that both must be convicted, or both acquitted. Coming down to later times, the same rule must evidently have been present to the minds of the judges who decided the cases of *Rex v. Cooke* (*ubi sup.*) and *Reg. v. Thompson* (*ubi sup.*). There are distinctions no doubt which prevent either of these cases from being directly in point here, but in the former of them, the Court of King's Bench, consisting at that time of Lord Tenterden, C.J. and Bayley, Holroyd, and Littledale, JJ., though it did not decide, yet seems to have assumed as the underlying principle of the whole matter the existence of the rule which has been contended for on behalf of the present defendant; and consequently the direction which I gave to the jury could not be right. In the other of those two cases, Erle, J., although differing on a particular point from the other three members of the court, differed from them only on a purely technical point of pleading, and not as to the principle assumed and laid down by the rest of the court in that case. In fact, Erle, J. said not a word to the contrary of that principle, but rather assumed its existence, for he endeavoured to support the conviction there on the technical point that "persons unknown" might be construed to mean the two individuals as to whom the jury were unable to agree. Then comes the case in the House of Lords of *O'Connell v. The Queen* (*ubi sup.*), in which all the judges assumed this point to be the rule of practice, and although they differed in opinion upon some other points, they all agreed upon that one. The principle underlying that decision is, that where two or more persons are charged with conspiracy the count is a single and complete one and cannot be separated into parts. The principle is the same in the present case. Without doubt, therefore, in directing the jury as I did contrary to that rule I misdirected them, and therefore this rule for a new trial must be made absolute. I wish to say that I have not forgotten the rule (Order XXXIX., r. 2) with regard to hearing applications for a new trial; but criminal proceedings are an exception from the operation of that rule, and this being a criminal proceeding I have thought it right to take part in this judgment.

*Rule absolute for a new trial as to both defendants.*

Solicitors for the prosecution, *Sole, Turner, and Knight*, agents for *H. E. Hooper*, Newport, Isle of Wight.

Solicitors for the defendants, *John Turner and Son*, agents for *F. P. Henry*, Newport, Isle of Wight.

Q.B. Div.]

THE DIRECT SPANISH TELEGRAPH COMPANY v. SHEPHERD.

[Q.B. Div.]

Monday, May 19.

(Before HAWKINS and SMITH, JJ.)

THE DIRECT SPANISH TELEGRAPH COMPANY v.  
SHEPHERD. (a)

APPEAL FROM THE CITY OF LONDON COURT.

*Landlord and tenant—Water rates—Covenant by landlord to pay "all rates and taxes chargeable in respect of premises"—Waterworks Clauses Act 1847 (10 Vict. c. 17), ss. 3, 68, 72.*

*A lease, under which premises were held, contained a covenant that the lessor should "pay all rates and taxes chargeable in respect of the demised premises."*

*The landlord having refused to pay the water rate due in respect of the premises, the tenant was compelled to pay the same.*

*In an action brought by the tenant against the landlord to recover the amount so paid:*

*Held, that the water rate was a "rate" within the meaning of the above covenant and that the landlord was bound to pay the same.*

The action was brought by the lessees of premises in the City upon a covenant by the lessor "to pay all rates and taxes chargeable in respect of the demised premises."

An agreement for a lease of the premises in question had been made, by which it was agreed to insert a covenant in the lease that the lessor should "pay all rates and taxes chargeable in respect of the demised premises."

A lease was subsequently executed, but it contained the covenant "that the lessor should pay all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees within the rooms hereby demised."

The premises, which consisted of four rooms on one floor, were supplied with water by the New River Water Company, and, as the defendant refused to pay the water rate in respect thereof, the plaintiffs were obliged, to prevent the cutting off of their water supply, to pay 5*l.* to the company as the water rate due at Christmas 1883.

The plaintiffs then brought this action in the City of London Court, under the above covenant in the lease, to recover from the defendant the sum of 5*l.* so paid by them. On the application of the defendant the learned judge struck out the clause in the lease relating to the payment of water rates, and inserted a covenant by the lessor "to pay all rates and taxes chargeable in respect of the demised premises," in accordance with the agreement. The learned judge held that a water rate was not a "rate or tax" within the meaning of the above covenant, and gave judgment for the defendant, with liberty to the plaintiffs to appeal upon the point whether a water rate is a "rate or tax."

*W. Graham (R. Spratt with him) for the plaintiffs.*—This water rate is clearly a "rate" within the meaning of the above covenant. A payment for water is called a "rate" in sect. 68 of the Waterworks Clauses Act 1847. It is the universal practice in the City for landlords to pay these charges. [SMITH, J.—And they know the amount of them before fixing the rent.] He was stopped.

*Upjohn for the defendant.*—The water rate or water rent in question is not a "rate chargeable

in respect of the demised premises" within the meaning of the covenant. The New River Company's Act 1852 (15 & 16 Vict. c. 160), s. 3, incorporates the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17). Under the Act of 1847 a payment for water is not a charge upon the premises, but is a mere payment for the supply of water, that is, a payment for goods sold and delivered, the price being determined by reference to the annual value of the premises occupied. By sect. 3 of that Act, a "water rate" means "any rent, reward, or payment for the supply of water." By sect. 68 the water rate is payable by, and recoverable from, the person requiring, receiving, or using the supply of water, and is payable according to the annual value of the tenement supplied. By sect. 70, the water rates are payable in advance; and by sect. 74 the rate is recovered from the persons supplied by action, or by a proceeding before justices. Again, by the Metropolis Water Act 1871 (34 & 35 Vict. c. 113), s. 48, an incoming tenant is not bound to pay arrears of water rates. Under the Act of 1847 the company supplying the water has no lien upon the property where the supply is delivered for the amount of the rate:

*Sheffield Waterworks Company v. Wilkinson*, 4 C. P. Div., at pp. 422, 424; 41 L. T. Rep. N. S. 241; 48 L. J. 145, M. C.

The rates intended by the covenant are rates which, like poor's rates, are a charge upon the occupier in respect of his possession; but a water rate is not chargeable in respect of the premises, as payment cannot be enforced if notice is given to the water company that the water is not wanted. The effect of holding a water rate to be within the covenant will be to impose upon the landlord a charge varying at the will of the tenant, for the tenant might agree to pay by meter according to the quantity supplied, or might increase the rate by using a bath upon the premises, or a water-closet, or by causing the water to be supplied at a higher level.

*Graham* was heard in reply.

HAWKINS, J.—I think that this appeal must be allowed, and that the plaintiffs are entitled to judgment. The whole question is, whether a water rate is within the terms of the covenant or agreement. By the agreement it is provided that the lessor is "to pay all rates and taxes chargeable in respect of the demised premises," and by the covenant that the lessor is "to pay all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees within the rooms hereby demised." Substantially, the language of the agreement is the same as that of the covenant. So, whether we take the one or the other, the result will be the same. Under this covenant the tenant seeks to recover a sum of money which he says he has had to pay for water rates, and the landlord says he is not bound to pay, as a water rate is not "a rate or tax" within the meaning of the above covenant. In my opinion, a water rate is a rate chargeable in respect of the demised premises within the meaning of the above covenant. The interpretation clause of the Waterworks Clauses Act 1847 uses the expression water rate. Then what is to be deemed a water rate within the meaning of the Act? A water rate is said to include any rent, reward, or payment for a supply of water.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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Then sect. 68 provides that the water rate shall be paid by the person requiring or using the supply of water, and shall be payable according to the annual value of the tenement supplied. The water rates are here chargeable in respect of the tenement supplied with water, and in respect of the annual value of the same. It seems to me, therefore, that they are rates chargeable in respect of premises, and it is not necessary that they should be chargeable on the premises. I think that sect. 72 also throws some light on the point. This section provides that where the annual value of a tenement does not exceed 10l. the owner of the tenement is to be liable to the payment of the water rate, instead of the occupier. The effect of this covenant and the agreement is simply to extend the liability of the landlord beyond the 10l. limit provided in the section, and to make, as between the landlord and the tenant, the landlord liable. I think it is clear that the water rate is a "rate" within the meaning of the covenant, and that this appeal must be allowed.

SMITH, J.—Confining myself to the judge's notes, the question for the court to determine is whether a water rate is a "rate or tax." If it is not a "tax," what is it? I say a rate, but Mr. Upjohn says it is simply a payment for goods sold and delivered. I do not think that it is so, and for this reason, that if the occupier of a house does not take a drop of water out of the pipes, he would nevertheless be liable to pay the water rates unless he gave notice to the water company that he did not intend to use the water. As to the construction of the covenant, it is expressly stated therein that the landlord is to pay "all rates." Suppose, instead of having been expressed in this general form, it had been amplified into highway rates, sewers rates, &c., it is clear that the landlord would have been liable for each of these rates. But the effect of the covenant is just the same as if it had been so expressed. I think therefore that this water rate is a "rate," and, further, that it comes within the meaning of the agreement as a "rate chargeable in respect of the premises," and so that this appeal must be allowed.

*Appeal allowed without costs. Leave to appeal refused.*

Solicitors for the plaintiffs, *Blunt, Tebbs, and Lawford.*

Solicitors for the defendant, *Moon and Gilks.*

Tuesday, May 27.

(Before STEPHEN and MATHEW, JJ.)

HEAWOOD (app.) v. BONE (resp.). (a)

*Lodger — Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79)—Premises used for business purposes.*

*In order to constitute a person a "lodger" within the meaning of the Lodgers' Goods Protection Act 1871, it is necessary that he should live, i.e., habitually sleep, on the premises.*

*The protection afforded by the Act does not extend to the occupation of premises for business purposes only.*

This was a case stated by Sir R. Carden, one of the justices for the City of London, on the appli-

cation of the appellant, for an order for the restoration of certain furniture, goods, and chattels under the Lodgers' Goods Protection Act 1871 (34 & 35 Vict. c. 79), s. 2. The furniture, &c., had been seized by the respondents for a distress for rent due and owing by one Solomon Botibol, the immediate landlord of the appellant.

Sect. 1 of the said Act provides:

If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff, or other person employed by him to levy such distress, with a declaration in writing made by such lodger setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger, and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord, and such lodger may pay to the superior landlord, or to the bailiff, or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord, and to such declaration shall be annexed a correct inventory subscribed by the lodger of the furniture, goods, and chattels referred to in the declaration, and if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.

Sect. 2 of the said Act is as follows:

If any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to any action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

The following facts were either proved before me or admitted by both parties:

(a.) That the said William Thomas Bone and George William Henry Bone were the "superior landlords" of the said premises at No. 77, Fleet-street, and that Solomon Botibol, the "immediate landlord" was their tenant.

(b.) That the said Thomas Christian Heawood (the appellant) was in occupation of the first floor and basement of the said premises at a yearly rent of 75l., to be paid quarterly in advance under an agreement in writing (but it was not in evidence).

(c.) That on the 26th March last the said William Thomas Bone and George William Henry Bone, the superior landlords, levied a distress on the furniture, goods, and chattels of the said Thomas Christian Heawood for 75l. rent due to them by the said Solomon Botibol, the immediate landlord.

(d.) That subsequently thereto the said Thomas Christian Heawood tendered to the said superior landlord the sum of 18l. 15s., being the amount of

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a quarter's rent due from him in advance to the said immediate landlord, and also made the declaration required by sect 1 of the said Act, and annexed thereto an inventory in due form, as required by the said Act.

It was admitted that all the formalities required by the Act had been complied with so far as to entitle the said Thomas Christian Heawood to make the said application to me, and that the said superior landlords had nevertheless proceeded with the said distress.

(c) The appellant stated in evidence that he lived at Peckham, and did not sleep at the said premises, No. 77, Fleet-street, but carried on business as a publisher there; and he also stated in evidence that he had no key of the outer door; that the said immediate landlord had the possession and control of that door on the said 26th March, and had always had it before then; and that the said immediate landlord used to wait for him every morning and open the outer door for him.

5. The said superior landlords, through their counsel, having pointed out that there was no definition of the word lodger in the said Act, contended that as the appellant did not reside or sleep on the premises, and that as he occupied them for purposes of business, he was not a lodger within the meaning of the said Act. The appellant's counsel contended that it was not necessary for the appellant to sleep on the premises in order to claim the protection of the said Act, as the immediate landlord had control over the outer door.

6. The following cases were cited: *Morton v. Palmer* (45 L. T. Rep. N. S. 427; 51 L. J. 7, Q. B.); *Phillips v. Henson* (37 L. T. Rep. N. S. 432; 3 C. P. Div. 26; 47 L. J. 273), and *Doe v. Laming* (4 Camp. 77); and reference was also made to the clause relating to lodgers in the Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 4.

7. After hearing the case, and the arguments of the counsel on both sides, I held that the said Thomas Christian Heawood was not a lodger within the meaning of the said statute, and thereupon I dismissed the application, and declined to make the order required.

8. The question for the opinion of your honourable court is, Whether the said Thomas Christian Heawood (the appellant) was a "lodger" within the meaning of the Act 34 & 35 Vict. chapter 79?

Given under my hand this 25th day of April 1884, at the Mansion House Justice-room aforesaid.

(Signed), ROB. W. CARDEN,  
Alderman and J. P., London.

*Lionel Hart* for the appellant.—The appellant is entitled to a return of the goods. The statute does not give any definition of the word "lodger." The standard dictionaries define a lodger as one who lives or resides in the house of another. This is no assistance, as it leaves open the meaning of living or residing. The authorities do not make living or residing the test of lodging. Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in, or retains possession of or a dominion over, the house gene-

rally, or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord. Per Bovill, C.J.:

*Thompson v. Ward*, 24 L. T. Rep. N. S. 679; L. Rep. 6 C. P. 327.

He cited

*Bradley v. Baylis*, 46 L. T. Rep. N. S. 253; 8 Q. B. Div. 195;

*Wansey v. Perkins*, 7 M. & G. 151.

The object of the Act is to protect the goods of persons between whom and the landlord there is no direct privity:

*Phillips v. Henson*, 37 L. T. Rep. N. S. 432; 3 C. P. Div. 26;

*Morton v. Palmer*, 45 L. T. Rep. N. S. 427; 51 L. J. 7, Q. B.

*J. V. Austin* for the respondents.—The appellant cannot be said to be a lodger. The word "lodger" is to be used in its ordinary sense. If [the Legislature had intended that it should be understood in a special sense, a definition would have been inserted in the Act. The Act is in derogation of the common law rights of a landlord, and should be construed strictly as against the appellant. Residence is the essential element of lodging, and by residence is meant living and sleeping on the premises. In the registration cases residence is absolutely necessary to constitute a lodger. He cited

*Barnes v. Peters*, L. Rep. 4 C. P. 547.

STEPHEN, J.—I am of opinion that this appeal must be dismissed. The question whether, upon the facts stated, the appellant is a lodger is no doubt a fickle one to determine. I do not think that the registration cases bear on the matter at all. It seems to me that by the word "lodger" the Legislature meant a person who lives on the premises. Now, living at a place generally implies habitually sleeping there—that is, going to bed at night there. It is to be observed that the object of the statute was to protect poor people from having their homes broken up by a distress of the superior landlord. I am clearly of opinion that the Legislature never intended that a person in the position of the appellant should be included in the description of lodger so as to be entitled to the protection of the Act. The appeal must be dismissed.

MATHEW, J.—I am of the same opinion. It seems to me that the essential element of lodging is living or residence, and that, to constitute a person a lodger of any premises, it must be shown that he resides—that is, sleeps there. The appellant does not come within that definition, and this appeal must therefore fail.

*Appeal dismissed.*

Solicitor for the appellant, *H. J. V. Philpots*.

Solicitors for the respondents, *A. S. Edmunds and Son*.



[ADM.]

THE PACIFIC.

[ADM.]

# PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

## ADMIRALTY BUSINESS.

Thursday, June 12.

(Before BUTT, J., assisted by TRINITY MASTERS.)

### THE PACIFIC. (a)

*Collision—Regulations for Preventing Collisions, art. 11—Infringement—Lights—Fishing smack—Overtaking ship.*

The bright white light carried by a trawling fishing smack when attached to her nets in pursuance of the provisions of art. 9 of the Regulations for Preventing Collisions 1863, although visible astern, is not a white light shown from the stern to an overtaking ship within the meaning of art. 11 of the Regulations for Preventing Collisions 1880.

Where it is the duty of a vessel to carry or show lights, and those lights are not carried where they are visible, or are not shown, the court will not be extremely nice in finding another vessel to blame because those on board her fail to see the first-mentioned vessel within a few yards of the distance when such vessel ought first to have been seen.

THIS was a damage action *in rem*, instituted by the owners of the fishing smack *Speculator* against the owners of the steamship *Pacific*, to recover damages for the loss of the smack, occasioned by a collision between the two vessels on the 24th March 1884 in the North Sea. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows:—About 3 a.m. on the 24th March 1884 the fishing smack *Speculator*, manned by a crew of five hands all told, was trawling on the Dogger Bank about 170 miles E.N.E. of the Spurn. The weather was fine and clear, with a light wind from about north, and the *Speculator* was on the port tack with all sail set except the mizen topsail, her mainsheet being slacked out. Her trawling gear was on the ground, and she was heading about E. by N. and making about one knot an hour and some leeway. A white light was exhibited from the crosstrees on her mainmast; such light was visible all round the horizon, and a good look-out was being kept. Under these circumstances the masthead light of the *Pacific* was seen from three to four miles distant, bearing about a point on the starboard quarter. Shortly after the red light came into view, and, although loudly hailed by those on board the *Speculator*, the *Pacific* came on with great speed and struck with her stern and port bow the starboard quarter of the *Speculator*, doing her so much damage that she shortly sank.

The facts alleged on behalf of the defendants were as follows:—The screw steamship *Pacific*, of 466 tons net, was shortly before 3.10 a.m. on the 24th March 1884 in the North Sea, on a voyage from Hull to Dantzic. The weather was fine, but dark and cloudy towards the horizon, and there was a fresh breeze from about north. The *Pacific* was proceeding under steam with her foretopsail and forestaysail set, heading E. by N.  $\frac{3}{4}$  N., and making between eight and nine knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being

kept on board of her. In these circumstances those on board the *Pacific* observed at the distance of about a ship's length from the *Pacific* and right ahead (if anything a little on the starboard bow) the boom of the smack *Speculator* under sail. No light on board the *Speculator*, until after the collision, ever became visible to those on board the *Pacific*. The engines of the *Pacific* were immediately stopped and her helm was ordered hard-a-starboard, but a collision between the two vessels took place almost immediately afterwards. The defendants (*inter alia*) charged the plaintiffs with breach of art. 11. of the Regulations for Preventing Collisions at Sea, in not exhibiting a white or flare-up light from the smack's stern.

Art. 11 of the Regulations for Preventing Collisions is as follows:

A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Art. 9 of the Regulations for Preventing Collisions at Sea 1863, continued in force by Order in Council as follows:

Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light.

The evidence on behalf of the plaintiffs proved that the white light was carried in the weather crosstrees, that that was the usual place to carry it, and that it was visible astern. The witnesses on behalf of the defendants admitted that while it was possible, had their attention been directed to the smack, to have seen her at a distance of two ship's lengths, they did not see her until within the distance of one ship's length. They also stated that, having regard to the relative position of the two vessels, it was impossible for them to have seen the white light of the smack.

Dr. Phillimore (with him Bucknill) for the plaintiffs.—Assuming the smack's light not to have been visible all round the horizon, it was nevertheless carried in the place where it is the practice for fishing smacks to carry their light. Those on board the steamer, seeing that they were navigating across a fishing ground, should have taken extra precautions. It is, however, admitted that the steamer was making from eight to nine knots, and it is submitted that, under the circumstances, this was an excessive rate of speed. Assuming that the smack was bound by art. 11, we contend that there has been a compliance with it. The rule requires a white light or a flare-up light to be shown from the stern. Having regard to the fact that the smack's light was a white light on the crosstrees, and therefore visible astern, the duty to show a white light from the stern was complied with. [BUTT, J.—Surely the obvious intention of the Legislature in using the words "from her stern" is that the light is to be abaft everything that might possibly interfere with its being visible to an overtaking vessel. That is what I think the Legislature meant by the rule.] Assuming that to be so, the effect in the present case is the same. Whether the light had been exhibited from the stern or was hung on the crosstrees, it was yet visible to the overtaking ship, and therefore the breach of the rule cannot be said to have by any possibility contributed to the collision. According to *The Reiher* (4 Asp. Mar. Law Cas. 479; 45 L. T. Rep. N. S. 767) a vessel is not bound to show a white light or flare-up light to

(a) Reported by J. P. ASPINALL and F. W. BAINES, Esqrs.,  
Barristers-at-Law.

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an overtaking vessel, unless there is ground for the apprehension of danger. Under the circumstances of this case, there was no ground for the apprehension of danger. The defendants have admitted that it was possible for them to have seen the smack at a distance of two ship's lengths, while they say that as a fact they did not see her until within a ship's length off. If so, they should be held to blame for having a bad look-out.

*Hall, Q.C.* (with him *Kennedy*) for the defendants.—It would be impossible for vessels coming from the southward in certain directions to see the smack's white light, which would necessarily be shut out by the mast and rigging. It is obvious that the plaintiffs have infringed art. 11 of the Regulations. The white light there alluded to must be shown at the stern, so that there may be nothing abaft it which may intercept its rays, and further to indicate to an overtaking vessel the exact position of the stern of the overtaken ship, and thus enable the overtaking ship to manœuvre accordingly. The fact that those on board the steamer did not see the smack herself quite so soon as was physically possible is no proof of negligence. As to the speed of the steamer, there is no rule of navigation which says that in the absence of fog a steamer shall not go full speed, provided she is carefully navigated.

*Dr. Phillimore* in reply.—A steamer is not justified in running at full speed on a dark night across a fishing ground:

*The City of Brooklyn*, 1 P. Div. 276; 3 Asp. Mar. Law Cas. 280; 34 L. T. Rep. N. S. 932.

*BUTT, J.*—This is a case where, on a fine night but perhaps rather dark and cloudy towards the horizon, the smack *Speculator* was run down and sunk by the steamship *Pacific* in the North Sea, somewhere in the neighbourhood of the Dogger Bank. The substantial questions in the case relate to the lights carried or shown by the smack. For reasons to which I have adverted in the course of the evidence and during counsel's speeches, it is not necessary to go into the questions raised under the Orders in Council, which deal with art. 9 of the old and art. 10 of the new Regulations for Preventing Collisions. It is clear from the evidence that the smack's light was so placed that it did not show all round the horizon. What exact number of points was obscured it is not easy to say, but that it did not show all round is clear. But I do not say that the smack is necessarily to blame for that. There is a difficulty in placing these lights, and it has yet to be decided whether it is possible to have a light which will show all round the horizon. However, in that state of things, it is certainly more important that the other regulations as to lights should be strictly observed. Now, it seems clear to myself and the Elder Brethren that the regulation which requires a light to be shown from the stern to an overtaking vessel was infringed. Even apart from the regulations, one would have thought that, under the circumstances of this case, it would only have been an ordinary precaution to have shown a light from the smack's stern. Some suggestion has been made on behalf of the plaintiffs that, assuming the white globular light fixed on the cross-trees was not hidden by the sails or spars of the smack, but was visible astern, there has been a substantial compliance with the

regulation. I, however, do not think that contention can successfully be maintained. I think the view of the Legislature in laying down this regulation was something very different from a light carried in the forepart of the vessel, even assuming it to be visible astern. It has then been said that the steamer is also to blame. As to those on the steamer not seeing the smack's light, I think that it was so obscured by the smack's sails as not to be visible to them. We are satisfied that there was a good look-out on the steamer. The light of another steamer had just previously been seen, and we think it impossible that the smack's light, which is admitted by those on board the steamer to have been a good light, should not have been seen had it been visible. There has been some discussion as to the way in which this light was carried. However, taking the view I do, it is not necessary to decide that. Wherever it was, I think that it was obscured from those on the steamer until the smack had been turned round by the force of the blow. Then arises a further question. Assuming that the smack's light was obscured, ought not those on the steamer to have seen the smack's sails at an earlier period and perhaps in time to have avoided the collision? I have considered that matter, and I must say that where it is the duty of a vessel to carry or show lights, and those lights are not carried where they are visible or are not shown, I do not think the court ought to be extremely nice in finding another vessel to blame because she has failed to see her within a few yards of the distance when she ought first to have been seen. It is then said that the steamer in crossing a fishing ground at full speed was going at an improper rate. I, however, do not think that her speed under the circumstances was such a rate of speed as to constitute negligent navigation. On the whole, therefore, I come to the conclusion that the smack must be pronounced alone to blame for this collision.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Pritchard and Sons*.  
Solicitors for the defendant, *Stokes, Saunders, and Stokes*.

*Tuesday, June 10.*

(Before *BUTT, J.*)

THE BOWSFIELD. (a)

*Collision—Loss of life—Action in rem—Lord Campbell's Act* (9 & 10 Vict. c. 93)—*Amendment of writ—Practice—Order XVI., r. 11.*

*Plaintiffs commenced an action in rem under Lord Campbell's Act on the 4th Jan. 1884 in respect of loss of life by collision at sea on the 10th Jan. 1883. After the 10th Jan. 1884, it having been decided in the interim by the Court of Appeal that the Admiralty Court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrongdoing ship personally.*

*Application refused upon the ground that, under the provisions of Order XVI., r. 11, proceedings against the parties proposed to be added would only be deemed to have commenced from the date of the service upon them of the writ of summons, and hence the action would not have been commenced*

(a) Reported by J. P. ARTHUR and F. W. BAILES, Esqrs.,  
Barristers-at-Law.

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against them within the time provided by Lord Campbell's Act, and the court being of opinion that it had no power to add parties as defendants *in personam* in an action *in rem*, thought it ought not to make the order merely because the objection as to time was an objection which ought strictly to be taken at a later stage.

THIS was a motion by the plaintiffs in an action *in rem* under Lord Campbell's Act to amend their writ of summons by adding the names of the registered owners of the steamship *Bowesfield* as defendants in the action.

The collision, out of which the action arose, occurred between the schooner *Laura* and the British steamship *Bowesfield*, on the 10th Jan. 1883, in the Straits of Dover. By reason of the collision Carl Bjorn Pedersen and Axel Pedersen, two of the crew of the *Laura*, were alleged to have been drowned.

On the 4th Jan. 1884 the legal personal representatives of Carl Bjorn Pedersen and Axel Pedersen brought an action *in rem* under Lord Campbell's Act against the owners of the *Bowesfield* to recover damages sustained by the deaths of the said Carl Bjorn Pedersen and Axel Pedersen.

The *Bowesfield* was never arrested, in consequence of her owners on the 17th Jan. 1884 undertaking to enter an appearance in the action.

Owing to the decision of the Court of Appeal in *The Vera Cruz* (51 L. T. Rep. N. S. 104; 9 P. Div. 96), that the Admiralty Division has no jurisdiction to entertain an action *in rem* under Lord Campbell's Act, the plaintiffs took out a summons on the 14th May 1883 before the registrar to amend the writ of summons by adding the names of the registered owners of the *Bowesfield* as defendants. On this summons coming on for hearing the registrar refused to make the order and condemned the plaintiffs in the costs of the summons. Thereupon the plaintiffs took out a similar summons before the judge in chambers, who upon it coming before him referred it into court.

Lord Campbell's Act (9 & 10 Vict. c. 93), s. 3, is as follows:

Provided always and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

T. T. Bucknill, on behalf of the plaintiffs, in support of the motion.—This application is made in consequence of the decision of the Court of Appeal in *The Vera Cruz* (*ubi sup.*), where it was held that no action *in rem* would lie under Lord Campbell's Act. The plaintiffs, therefore, wish to add the owners of the *Bowesfield* under the provisions of Order XVI. r. 11. [BURR, J.—Can you say that you have brought an action against them within the twelve months required by Lord Campbell's Act?] I must say that or fail. [BURR, J.—Then do you say that an action against the ship is an action against the parties owning the ship?] According to the form of the writ it is addressed to the "owners and parties interested in the ship or vessel A. B." It is to, be noticed that in this particular case the ship was never arrested and the owners undertook to put in an appearance. [BURR, J.—You want to turn an action *in rem* into an action *in personam*. I do not think that ever has

been done.] In an action of possession the court has directed that the managing owner should appear as defendant. [BURR, J.—Can you refer me to any case in which the court has engrafted parties on to an action *in rem*?] I know of no authority which says it shall not be done, and in a recent case, *The Hollandia* (not reported), Sir James Hannen joined the pilot. It may be that prior to the Judicature Act this could not be done, but I submit that your Lordship now has the power under Order XVI. r. 11, the important words of which are, "in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." [BURR, J.—I can add a pilot under this order upon the ground that you cannot do effective justice without it. Dr. Phillimore, as *amicus curiæ*, referred to the case of *The Hope* (1 W. Rob. 154), where Dr. Lushington had expressed an opinion that it was not competent for the court to engraft upon a proceeding *in rem* a personal action against the master.] In two cases subsequent to the Judicature Act owners have been added personally to an action *in rem*:

*The Native Pearl*, 3 Asp. Mar. Law Cas. 515; 37

L. T. Rep. N. S. 548;

*The Annandale*, 3 Asp. Mar. Law Cas. 489; 2 P.

Div. 179; 37 L. T. Rep. N. S. 364.

According to the note at p. 23 of Coote's Admiralty Practice, the same thing could have been done prior to the Judicature Act. [BURR, J.—That I doubt. Your difficulty here seems to me that, having got an action which is useless, you are asking me to turn it from an action *in rem* into an action *in personam*. I do not think that is contemplated by the rule. What you are seeking to do is to deprive the defendants of the benefit of the provision in Lord Campbell's Act which says the action shall be brought within twelve months.]

J. P. Aspinall for the defendants *contra*.—*The Native Pearl* (*ubi sup.*) is hardly a binding authority in this case, because the action there was an action *in rem* under the Admiralty Court Act not to enforce a maritime lien, but merely a right against owners commencing from the date of action. In the present case the action is an action *in rem* irrespective of statute. Moreover, that action was a default proceeding, and hence the addition of the defendant was not argued. Even assuming the present application was acceded to, the plaintiffs would be out of time because by the provisions of Order XVI. r. 11, the proceedings as against the party added are to be deemed to have begun only on the service of the writ or notice.

Bucknill in reply.—This is not the proper time to take this last objection, though it may well be a question hereafter. [BURR, J.—That is very true, but you must remember that before my attention was called to those words I was against you, and although I am anxious to prevent a great injustice being done by reason of this lapse of time, I can now see no reason for straining my first impression and acceding to your application.] Inasmuch as the ship was never arrested, the parties have really appeared personally. [BURR, J.—No, they have not. They only appear to protect their interest in the *res*. They are not personally defendants.]

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BUTT, J.—I have very grave doubts indeed whether this is a matter over which I have power to act in the way I am now asked. However, I should have been strongly disposed to have gone counter to the inclination in my own mind had I thought that it would prevent the objection as to time being urged and availing the defendants in their contention. But it seems to me that it would avail, and I therefore must act upon what was my impression at the outset and refuse to make the order.

*Aspinall* asked for costs.

BUTT, J.—Had I made the order it must have been upon payment of costs by the defendants, as the necessity for doing so was caused by their mistake. They must, therefore, pay the costs.

*Motion refused.*

Solicitors for the plaintiffs, *Ingledeu, Ince, and Colt.*

Solicitors for the defendants, *Rielder and Sumner.*

## House of Lords.

Feb. 25, 26, and March 17.

(Before the LORD CHANCELLOR (Selborne),  
LORDS BLACKBURN and WATSON.)

BIRRELL v. DRYER. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE  
COURT OF SESSION IN SCOTLAND.

*Marine insurance—Time policy—Warranty—Ambiguity—Mazim, Fortius contra proferentem—Judicial notice.*

*Whether the underwriters or the owners are to be considered as the proferentes in regard to a condition in a policy of insurance, depends upon the character and substance of the particular condition. The respondents, shipowners, claimed against the appellants, the underwriters of a time policy of insurance, as for a total loss, and the appellants resisted the claim on the ground of a breach of a warranty in the policy. The warranty was "No St. Lawrence" between certain dates, and it was admitted that the vessel had navigated the gulf of St. Lawrence within the prohibited time, but the owners contended that the warranty applied only to the river St. Lawrence. It was proved that the navigation of the gulf was dangerous at that season, but less so than that of the river.*

*Held (reversing the judgment of the court below), that, in the absence of any evidence to that effect, the words of the warranty disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction as to negative words, and that both the gulf and the river were prohibited.*

*A court should take judicial notice of the geographical positions of, and general names applied to a district as shown on the Admiralty chart.*

THIS was an appeal from a judgment of the majority of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Lord Moncrieff), Lords Young and Rutherford Clark (Lord Craighill dissenting), which had reversed a judgment of the Lord Ordinary

(McLaren). The case is reported in 10 Court Sess. Cas. 4th series, 585; and 20 Sc. L. Rep. 385.

The action was brought by the respondents, who were shipowners, against the appellants, who were underwriters of a policy of insurance, under circumstances which appear in the head-note above and in the judgments of their Lordships, where also the arguments are sufficiently referred to.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Cohen*, Q.C., and *Hollams* appeared for the appellants.

The *Lord Advocate* (Balfour, Q.C.) and *Barnes* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: The question on this appeal is whether the words "warranted no St. Lawrence between the 1st Oct. and the 1st April" in a time policy on the respondents' ship *L. de V. Chipman* effected with underwriters of Glasgow on the 8th June 1878, for the twelve months from 29th May 1878 to 28th May 1879, include the Gulf of St. Lawrence, or are confined to the river of that name? Many witnesses were examined on both sides to show in what sense they understood these words, and thought that others ought to understand them, but none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen, and had been practically determined. Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible. Your Lordships have, therefore, to consider whether the ordinary rules and principles of construction do, or do not, enable you to ascertain the subject to which these words apply, having regard to those extrinsic facts which are either within your judicial cognisance, or sufficiently established by the evidence. The facts of which I think your Lordships are entitled to take judicial notice, independently of evidence, are these: The great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of St. Lawrence. There is a Cape St. Lawrence at the main southern entrance into the gulf. The river below Quebec expands into a broad estuary, passing, on each side of the island of Anticosti, into the gulf. The river and the gulf are thus naturally and immediately connected with each other, the access to and the outlet from the river being through the gulf, which is a large water-space, landlocked between the west coast of Newfoundland and the southern, eastern, and northern shores of Canada, New Brunswick, and Nova Scotia, having within it the considerable islands of Anticosti, Prince Edward's Island, and Cape Breton, and connected with the Atlantic Ocean by several channels, of which all but one are narrow. If the words "St. Lawrence" were preceded by the definite article, a noun substantive in the singular number must be understood, which, I think, could only be the "river"; and it would not, in my opinion, be consistent either with the popular or with the geographical use of the

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word "estuary," which means the tidal part of a river, to regard the whole waters of the gulf as forming part of the estuary, properly so called, of the river St. Lawrence. Here, however, the words are not "the St. Lawrence," they are negative, "no St. Lawrence." The other material facts, established by the evidence, are these. The navigation of the river St. Lawrence is open, and generally safe, from about the beginning of April till October, after which it becomes dangerous, chiefly from its liability to be impeded by frost, which often sets in suddenly and rapidly. After the middle of November vessels cannot remain there, except at the risk of being frozen in for the winter; and from the beginning of December till about April the navigation is, in ordinary seasons, entirely closed. At the end of March or the beginning of April the ice breaks up and descends into the gulf. The navigation of the gulf is never absolutely closed, but the harbours and narrow waters round its shores, on the south side as well as elsewhere, are often blocked up, or much impeded, in the winter by ice. Ships with grain and other cargo continue to sail from the Bay of Chaleur, from Miramichi, and from Prince Edward's Island, for some time after the river is closed, and sealing vessels visit the gulf during the winter. "As a general rule," according to the book called "the St. Lawrence Pilot," quoted by one of the appellants' witnesses, "the navigation is not considered safe, even in the southern part of the gulf, after the first week in December or before the 15th of April." "From about January," according to the evidence of one of the respondents' witnesses, "the gulf is practically closed," by which I understand closed to vessels of any considerable burthen engaged in the ordinary trade of those ports. During this winter season the gulf is dangerous, (though most of the witnesses consider its dangers to be less than those of the river), chiefly from fogs and from snowstorms, which are very dense and frequent. These dangers are enhanced to ships engaged in the usual trade of that region by the nature of their cargoes—timber, and more especially grain; and though the same kind of weather is also met with in the same season outside, upon the banks of Newfoundland, the danger in the gulf is greater because there is less sea-room there. Besides this the Anticosti lights are all put out in the middle of December, and, as the winter advances, the Belle Isle light, and all others of any consequence in the gulf, except some small local lights and that of St. Paul's, twelve or thirteen miles from Cape North, are also extinguished. As to the risks of this navigation from an insurer's point of view, there is a general consent among the witnesses on both sides. No evidence was given to show that any such insurance as that now in question could have been effected on similar terms (10 guineas per cent. premium) by a policy so expressed as unequivocally to leave the gulf open to the vessel insured during the prohibited months; and it is significant that two of the respondents' witnesses, who had been in the habit of insuring by policies in the form now in question, which they say they interpret as prohibiting the river navigation only, have themselves, since the meaning of the warranty was brought into controversy by the present action, been obliged to have their policies made out in an altered form, expressly excluding the gulf. Reading this contract of insurance in the light of the relevant facts, it appears

to me that there are two subjects, distinguishable from but closely connected with each other, to both of which the descriptive words "St. Lawrence" may apply, and that there is nothing to confine them to the one rather than to the other of those subjects. The office of the negative form of expression "no St. Lawrence" is not to define, but is to prohibit or exclude. It occurs in a contract for the purposes and objects of which it is reasonable and probable that both the gulf and the river should have been meant to be excluded. The reasons for such exclusion during the prohibited months are applicable to both, though in different degrees at different times during that period. I agree, under these circumstances, with the opinion and conclusion of the Lord Ordinary. I do not think that the evidence discloses any ambiguity or uncertainty sufficient to prevent the application to this case of the ordinary rules and principles of construction; and, according to those rules and principles, the whole St. Lawrence navigation, both of gulf and river, is, in my judgment, within the fair and natural meaning of these negative words, and is therefore prohibited during the months in question. There does not appear to me to be any necessity for resorting to presumptions in favour of or against either party, whether founded on the rule *Fortius contra proferentem*, or on the onus of proving an exception from the general affirmative terms of this contract. I therefore move your Lordships to reverse the interlocutor appealed from, and to restore that of the Lord Ordinary with costs.

LORD BLACKBURN.—My Lords: I also think that the judgment of the Lord Ordinary was right. The contract is in a time policy for a year, in which is indorsed as part of the contract "warranted no St. Lawrence between the 1st Oct. and the 1st April." No one can, I think, doubt that the document would, like every policy of marine insurance, be very difficult to construe if it were now for the first time brought before a court, but there is no dispute as to the meaning and effect of the contract. The question, as the Lord Ordinary, I think very accurately, says, is not one of degree but of identification. If the ship was during the prohibited time within the district described by the words "St. Lawrence," as here used, there is a defence. It is now admitted that she was within the Gulf of St. Lawrence, and was not within the river of St. Lawrence, and one question is whether "no St. Lawrence" means neither in the gulf nor the river, or means only not in the river. In *Uhde v. Walter* (3 Camp. 16), where the ship was insured from London to "any port in the Baltic," and was lost when proceeding to Revel, in the Gulf of Finland, Lord Ellenborough, C.J. said: "I think it is clearly competent to the plaintiff to prove that the 'Baltic' is *nomen generale*, comprehending in common understanding the gulfs and inlets which communicate with the sea, laid down as 'the Baltic' in geographical charts. If the Gulf of Finland is to be considered as the Baltic the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea." And, independent of the high authority of Lord Ellenborough, I think that in applying a local description to the particular spot, some evidence must be admissible. But the evidence received here does not go further than to show that several persons, having no

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better means of judging than the court, have formed an opinion one way, and several others have formed the opposite opinion, and it leaves the case as it was before. Reliance was placed by some of the judges below on the maxim *Fortius contra proferentem*. I do not think that the description of the district excluded can be considered as the words of one party more than of the other. The shipowner, knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the ship a description of that district in order to induce the underwriters to agree to a lower premium. I am by no means prepared to say that in some cases, where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of the assured and the underwriters that the description should be definite, and that is alluded to in the warranty "no British America between the 1st Oct. and the 1st April." No one could imagine that there was a material difference in the risk between a voyage from the most northern port in the United States and one from the most southern port of British North America, or between a voyage commenced on the last day which is not prohibited and one commenced on the first day which is prohibited; but a fixed limit is agreed on to prevent disputes. I think that the court should take judicial notice of the geographical position and the general names applied to such districts as this—in short, of all that we see in the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the Gulf that of St. Lawrence, and then gave the same name to the river, or *vice versa*, nor do I think it material. The name has for many years been applied to both. I think that, applying the name as we find it used in charts and by geographers to a well-defined district, it includes both the river and the gulf.

LORD WATSON.—My Lords: The appellants in their pleadings allege as matter of fact that, by the general custom of merchants, the words "warranted no St. Lawrence" in a policy of marine insurance include both the gulf and the river of that name. The respondents, on the other hand, aver that, according to mercantile custom, these words refer exclusively to the river St. Lawrence, and also that, assuming the truth of the appellant's allegations, the *L. de V. Chipman* was not navigated within the limits of the gulf. In the court below the parties were allowed to lead proof of their respective averments; but in the arguments addressed to the House, it was admitted on both sides that the appellants and respondents have equally failed to prove the statements which they made on record. It must, therefore, be taken as an established fact that there was a breach of warranty through the vessel being navigated within the limits of the Gulf of St. Lawrence during the voyage in the course of which she was lost, if it be held that the warranty applies to the gulf. In that case it follows that the respondents cannot recover under the policy either the average loss accruing during the deviation, or for the total loss which subsequently occurred. In the absence of evidence

sufficient to show that a technical meaning has been attached to the words "no St. Lawrence," or, it is accurate to say, in consequence of its being established by the evidence that the words have no technical meaning, it becomes necessary for the court to construe them; and, in construing them, I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view when they entered into the contract of insurance. The evidence of both parties was properly directed to the statements of fact upon which they relied in their record, to which the proof allowed was necessarily limited, and the result is that upon various matters, which it might have been of importance to investigate, we have no information. But there are certain facts established by the respondents' as well as the appellants' evidence, which appear to me to be very useful in considering what significance must be attached to the expression "no St. Lawrence." These facts are (1) that there is a gulf, well defined by the peculiar contour of its shores, into which a great navigable river debouches, and that both gulf and river bear the same name, St. Lawrence; (2) that, although there are ports within the gulf to which there is a separate shipping trade, yet, for many trading purposes, the gulf and the river are parts of the same navigation; and (3) that during several months of the year the navigation is exceptionally dangerous. Two at least of the three learned judges who formed the majority of the Second Division have held that "no St. Lawrence" must be applied to the river only, on the ground that the expression is ambiguous, and that the ambiguity must be solved adversely to the appellants, because "the underwriters are the *proferentes* with regard to a policy of insurance." That the underwriters may be rightly held to be the *proferentes* with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters—a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the *proferentes*; but I think the substance of the warranty must be looked to, and that in substance its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept while she is navigated under the policy, and that appears to me to be as much the concern of the shipowner as of the underwriters. To define the limits within which the vessel is to be navigated for the purpose of a time policy is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy. In both cases it is a definition of the subject-matter of the insurance, a term of the contract, the settlement of which must, in my judgment, be regarded, in a case like the present, as the deliberate act of both parties. Although the rule of construction *contra proferentem* may



not apply, I think that it was rightly argued for the respondents that, seeing the clause in question occurs in the shape of an exception from a leading term of the policy which gives the vessel leave to navigate in any waters, it can only receive effect in so far as it is plain and unambiguous. But I am not satisfied that there is any ambiguity, such as will avail the respondents, to be found in the clause when it is read as a whole. The ambiguity, according to the argument of the respondents, consists in this—that the words may decide either the river, or both gulf and river, and according to the view taken by Lord Young, consists in their being applicable either to the river, or to the gulf, or to both. It is not matter of dispute that the name “St. Lawrence” is applicable to the gulf and also to the river, and that, as suggested by Lord Young, it is equally correct to designate the gulf and river as the gulf and river of St. Lawrence; and if one could conceive a case of the words “St. Lawrence” standing by themselves in a policy, without any qualifying context, they certainly would be ambiguous, if not unintelligible. But in the present case any ambiguity which might otherwise have arisen is expelled by the word “no.” It is a universal negative, and, in my opinion, excludes all navigable waters, salt or fresh, bearing the name of “St. Lawrence,” which can reasonably be held to have been within the contemplation of the parties to the policy. If the river had been the only navigable water in North America known as “St. Lawrence,” and there had been elsewhere a gulf of that name, I might have hesitated to hold that the latter was within their contemplation; but the gulf and river of St. Lawrence are so intimately connected, and the perils attendant upon their winter navigation so much akin, that I have come to the conclusion that the warranty must be held to exclude both. Being of the same opinion with the Lord Ordinary and Lord Craighill, I agree with your Lordships that the interlocutor of the Second Division ought to be reversed, and that of the Lord Ordinary restored.

*Interlocutor appealed from reversed, and appeal allowed with costs.*

Solicitors for the appellants, *Waltons, Bubb, and Walton*, for *J. and J. Ross*, Edinburgh.

Solicitors for the respondents, *T. Cooper and Co.*, for *Archibald and Cunningham*, Edinburgh.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, Jan. 16.

(Before Lord SELBORNE, L.C., COTTON and FRY, L.JJ.)

Re BRIER; BRIER v. EVISON. (a)

*Trustees and executors—Wilful default—Loss by agent—Onus probandi—22 & 23 Vict. c. 35, s. 31.*

*Where an executor or a trustee properly employs an agent to collect money belonging to the estate, and such money is lost by the insolvency of the agent, the onus of proving that the loss has occurred by*

*the default of the trustee or executor lies on the person who seeks to make him liable for the loss.*

THIS action was brought in the Halifax District Registry against Messrs. Evison and Buckton, the trustees and executors of the will of John Brier, a coal merchant, for administration of his real and personal estate, the plaintiffs being beneficiaries under his will.

The common order for accounts and inquiries was made on the 28th June 1881, under Order XV., r. 1.

The statement of claim alleged misconduct on the part of the executors and trustees, but the order did not refer to any misconduct.

A receiver was appointed on the 20th July 1881.

The District Registrar, by his certificate, dated the 20th April 1882, found that the executors had received personal estate to the extent of 516l. 6s. 2d., and were entitled to be allowed, in account, 450l. 10s. 1d., leaving a balance of 65l. 16s. 1d., of which 42l. 19s. 10d. was in their hands, and 22l. 16s. 3d. at a bank to their credit. He also found that the debts still owing amounted to 202l. 15s. 10d. He also reported as follows:

The personal estate outstanding and undisposed of consists of household furniture in the possession of testator's widow, and of numerous small book-debts owing to testator, amounting nominally to 291l. 6s. 11d. Particulars of these book-debts appear in the schedule to the affidavit of John Evison and Henry Buckton, filed the 17th day of October 1881, and to be filed herewith, and a considerable portion appear to be bad debts. As to one item in the last-mentioned particulars of 118l. 3s. 9d., I have specially to report that it represents a portion of book-debts owing to testator, placed by the defendants in the hands of one Joseph Hobson to collect and collected by him, but which he has not accounted for to the executors, but has claimed to deduct in account 44l. 18s., an arbitrary sum, as his commission for collecting the debts. I consider 25l. to be ample remuneration, and the claim beyond that illegal as well as exorbitant. I have to add that this Joseph Hobson has lately petitioned for liquidation, and no part of this debt is likely to be recovered. Evidence on this matter appears in the affidavit of Joseph Ward, the receiver in this action, filed the 10th day of October 1881, and to be filed herewith.

The affidavit of Evison and Buckton, referred to in the certificate, set forth a long list of small book-debts amounting to 134l. 3s. 2d., a great number of which it stated were bad, and then contained these items:

Amount in the hands of Mr. Hobson on account of debts collected by him, less 55l. paid executors, as by their balance-sheet. From this sum Mr. Hobson's charges have to be deducted. . . . .	113 3 9
Balance due from Mr. Pollard on his promissory note . . . . .	44 0 0

£291 6 11

The 55l. above mentioned was paid by Hobson to the executors by four payments in April, May, and June 1880, and he continued to act as collector till the appointment of the receiver, without making any further payment to the executors.

The affidavit of the receiver referred to in the certificate related only to the exorbitance of Hobson's charge for collecting the debts.

No application was made to vary the certificate, and the case came on for further consideration before Chitty, J. on the 20th Nov. 1882, when affidavits were produced on both sides as to Hobson's fitness to be appointed collector. The executors deposed that the testator had kept his



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books in a very irregular manner, and that Hobson, who had been employed by him in his lifetime, was the only person who could understand them, and was in other respects a proper person to collect the debts. The witnesses on the other side alleged him to be a person of scanty means, and in all respects unfit for the office.

Chitty, J. held, on the construction of the registrar's certificate, that it found, as a fact, that the executors had received the money by their agent, and that they were bound to make good the loss which had occurred through his default, and therefore he ordered the executors to account to the estate for the 113*l.* 3*s.* 9*d.*, as being personal estate of the testator received by Hobson by their order and for their use, less the sum of 25*l.* found by the certificate to be the proper remuneration for the collection thereof.

The defendants appealed.

*J. Beaumont* for the appellants.—Although the certificate finds that there has been a loss of part of the outstanding estate, it does not find that the loss has occurred by the wilful neglect or default of the executors. The effect of rule 70 of R. S. C. 1883, Order LV., is that the certificate is conclusive. An inquiry as to wilful neglect and default cannot be directed, unless a case is made, on the pleadings where there are pleadings, and in other cases in such a way as to give the parties charged an opportunity of defending themselves:

*Job v. Job*, 6 Ch. Div. 563;

*Mayer v. Murray*, 8 Ch. Div. 424;

*Re Symons; Luke v. Tonkin*, 46 L. T. Rep. N. S. 684;

21 Ch. Div. 757.

Where trustees have properly deposited trust moneys with another person, and a loss occurs by his failure, they are only responsible in case of their own wilful default: (22 & 23 Vict. c. 35, s. 31.) Where a person has received money by his agent, and shows the agent has misappropriated the money, the burden lies on those who allege that the loss has occurred by his negligence:

*Spreight v. Gaunt*, 50 L. T. Rep. N. S. 390; 9 App. Cas. 1.

By allowing a remuneration to the agent it is admitted that he was properly employed to collect the debts. There is no evidence to show any default by the defendants.

*Bomer, Q.C.* and *W. Baker* for the respondents.

—The certificate shows that the executors received the money by their agent, and there is no reason why they should not be charged with it. The affidavit verifying the account sufficiently states the facts. If they are not sufficient we ask for a further inquiry.

[Counsel for the appellant consenting, the affidavits referred to in the certificate were read, but they only stated that Hobson received moneys till July 1881 without paying over anything to the executors after June 1880, and did not state when he became insolvent, or when the money came to his hands.]

Lord SELBORNE, L.C.—I think that in this case the burden of proof is on the respondents, who seek to charge the executors with this money. Sect. 31 of the statute 22 & 23 Vict. c. 35, provides in effect that trustees shall not be responsible for any banker, broker, or other person with whom trust moneys have been deposited (which I understand to mean properly deposited), unless it can

be shown that that loss happened through their own wilful default. The statute incorporated, generally, into instruments creating trusts the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by courts of equity, but gives it the authority and force of statute law, and appears to me to throw the *onus probandi* on those who seek to charge an executor or trustee with the loss arising from the default of an agent when the propriety of employing one has been established. In the present case Chitty, J. has virtually decided that in this case there was a proper employment of an agent for a proper purpose, and, as far as I can judge, the nature of the case justifies that view. Numerous small book-debts had to be collected, and it would be according to the ordinary course of business that they should not personally collect them, but should employ some proper and respectable person to do so. The testator was a coal merchant; one of his executors was a biscuit manufacturer, and the other an accountant. There is nothing to show that it would not be a reasonable and proper way of discharging their duty for the executors to employ an agent to get in the small debts, and the court below has held that it was so by allowing 25*l.* as a remuneration. If the executors had received this money they would have been entitled to pay the agent for collecting it, and the decision of the court on that point is founded on the opinion expressed in the certificate by the registrar, that he considered 25*l.* to be ample remuneration, which in fact came to this, that in his view that was the proper amount to be allowed for the remuneration of the agent. Therefore, on the judgment under appeal, and on the certificate, it seems to me we must assume the employment of the agent to have been right. Then, if a person seeks to charge the executors with a loss arising from the default of an agent whom it is admitted to have been reasonable to employ, does it not lie on him to inform the court of the circumstances under which the loss arose, the time during which the money was in the agent's hands, and the time at which the insolvency took place? This having been done, the executors, on the other hand, should have an opportunity of showing what efforts they had made and what means they had used for getting in the money, and what, if any, were the difficulties in their way. Now, it appears to me that in this case the person on whom the *onus probandi* lies has failed to inform the court of the circumstances which it was absolutely necessary for the court to know before it could come to the conclusion that the loss by the agent's insolvency was due to some wilful default on the part of the executors. That being so, I cannot help thinking that the judgment now appealed from is erroneous, and ought to be reversed, and we do not think that, as to so small an amount, we ought to direct any further inquiry.

COTTON and FRY, L.JJ. concurred.

*Appeal allowed.*

Solicitors for the plaintiffs, *Burn and Berridge*.  
Solicitors for the executors, *Learoyd and Co.*

May 6, 8, 10, 12, and 28.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

KETTLEWELL v. WATSON. (a)

*Vendor and purchaser—Unpaid purchase money—Lien—Retainer of deed by vendor to secure lien—Register county—West Riding of Yorkshire Registry Act (2 & 3 Anne, c. 4)—Allowing purchaser to register deed—Subsequent purchase of property—Neglect of sub-purchaser to search or inquire for original registered deed—Notice to original vendor that the property was being dealt with.*

*In register counties it is unnecessary to enter a memorial as to there being a vendor's lien on the property where such a lien is not conferred by any instrument in writing.*

*In register counties a purchaser is not relieved, by the fact of the deeds being registered, from inquiring for or examining the deeds.*

*The trustees of a charity sold land to X.; 1500l., part of the purchase money, remained unpaid, and the vendor's solicitor D. retained the conveyance, which stated in the body thereof that the full consideration had been paid, and had indorsed on it a receipt for the full consideration signed by the trustees. Shortly afterwards D. allowed the purchaser to register the deed in the West Riding Registry of deeds, but afterwards retained possession of the deed, as the balance of purchase money was never paid. X. divided the property into lots for building purposes. Two lots were conveyed to H. (a clerk of X.), each conveyance stating, but untruly, that a consideration, named therein, had been paid. H. sold one lot to P., who employed no solicitor, but allowed X. to carry out the transaction, H. having mortgaged the other lot, sold the equity of redemption in it to R. Neither P. nor R. searched the register of deeds or made inquiries as to the conveyance to X.*

*Held, that P. and R. had neglected the ordinary precautions which purchasers in a register county ought to take by making such searches and inquiries, and that such neglect would have had the effect of leaving the lien for 1500l. chargeable on the lots purchased by them; but that D., as the agent of the original vendors, had (on the evidence) been aware that X. was about to sell the property in lots, and that the purchasers of the lots were buying on the faith of X.'s title being unincumbered by lien or otherwise, and that the lien could not be enforced against the lots sold to P. or R.*

*The judgment of Fry, J. (46 L. T. Rep. N. S. 83; 21 Ch. Div. 685) reversed as to the lots of P. and R.*

THE plaintiffs, Samuel Kettlewell, Thomas Tennant, and William Beckett Denison, were the trustees of a charity at Leeds, known as Jenkinson's Hospital, and were seised in that character of certain land containing about four acres in the neighbourhood of Leeds and within the West Riding of the county of York.

They entered into an agreement on the 21st June 1882 (to which the consent of the Charity Commissioners was obtained) to sell the land to B. H. Richardson and T. H. Watson, land and estate agents, in fee, for 2523l., and a deposit of 223l. was then paid to the plaintiffs.

By an indenture, dated the 15th Nov. 1872, the plaintiffs conveyed the land to Richardson and Watson and their heirs (at the price of 2523l., a receipt for the whole of which was indorsed on the deed and signed by the plaintiffs), as to one undivided moiety to the use of Richardson, his heirs and assigns, and as to the other undivided moiety to the use of Watson, his heirs and assigns.

Notwithstanding the indorsed receipt, nothing was paid at the time, but, to secure the balance of the purchase money and as a protection to the lien of the plaintiffs therefor, the deed was retained by Mr. Dibb, the solicitor for the vendors.

On the 1st Jan. 1873 the sum of 800l. was paid by the purchasers, in part payment of the 2300l., leaving a balance of 1500l. unpaid. A memorial of this indenture was registered, on the 10th Jan. 1873, in the registry office for the West Riding of Yorkshire at Wakefield, by Mr. Dibb, at the request of Richardson and Watson, in accordance with the agreement of the 21st June 1872, by which it was stipulated that interest at 5 per cent. per annum should be paid on the purchase money remaining unpaid. Interest was paid on the 1500l. down to the 1st July 1878, but from that date no interest was paid, but the 1500l. and interest from that date was due.

The circumstances under which Dibb effected the registration and the intention of the parties with regard to the registration are stated in the judgment of the Court of Appeal.

On various dates prior to the year 1878 the purchasers, Richardson and Watson, parted with the whole of the land acquired by them under the conveyance of the 15th Nov. 1872 to a large number of persons, in lots for building purposes. On the 17th Feb. 1879 Richardson, and on the 12th April 1878 Watson, filed a petition for liquidation, and the affairs of the former were so liquidated, but the latter was subsequently adjudicated a bankrupt. The plaintiffs proved in the bankruptcies, but did not claim their lien as a security.

On the 7th July 1879 the present action was commenced by the vendors against such of the persons who had so acquired title to portions of the land in question through Richardson and Watson as it was thought to be possible to fix with notice of the nonpayment of the purchase money, as defendants.

By a deed, dated the 1st Jan. 1874, Richardson and Watson granted 825 square yards of the land to A. F. Holroyd in fee; and by another deed, dated the same day, they granted another piece of the land, containing 821 square yards, to Holroyd in fee. Holroyd was a clerk in the office of Richardson and Watson, but it was not proved that he had any actual notice of the plaintiffs' lien. Each deed purported to be made in consideration of 200l. paid by Holroyd, but, in fact, he gave no consideration for either plot.

By two deeds, dated respectively the 27th Feb. and the 30th March 1874, Holroyd granted the two pieces of land to the defendant Padgett in fee by way of mortgage.

Padgett had no actual notice of the plaintiffs' lien. He did not employ any solicitor to act for him in the case of either mortgage, but left it to Richardson and Watson to manage the business,

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

though he did not authorise them to employ a solicitor on his behalf.

By a deed, dated the 12th Feb. 1874, Richardson and Watson granted 765 other square yards of the land to Holroyd in fee. He had then no notice of the lien, and he gave no consideration, though the conveyance purported to be made for value.

By a deed, dated the 13th Feb. 1874, Holroyd mortgaged the 765 square yards to one Eastwood, and by a deed, dated the 2nd Sept. 1874, Holroyd granted the equity of redemption in the same piece of land in fee to Joseph Roberts, who died in May 1878, having devised all his real estate to the defendants, James Roberts, H. H. Wylde, and William Richardson, in fee, upon certain trusts, and appointed them his executors.

Fry, J. on the 30th Jan. 1882 held that Padgett had employed Richardson and Watson as his general agents to manage the business of his mortgages from Holroyd, who was himself a volunteer, and that it was their duty to communicate to him their knowledge of the plaintiffs' lien, and consequently that Padgett was affected with notice of the lien.

Fry, J. also held that, as Joseph Roberts had only purchased an equitable interest, he had no equity which could be preferred to that of the plaintiffs. His Lordship accordingly gave judgment against Padgett and Roberts' devisees; and also gave judgment against other defendants who had purchased portions of the original plot: (46 L. T. Rep. N. S. 83; 21 Ch. Div. 685.)

Roberts' devisees and Padgett appealed.

*Whitehorse, Q.C. and Bunting* for the devisees of Roberts.—The plaintiffs' lien is in the nature of a charge or equitable mortgage for the amount of the purchase money remaining due, and some memorandum of it ought to have been registered under the statute 2 & 3 Anne, c. 4. By the omission to register the lien has been lost. If the purchasers had asked for the original conveyance, they would no doubt have found that it was in the possession of the plaintiffs, but they were not bound to do so, but were entitled to rely on the register as showing all the incumbrances:

*Moore v. Culverhouse*, 27 Beav. 639;

*Re Wright's Mortgage Trust*, 28 L. T. Rep. N. S. 491;

L. Rep. 16 Eq. 41;

*Neve v. Pennell*, 9 L. T. Rep. N. S. 285; 2 H. & M. 170;

*Credland v. Potter*, 30 L. T. Rep. N. S. 356; 31 L. T. Rep. N. S. 522; L. Rep. 10 Ch. App. 8;

*Agra Bank v. Barry*, L. Rep. 7 E. & I. App. 135;

*Chadwick v. Turner*, 14 L. T. Rep. N. S. 86; L. Rep. 1 Ch. App. 310.

The plaintiffs in this case have, moreover, precluded themselves from insisting on their lien, for all parties intended that the land should be sold in lots—a state of things inconsistent with the lien remaining—and the plaintiffs, knowing that the property was being sold in lots, refrained from giving notice of the lien to the purchasers, and permitted them to pay their purchase money to Richardson and Watson:

*Earl of Jersey v. Briton Ferry Company*, L. Rep. 7 Eq. 409;

*Smith v. Evans*, 2 L. T. Rep. N. S. 227; 28 Beav. 59.

The plaintiffs by registering the deed led the purchasers from Richardson and Watson to assume that the sale had been entirely completed, and that Richardson and Watson had the right to

deal with the land. The equity of these defendants is better than that of the plaintiffs:

*Rice v. Rice*, 22 L. T. Rep. O. S. 208; 2 Drew, 73;  
*Phillips v. Phillips*, 5 L. T. Rep. N. S. 655; 4 De G. F. & J. 208.

*W. Barber, Q.C. and Bardswell* for Padgett.—In addition to the arguments on behalf of the other appellants, we contend that Padgett, by leaving the management of the mortgages to Richardson and Watson, cannot be held to be affected by notice of the lien. He is a purchaser for value, having the legal estate. He really purchased, not from Holroyd, but from Richardson and Watson, whose interest it was to conceal incumbrances from him. They did not become his agents by carrying out the business for him:

*Epin v. Pemberton*, 32 L. T. Rep. O. S. 250; 4 Drew, 333; 32 L. T. Rep. O. S. 345; 3 De G. F. & J. 547;

*Perry v. Holl*, 2 L. T. Rep. N. S. 585; 2 De G. F. & J. 38;

*Hipkins v. Amery*, 3 L. T. Rep. N. S. 53; 2 Giff. 292.

In the absence of actual notice the title on the register is conclusive:

*Hine v. Dodd*, 2 Atk. 275;

*Wyatt v. Barwell*, 19 Ves. 435;

*Chadwick v. Turner*, 14 L. T. Rep. N. S. 86; L. Rep. 1 Ch. App. 310.

*Cookson, Q.C. and Langworthy* for the plaintiffs. [They were not called on as to the necessity for registering the lien].—The plaintiffs have been guilty of no misconduct by which their lien could be lost. No ground for placing the equity of Roberts higher than that of the plaintiffs has been shown. The plaintiffs took some precautions, but Roberts neither inquired nor investigated the title. An inquiry would have resulted in the discovery that the plaintiffs had retained the deed, and had a lien on it. The usual course was followed in allowing the deed to be registered. Such registration was necessary to complete the legal title of Richardson and Watson. As the witnesses to the execution of the deed have to attend the registration, delay might have been inconvenient. A vendor's lien cannot be waived unless there is an intention to waive it; and if it was waived as to part it was not necessarily waived as to the rest of the property:

*Mackreth v. Symmons*, 15 Ves. 329;

*Peto v. Hammond*, 30 Beav. 495;

*Crosse v. General Reversionary and Investment Company*, 3 De G. M. & G. 698.

The lien is not a new charge, but part of the old estate of the vendors, which they have never lost. The absence of notice to Roberts is no reason why his equity should be preferred to that of the vendors:

*Mumford v. Stohwasser*, 30 L. T. Rep. N. S. 859; L. Rep. 18 Eq. 556;

*Phillips v. Phillips*, 5 L. T. Rep. N. S. 655; 4 De G. F. & J. 208;

*Cave v. Cave*, 42 L. T. Rep. N. S. 790; 15 Ch. Div. 639;

*Stackhouse v. Countess of Jersey*, 4 L. T. Rep. N. S. 204; 1 J. & H. 721;

*Worthington v. Morgan*, 16 Sim. 547.

Padgett was equally negligent. He had also actual, not constructive notice, through Richardson and Watson, who acted as his agents:

*Brotherton v. Hatt*, 2 Vern. 574;

*Rolland v. Hart*, 24 L. T. Rep. N. S. 250; 25 L. T. Rep. N. S. 191; L. Rep. 6 Ch. App. 678;

*Bradley v. Riches*, 38 L. T. Rep. N. S. 810; 9 Ch. Div. 189;

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*Wyllie v. Pollen*, 9 L. T. Rep. N. S. 71; 3 De G. J. & S. 596;

*Attisbury v. Wallis*, 27 L. T. Rep. N. S. 301; 8 De G. M. & G. 454.

*Whitehorne and Barber* replied.

*Cur. adv. vult.*

May 28.—The following written judgment of the court was delivered by

LINDLEY, L.J.—The facts in this case have been already reported, and, except so far as they relate to Dibb's conduct, to which allusion will be made presently, it is unnecessary to add to the statement of them in that report. The *primâ facie* right of an unpaid vendor of land to an equitable lien upon it for the amount of his unpaid purchase money is too well established to be disputed. The right arises whenever there is a valid contract of sale and the time for completing that contract has arrived and the purchase money is not duly paid. There is no necessity for the vendor to stipulate for the lien; and although the lien arises from, and may in one sense be said to be created by the contract of sale, still no contract to confer the lien is necessary, and in that sense the lien may be said to arise independently of contract. No contract to confer the lien being necessary, it follows that where it is not in fact conferred by a written document there is no instrument creating it a memorial of which can be registered under the provisions of the statute 2 & 3 Anne, c. 4. The vendor's lien is in this respect like a deposit of deeds as a security for a loan without any memorandum or document showing the purpose of the deposit. *Sumpter v. Cooper* (2 B. & Ad. 223) decided that the statute does not apply to a security so created, and no other decision would be in accordance with the language of the Act. Such cases are not provided for by the statute, and it is not competent for this or indeed any court to hold a transaction to be within the provisions of a statute when its language clearly does not apply to the transaction in question. We are unable, therefore, to accede to the contention that in this case the vendor's lien must be negatived simply on the ground that no memorial of it was registered. The answer to that contention is, there was no document of which a memorial could be made. *The Agra Bank v. Barry* (L. Rep. 7 E. & I. App. 135) is a valuable authority to show that a purchaser of land in a register county is not bound to inquire about deeds and documents memorials of which have not been registered, and of which he has no notice. But that case has really no bearing on the present, and the reasoning of the noble lords who decided it has no application to transactions memorials of which are not required to be made or registered. Neither can we accede to the contention that in register counties it is not necessary for a purchaser to inquire for or examine deeds memorials of which are registered. The registered memorials themselves give very little information, and the object of the statute seems rather to be to let people know what they are to inquire about than to dispense with inquiry respecting deeds and documents memorials of which are registered. On the one hand, the register invites a purchaser's attention to the documents on it; and on the other, it limits his inquiry to these documents, unless he has notice of others from some other quarter. The common practice, more-

over, certainly is in accordance with this view, and *primâ facie* a purchaser of lands in a register county omits ordinary precautions if he makes no inquiry respecting the documents the existence of which is disclosed by the register. The conveyance of the 15th Nov. 1872, from the plaintiffs to Richardson and Watson, was properly entered on the register, but neither of the appellants searched the register or made any inquiry whatever for that deed. *Primâ facie*, therefore, both of the appellants omitted to take reasonable precautions; and although they were undoubtedly *bonâ fide* purchasers for value without notice of the plaintiffs' lien, it was strenuously contended that, not having chosen to make any inquiry for that deed, they ought to be treated as having had notice of its retention by the plaintiffs and of their lien which they preserved by retaining it. Fry, L.J. did not decide against the appellants on this ground, and, for the reasons which will be given presently, it is not necessary to consider whether he might have done so or not. He decided Roberts's case on the ground that his estate was equitable only, and this would have been a sufficient ground if there were not other circumstances in the case affecting the rights of the plaintiffs. The Lord Justice decided against Padgett on the ground that he had in effect made Richardson and Watson his agents to do more than prepare his mortgage and register it, and that he had through them notice of the plaintiffs' lien. We feel considerable difficulty in adopting the view taken by the Lord Justice of the extent to which Padgett made Richardson and Watson his agents, and of the notice which he had through them of the plaintiffs' lien. But, for the reasons which will be stated presently, it is not necessary to say more upon this point. Assuming all the foregoing points to be decided adversely to the appellants, there are circumstances in this case which entitle the appellants to succeed in their contest with the plaintiffs. These circumstances we now proceed to state. The plaintiffs were trustees for a charity, and Dibb was their law clerk and agent. They allowed 1500*l.*, part of the purchase money, to remain unpaid. They, nevertheless, expressly sanctioned the registration of the conveyance from themselves to Richardson and Watson. The plaintiffs left the further completion of the sale entirely to Dibb, and they even authorised him to receive the unpaid purchase money. He retained the conveyance for them as a security for it, and Mr. Denison, the acting trustee, knew this. Dibb is unfortunately dead. But, considering the plaintiffs' answers to interrogatories, the proved existence of the sale plan early in 1873, the dates of many of the sub-sales, the descriptions of the parcels in them, Dibb's answers to letters written to him by solicitors acting for sub-purchasers and mortgagees, the dates of these letters and the evidence, we cannot avoid the conclusion that Dibb knew perfectly well that Richardson and Watson wanted their deed registered, not only to protect themselves, but in order that they might sell the property, and that they intended to sell it, and did sell it in lots, and knew that they were selling lot after lot to persons who made no inquiry for the registered deed which he held, and who bought upon the faith that Richardson and Watson were the owners of the property sold, and able to sell free from any charge or lien.

Dibb did not die until 1875, and all the land was not sold even then. The last lot was not sold until Sept. 1877, nearly two years after his death. By retaining the deed as he did, Dibb could at any time have interfered and required the sub-purchasers to pay their money to him if he had thought it necessary or expedient to do so; and Mr. Denison's evidence shows that Dibb relied on this power as a sufficient protection to the plaintiffs, his clients. Mr. Denison's evidence also shows that he knew this, and that he relied on Dibb's vigilance to protect their interests. In our opinion, the conduct of Dibb induced purchasers of the portions of the estate sold reasonably to believe that Richardson and Watson had power to deal with the estate as absolute owners free from the lien now insisted on; and, as he so acted, the plaintiffs, who left everything to him, cannot, in our opinion, assert their lien against lots purchased without notice that the trustees desired to insist on their lien, even though such purchasers have an equitable title only. Fry, L.J. appears to us to have attached too little weight to Dibb's knowledge and conduct, and, differing from him on this point, we are of opinion that the plaintiffs are not entitled to enforce their lien against the appellants, or either of them, and that the action ought to be dismissed against them, with costs both here and below.

#### *Appeals allowed.*

Solicitors for Roberts, Wyld, and Richardson, Hickin and Graham, for Lodge and Rhodes, Leeds.

Solicitors for Padgett, Layton and Jacques, for Scholfield and Son, Dewsbury.

Solicitors for the plaintiffs, Paterson, Snow, and Bloxam, for Dibb, Atkinson, and Braithwaite, Leeds.

Monday, Feb. 25.

(Before COTTON, BOWEN, and FREY, J.JJ.)

SCHOLFIELD v. SPOONER. (a)

*Marriage settlement — Covenant to settle after-acquired property — Gift to wife — Intention of donor.*

*On the marriage of S. and his wife, in 1870, three deeds were executed. By the first, freeholds were settled for the benefit of husband and wife, during their joint lives, in moieties; the wife's moiety for separate use with restraint on anticipation. By the second, husband and wife covenanted that personal property coming to the wife during coverture should be settled on trust for husband and wife during their joint lives in moieties, the wife's moiety for her separate use with restraint on anticipation. By the third, the wife's father covenanted to pay an annuity to the trustees on trust for the husband and wife during their joint lives, in moieties, the wife's moiety for her separate use with restraint on anticipation. In 1874 S., for value received from the wife's father, and by his direction, assigned his interest in the annuity to the same persons who were trustees of the settlements, on trust for the wife, for her separate use for life, and after her decease on the trusts of the settlements. In this deed the two settlements were recited, but not the deed of covenant as to after-acquired property, and there was no clause restraining anticipation.*

*In 1878 the wife, with the concurrence of the husband, purported to assign to a mortgagee all her interest in the annuity under the deed of 1874.*

*Held, that the interest given to the wife by the deed of 1874 came within the covenant to settle, and therefore all the interest was subject to the restraint on anticipation, and that nothing passed by the mortgage.*

*Decision of Pollock, B. (48 L. T. Rep. N. S. 159) affirmed.*

*Where a married woman has entered into a covenant to settle after-acquired property, and property is given to her which comes within the covenant, any expression of intention by the donor that it shall not be affected by the covenant is inoperative.*

*Re Mainwaring's Settlement (L. Rep. 2 Eq. 487) observed upon.*

This was an appeal from Pollock, B. sitting for Pearson, J.

The facts were shortly as follows:

On the marriage of Mr. and Mrs. Spooner in 1870 three deeds were executed. By the first freeholds were settled for the benefit of husband and wife, during their joint lives, in moieties; the wife's moiety for her separate use with restraint on anticipation. By the second, husband and wife covenanted that personal property coming to the wife during coverture should be settled on trust for husband and wife during their joint lives in moieties, the wife's moiety for her separate use with restraint on anticipation. By the third, the wife's father covenanted to pay an annuity to the trustees on trust for the husband and wife during their joint lives, in moieties, the wife's moiety for her separate use with restraint on anticipation.

In 1874 Mr. Spooner, for value received from the wife's father, and by his direction, assigned his interest in the annuity to the same persons who were trustees of the settlements, on trust for the wife, for her separate use for life, and after her decease on the trusts of the settlements. In this deed the two settlements were recited, but not the deed of covenant as to after-acquired property, and there was no clause restraining anticipation.

In 1878 the wife, with the concurrence of the husband, purported to assign to a mortgagee all her interest in the annuity under the deed of 1874.

Mr. Spooner afterwards became bankrupt, and questions having arisen as to how the annuity of 500*l.*, which was the only present income, ought to be dealt with, the trustees on the 21st Jan. 1882 commenced this action for the administration of the trusts under the direction of the court.

On the 19th Jan. 1883 Pollock, B. declared that the moiety of the annuity of 500*l.* assigned by the indenture of 1874 was within the covenant to settle after-acquired property contained in the second of the deeds of 1870, that no part thereof passed by the mortgage, and all further proceedings were stayed.

The case is reported in 48 L. T. Rep. N. S. 159, where the facts are fully stated.

From this decision the representatives of the mortgagee appealed.

*P. B. Abraham* for the appellants.—A covenant to settle after-acquired property does not include an annuity or life estate. But if it does, this

covenant does not include this annuity. It is usual to insert express trusts as to annuities and life estates: Davidson's Precedents, 3rd edit. vol. 3, p. 730. Here they are omitted, and it must be therefore taken that that was done intentionally. The trusts declared do not apply to annuities, and it may therefore be inferred that it was not intended to include them. It was the intention of the father that the annuity was not to be subject to the covenant:

*Re Mainwaring's Settlement*, L. Rep. 2 Eq. 487;

In *Re Allnutt*; *Pott v. Brassey* (48 L. T. Rep. N. S. 155; 22 Ch. Div. 275) Chitty, J. dissented from *Re Mainwaring's Settlement*, but in that case there were special circumstances.

*W. Barber, Q.C. and Lewin* for the plaintiffs, *Fischer, Q.C. and E. Ford* for Mrs. Spooner, and *J. W. Middleton* for the trustee in bankruptcy of the husband, were not called on.

*Corron, L.J.*—This is an appeal against the decision of Pollock, B. that a certain annuity settled on Mrs. Spooner in 1874 was bound by a covenant contained in her marriage settlement executed in 1870. This covenant is in the widest terms. It is a covenant both by the intending husband and the intending wife that all the estate property and effects whatsoever, both real and personal, which the intended wife or the intended husband in her right should at any time or times during the intended coverture become seised or possessed of, or entitled to, either in law or in equity (with an exception of certain things which I need not mention) should be settled as to real estate in manner therein mentioned, "and as to personal estate, including leaseholds upon the trusts hereinafter declared, expressed, and contained concerning the same." We have therefore a covenant expressly extending to all real and personal estate to which the lady or her husband in her right might become entitled (except certain particulars of personal estate) with a declaration that the trustees should stand possessed of what was included in the covenant, and was to be assigned to them upon certain trusts. Thus far the covenant and declaration of trust clearly would apply to this annuity, as it does not come within the exception to which I have referred, and was given to Mrs. Spooner for her separate use without any restraint on anticipation. Then there arises undoubtedly a question whether, upon the construction of the covenant to settle, it ought to be held that no trusts are declared which can be held to apply to this annuity, in which case it might be said that, as there are no trusts declared, then, even if the trustees are to take this annuity, it must be held by them upon the trust declared by the party who gave the annuity—that is to say, to Mrs. Spooner—for her separate use, with no restraint on anticipation. I think, however, that this is not the correct view. The draftsman has framed the declaration of trust awkwardly. Immediately after the words "upon trust to stand possessed thereof," we find this: "As to such part thereof as shall not consist of money, or of such stocks, funds, shares, or securities, as are herein authorised as investments or of annuities or other estate or interest for the life of the said Elizabeth Empson Lister, or for any term or period determinable on her death, to convert the same into money." Then we have another clear parenthesis: "But as to any reversionary pro-

perty or interest, not until the same shall fall into possession, unless they or he shall consider that the deferring the conversion will not be advantageous to the trust estate." We find then a direction that life annuities and securities in a proper state of investment are not to be converted. Then the trustees are directed to "invest the money arising from such conversion with such parts of the said personal estate as shall consist of money in or upon such stocks, funds, shares, and securities, as hereinafter mentioned." There is no provision there as to any stocks or securities in a proper state of investment, or as to annuities. Then it proceeds: "And during the joint lives of the said R. L. W. Spooner and Elizabeth Empson Lister, pay to them, or permit them to receive, the interest, dividends, and annual produce thereof in equal half shares," the share of the wife to be for her sole and separate use without power of anticipation. In my opinion the words "the interest, dividends, and annual produce thereof" apply not only to the income of the investment, which was dealt with in the parenthesis, but also to the income of that which was before supposed to be vested in the trustees, but of which nothing is said in the parenthesis. Mr. Abraham's argument, if carried to its results, would come to this, that consols or a mortgage, or anything that was in a proper state of investment for the purpose of this settlement, would not be dealt with in the direction as to what was to be done with the interest, dividends, and annual produce. Those words are not well chosen for dealing with an annuity, but we must see what was the real meaning of the declaration, and, as far as I can see, it was this, that the income of the property which was not money nor property which ought to be converted is dealt with here, as well as the income of the investments directed to be made of property which consisted of money, and of the proceeds of property which was to be converted into money. Whatever the consequences may be where the parties have entered into a covenant, we have nothing to do with, but to construe the covenant and give effect to the construction, however inconsistent it may be with what we may guess to have been the real intention of the parties. Then it is said that the settlement executed by the father in 1874 shows that he did not intend that the covenant should operate upon the annuity which, by his direction, was assigned in trust for Mrs. Spooner, and that, therefore, the annuity is not affected by the covenant. Now, suppose the father had left his daughter 10,000*l.* absolutely for her sole and separate use, and had said in terms as clear as he could that she was to have it absolutely, and that it was not to be settled, it could hardly be contended that this 10,000*l.* was not to be brought into settlement. It was contended that *Re Mainwaring's Settlement* (L. Rep. 2 Eq. 487) showed that we ought to give effect to the intention of the donor if he has said that the property was not to come into settlement. Undoubtedly there are expressions used by the learned judge who decided that case which support such an argument; but what the decision comes to is this, that, looking to the trusts of what was in that case given to the lady, it was not property which could, on the true construction of the covenant, be considered coming within it. In the present case the father gave to Mrs.

Spooner an estate for life to her separate use, without any restraint on anticipation. That is, in my opinion, clearly within the covenant contained in the marriage settlement, and must be treated as settled upon the trusts therein declared.

BOWEN, L.J.—I am of the same opinion. Whether property falls within a covenant to settle after-acquired property or not must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only, to my mind, a rule of construction, and the question must be whether, on the true construction of the covenant, the particular property falls within it or not. If that is the right view, it cannot be material to consider the intention with which after-acquired property has been given. A gift is not less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declaration of intention as to what are to be the consequences can have any effect. It was contended by Mr. Abraham that, according to the true construction of this covenant, life annuities are not within it at all, for that the instrument declares no trusts which can apply to such annuities. For the reasons which have been given by Cotton, L.J. I think that this construction fails. It seems to me that the omission from this deed of the provision usually inserted in covenants of this kind as to life interests of the wife is immaterial if there is language left in the deed sufficient for the purpose of dealing with those interests. Then Mr. Abraham contends that this annuity does not fall within the covenant because the re-settlement shows that the father did not intend the covenant to apply to it. Now, this intention can only be gathered from the terms of the re-settlement itself, and, although I quite admit it not to be likely that the framer of the re-settlement intended the annuity to fall within the covenant, still I do not find anything which distinctly shows a contrary intention. But I think that it is not a question of intention at all. The question, as it appears to me, only is, not whether the father intended to give it so as to come within the covenant, but whether he did in fact give it in such a way as to come within the covenant. *Re Mainwaring's Settlement* (L. Rep. 2 Eq. 487) decides no more than this, that property does not fall within the covenant to settle after-acquired property if it is given in such a way that it will not fit in with the trusts of the settlement. It is perfectly true that language is used by Sir W. P. Wood at the bottom of page 495 which would lead one to suppose that he thought that the intention of the parties who gave could be a governing consideration. That, however, is not, I think, the basis of his judgment, and, if it was, I should venture, with the greatest respect, to say that, in my opinion, it could not be supported.

FRY, L.J.—The question in this case is, whether an annuity given by a father to his daughter

during the joint lives of the daughter and her husband falls within the scope of the covenant to settle her after-acquired property. Mr. Abraham discussed two points arising out of that inquiry. The first is one of considerable moment, viz., whether the intention of the donor can operate to take a gift out of the operation of the covenant when, but for such expression of intention the gift would have fallen within its operation. He has pressed upon us the case *Re Mainwaring's Settlement* (L. Rep. 2 Eq. 487) as determining that point in his favour. Now, on principle it appears to me to be impossible that that question can be answered in the affirmative. It seems to me that we must inquire first what is the construction of the covenant to settle; next, what is the gift, and that if the gift comes within the scope of the covenant, then no expression of intention on the part of the donor can take it out of the operation of the covenant. In construing the gift we must consider what is the subject-matter of the gift, and what are the limitations subject to which it is made, and if it is found that those limitations are inconsistent with the limitations of the covenant to settle, then the court may well conclude that the subject-matter of the gift does not come within the operation of the covenant. The intention of the donor of the gift cannot, in my judgment, be regarded except so far as it bears on the nature of the gift he has made. The same question came for consideration in the case of *Re Allnutt* (48 L. T. Rep. N. S. 155; 22 Ch. Div. 275-279). Chitty, J. there cites the observation of Wood, V.C. to this effect: "She, therefore," that is the donor, "means to say, I do not intend this portion of my daughter's property to be comprised in her settlement. I intend that she shall take it upon this express condition, that it shall not be settled." Upon that Chitty, J. made this observation: "I respectfully dissent from that proposition, and I think I ought on principle to dissent from it, if it is meant that I am to regard the testator's intention when it is expressed in some manner which is not legally binding. Taking the whole judgment together, I think the Vice-Chancellor intended to decide as a question of construction of the will, that the gift was such that it did not fall within the scope of the covenant; in other words, that it did not fit the covenant. That may be treated as a question simply of construction of the will, and if so, of course the decision does not bind me in any way." In those observations of Chitty, J. I entirely concur. Then there arises the second question, which is, whether the covenant to settle operates upon the gift so made? The general words, "all the personal estate of which the said Elizabeth Empson Lister shall at any time during the said intended coverture become possessed of by gift or any other means whatsoever," as it appears to me properly include an annuity of this kind. But the matter does not rest there, because the subsequent exception of life annuities from the trust for conversion shows that an annuity was intended to be included within the operation of the covenant. Then comes the further question: Are the trusts declared in the covenant so inconsistent with the nature of the annuity given by the deed of re-settlement that it is clear the covenant cannot include it? The covenant might have been more artistically drawn, but I think, as has been pointed out by Cotton, L.J., that the words are sufficient



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to declare trusts of this annuity. There is an express declaration that all the personal estate shall be held by the trustees upon trust during the joint lives of Mr. and Mrs. Spooner to pay to them the annual profits thereof in equal half shares. It appears to me that the annual produce of the annuity is the sum that the annuity produces in each year, and although more appropriate words might have been used, those are quite adequate to include the instalments of the annuity.

Solicitors for plaintiffs, *Williamson, Hill, and Co., for England and Son*, Howden, Yorkshire.

Solicitors for the mortgagees, *Lousada and Emanuel*.

Solicitors for the trustee in bankruptcy, *Lousada and Emanuel*, for *W. H. and H. F. Davies*, Weston-super-Mare.

Solicitors for Mrs. Spooner, *Mead and Daubeny*, for *William Smith*, Weston-super-Mare.

Saturday, March 8.

(Before COTTON, BOWEN, and FRY, L.JJ.)

Re STOER. (a)

*Lunacy—Divorce—Illegitimate child—Suit to perpetuate testimony—Rules of Court 1883, Order XXXVII., r. 35.*

A lunatic, having several children, obtained a divorce from his wife on the ground of her adultery. It was alleged that one of the children born before the divorce was illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy.

Held, that the proper course was for the court to settle some of the lunatic's property on his children, and the legitimate children having raised the question as to the right of the child who it was alleged was illegitimate to participate, could then bring an action to perpetuate the testimony.

On the 6th Nov. 1880 C. M. Stoer was found lunatic by inquisition.

By a decree of the 21st Feb. 1882 the marriage of the lunatic and his wife was dissolved on the ground of adultery committed by the wife.

On the 23rd May 1879 the lunatic's wife gave birth to a child who was alleged by the committee and the lunatic's next of kin to be illegitimate. Before the birth of this child there had been nine children of the marriage.

The committee presented a petition in the matter of the lunacy asking that he might be at liberty, on behalf of the lunatic or otherwise, as the court might direct, to prosecute an action under Order XXXVII., r. 35, to perpetuate the testimony as to the illegitimacy of the child born on the 23rd May 1879. The matter having been referred to the master, he reported in favour of proceedings being taken.

The petition was now heard.

*Cookson, Q.C. and Russell Roberts* for the petitioner.—Rule 35 of Order XXXVII. is copied from 5 & 6 Vict. c. 69, by which suits for perpetuating testimony are regulated. In this case the difficulty is as to the person who ought to take the proceedings. The rule provides that they shall be taken by some person who would, under the circumstances alleged by him to exist,

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

become entitled, on the happening of some future event, to some estate or interest. The lunatic has no interest, but, if a small part of the property is settled on the children, they will have an interest in the matter, and can then raise the question as to which of them are legitimate:

*Lord Dursley v. Fitzhardinge Berkeley*, 6 Ves. 251; *Gurney v. Gurney*, 8 L. T. Rep. N. S. 380; 1 H. & M. 413.

*Warmington, Q.C.*, for the next of kin, supported the petition.

COTTON, L.J.—In the special circumstances of this case it appears desirable that proceedings should be taken to perpetuate the testimony as to the illegitimacy of the child, which question must be decided at the death of the lunatic. The best way of doing this will be to make a settlement of some part of the lunatic's property upon his children, and the legitimate children may then raise the question of the right of this child to participate, and may commence an action to perpetuate the testimony. But before the court sanctions such a settlement, the matter must be brought before us in our private room, where a statement must be produced showing what fund there is in court available for that purpose, what evidence it would be advisable to procure, and whether such evidence would prove the illegitimacy of the child, and also what would be the probable cost of the proceedings to perpetuate the testimony. If a settlement is made, the proper trusts will be for the lunatic for life, and after his death for his children living at his death who shall attain twenty-one, or being daughters shall marry under that age, and if no child shall take an interest then for the next of kin of the lunatic living at his death. And there must be a power of revocation reserved to the lunatic, as he may recover. No order can at present be made on the petition.

BOWEN and FRY, L.JJ. concurred.

Solicitor for petitioner, *J. H. Daniel*.

Solicitor for next of kin, *J. B. Wheeler*.

May 14 and June 10.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

GRAFTON v. WATSON. (a)

*Trade mark—Design—Infringement—Prima facie case—Injunction—Costs—R. S. C. 1883, Order LXV., rr. 8, 9.*

Both plaintiffs and defendants were calico printers. The plaintiffs had registered four designs, and some months after registration discovered that goods bearing designs similar in effect to theirs were being sold by the defendants. The defendants' designs did not actually produce the minutiae of the plaintiffs' designs, but they were a combination of similar drawings so arranged and coloured as to produce a similar effect. The defendants admitted that they had submitted the plaintiffs' designs to their artist in Paris so that he might, whilst producing the same effect, which was the fashion in vogue, avoid imitating the minutiae of the plaintiffs' designs.

The question arose whether a registered design, consisting of a dominant and of subordinate parts so arranged as to produce a certain general effect,

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

could be infringed by a design producing a similar effect, although such design imitated neither the dominant nor the subordinate parts of the original and registered designs. It was contended that general effect could not be registered.

*Held, that the plaintiffs having established a prima facie case, on the balance of convenience and inconvenience, an interlocutory injunction must be granted until the hearing of the action.*

*Decision of Chitty, J. (50 L. T. Rep. N. S. 420) affirmed.*

*Per Cotton, L.J.:* Where a registered design is known to a person who produces a design like that which is registered, the burden of proving that the registered design has not been copied is thrown on him.

*In the case of an interlocutory injunction the Court refused to make an order that the costs should be allowed on the higher scale, though an important question was raised.*

THIS was an appeal from a decision of Chitty, J. granting an interlocutory injunction.

The plaintiffs, Messrs. F. W. Grafton and Co., are calico printers at Manchester; and the defendants are Messrs. William Watson and Co., who are engaged in the same trade, also at Manchester.

The plaintiffs, in October last, registered, under the Copyright of Designs Acts of 1842, 1858, and 1875, four designs as applicable to the ornamenting of articles comprised in the class which includes calico goods. This action was commenced in January last, claiming (*inter alia*) an injunction to restrain the defendants, during the continuance of the plaintiffs' rights, from printing or selling any goods not of the plaintiffs' manufacture to which should have been applied any design of the plaintiffs registered under the Act, or any design being a fraudulent or obvious imitation of, or only colourably different from, the plaintiffs' registered designs, and from representing that goods not of the plaintiffs' manufacture, printed, sold, or exposed for sale by the defendants, are goods printed by the plaintiffs or bearing the registered designs of the plaintiffs. The nature of the dispute between the parties will be best understood by a particular instance. One of the plaintiffs' designs consisted of an acorn in its cup, with its stalk, and some sprigs of leaves, and when used for printing on calico the acorns were arranged at regular intervals, and the sprigs of leaves arranged regularly between the acorns, so as to form a regular continuous pattern. In some cases the acorns and sprigs were printed in a dark colour, with a lighter edge, on a white or light ground, thus giving an embossed or velvety appearance or effect to the pattern. Various colours were employed by the plaintiffs. The defendants employed for printing on their goods a design consisting of a mangosteen (an oriental fruit) and a sprig of leaves, and these were arranged on the calico similarly to the acorn and sprig on the plaintiffs' goods, and were printed in very similar colours. This, it was contended, was an infringement of the plaintiffs' "acorn" design. It was admitted that the outlines and component parts of the two designs were different, but it was said that the general style and aspect was the same, and that consequently there was an infringement. It appeared that the designer in Paris employed by the defendants had

had the plaintiffs' patterns handed to him at the time he was preparing designs for the defendants, but was instructed, while producing the same effect, which was the fashion then in vogue, not to copy them, though, in effect, to imitate them as far as the law allowed.

The case came before Chitty, J. upon motion for an interlocutory injunction in March last, and his Lordship granted the injunction, holding that the defendants' design was a "fraudulent or obvious imitation" within sect. 58 of the Patents, Designs, and Trade Marks Act of 1883, and could not have been produced without copying the ideas of the plaintiffs; and that upon the balance of convenience and inconvenience, especially having regard to the ephemeral value of a trade of this kind, the plaintiffs, who had made out a *prima facie* case, were entitled to an injunction until the trial of the action or further order, with the usual undertaking in damages.

The case in the court below is reported 50 L. T. Rep. N. S. 420.

From this decision the defendants now appealed.

*Aston, Q.C., Ince, Q.C., and E. W. Byrne, for the appellants.*—The case made out by the plaintiffs is not sufficiently strong to entitle them to an interlocutory injunction. The defendants, in the preparation of their design, employed independent thought and labour and introduced new ideas in order to produce a result different from that of the plaintiffs. They were justified in looking at the plaintiffs' design for the purpose of ascertaining the prevailing fashion, and in adopting the general style and effect, so long as they did not servilely copy that design or use the same elements and combinations. The dominant and the subservient parts of the plaintiffs' design being essentially different from those of the defendants, it could not be said that there had been any infringement by them. What the plaintiffs really seek to obtain is an injunction against the use of a similar style and result which, it is submitted, are things that cannot be registered. When a design is registered by depositing a pattern or sample the proprietor is confined to that particular combination, and when there is no reproduction of the whole design in all its component parts by using substantially the same combination there is no infringement. At all events, the plaintiffs' case is far too doubtful to entitle them to an interlocutory injunction, and the only order that ought to be made adversely to the defendants would be to leave the question to be decided at the trial of the action upon an undertaking by the defendants to keep an account in the meantime. If the defendants are prohibited from selling the goods the loss to their trade and connections may be enormous, and may ruin their business for years to come. On the other hand, if they are ordered to keep an account, and it turns out they are wrong, the plaintiffs will get all the profits made by the sale of the goods, and the defendants will not suffer. The injunction is not necessary to deter manufacturers, as the fact that the defendants are ordered to keep an account will be sufficient. They referred to

*McCrae v. Holdsworth*, 23 L. T. Rep. N. S. 444; L. Rep. 6 Ch. App. 418;

*Thom v. Syddall*, 26 L. T. Rep. N. S. 15.

The *Solicitor-General*, *Rigby*, Q.C., and *O. L. Clare*, for the plaintiffs, were not called on.

BAGGALLAY, L.J.—We will not trouble you, Mr. Solicitor-General. This appeal has been brought in an action commenced by the plaintiffs to restrain the infringement by the defendants of the plaintiffs' copyright design. Upon the statement of claim being filed an application was made for an injunction, and on the 16th March Chitty, J. made the order restraining the defendants from printing or producing, or exposing for sale, or selling, any goods not being of the plaintiffs' manufacture to which shall have been applied any design of the plaintiffs registered pursuant to the Copyright of Designs Act, or any design being a fraudulent or obvious imitation of the plaintiffs' said registered designs. Now I will abstain as much as I possibly can from any intimation of any opinion as to whether there has or has not been any piracy of the plaintiffs' copyright. It is clear—I think it has been substantially admitted—that there is a question, and a very serious and important question, to be decided at the hearing of the action. I say it has been substantially admitted, because the course pursued by the defendants in the present case recognises the fact that there is a question to be tried. When an application was made so long ago as last February to expedite the hearing, they declined to accede to it (I am now taking the statement made in court to-day) on the then existing materials, though the then existing materials were substantially what we have had before us. Therefore it is quite clear upon the materials as they stand that there is a question to be tried, and that the materials are not in the opinion of the defendants sufficient to try the question. Now what should be done in a case of this kind? One of two courses is ordinarily adopted by the court under the circumstances: either to grant an injunction restraining the repetition of the alleged piracy as against the defendants; or, on the other hand, to put the defendants on an undertaking to keep an account. In the one view of the case, namely, the plaintiffs obtaining an injunction, they will be answerable in damages in respect of any loss occasioned to the defendants by reason of the pendency of an injunction to which it may eventually be found the plaintiffs are not entitled; and on the other hand, if the account is kept by the defendants, and honestly kept, which there is no reason to doubt in the present case, there is a means by which the plaintiffs would be to some extent indemnified if there should be a decision ultimately in their favour. Between those two modes of proceeding we have now to decide. On the one hand it has been fairly argued on the part of the defendants, and I think there is force in the argument, that it may be difficult to altogether put them in the same position if an injunction is granted, and it eventually turns out the injunction should not have been granted, as they would have been if there had been no such injunction. There must be inconvenience, and possibly loss, to some extent, of the full amount of profit which but for such injunction they would have made; but on the other hand there is the same difficulty if the

defendants are put on an undertaking to keep an account, and the plaintiffs eventually succeed; they will not—the plaintiffs cannot in many cases—recover the full amount of profit which they would have been entitled to derive from their invention in the event of there being ultimately a decision in their favour. There is inconvenience on both sides, and certainly, as far as I can form an opinion, a probability that in neither case can the party who has to submit to restrictions ultimately recover all he would have been entitled to. But we must decide which of these two inconveniences must be submitted to. The first and very obvious observation to be made is this: The defendants have brought it upon themselves. It may be that in the event they may show they are entitled to do that which they have done, and of which the plaintiffs complain; but they start by the assertion of a right to go as near to the line as they possibly can, recognising fully that they must not go over the line, and that they must not be guilty of any fraudulent or obvious imitation of the plaintiffs' designs. We have that view of the case strengthened by the fact that the defendants considered the plaintiffs' design—which was producing in calico an imitation of the effect produced in silk or velvet in Paris—took patterns of the French workmanship which they desired to apply in calico, and also some of the plaintiffs' registered designs, put them into the hands of their own designer, and said, "Go as close as you can, but mind take care that you do not go over." They warn him, and in nine cases out of ten in similar cases a similar warning is given. Then you have the affidavit of the man who made the design from the materials so given to him by the defendants, in which he says that he did not make a fraudulent or obvious imitation. He may perhaps form a very different estimate from what a jury or a judge will arrive at before whom the matter comes ultimately to be tried. It cannot be assumed that the view expressed by a man who has a pretty strong interest in the matter is necessarily to decide the case. If it did the court would be bound to interfere in no way, either by injunction or by directing an account. I think, therefore, if an inconvenience is to be sustained on one side or the other, the persons who are to bear the inconvenience, having regard to all the circumstances of the case, are the defendants who have brought it on themselves by endeavouring, as far as they safely can, to imitate the designs of the plaintiffs. I think, therefore, that they ought to be the persons to suffer the inconvenience. I should have been of that opinion if the case had been before me for the first time, if I had been the judge of first instance before whom it was tried; but that opinion is very much confirmed in my mind when I find the learned judge before whom the case was brought came to the conclusion that the injunction should be granted. I am entirely of the same opinion, and I think, therefore, the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. This is unfortunately only an interlocutory application; that is to say, an application for an interlocutory injunction, because we cannot decide the rights of the parties finally. All that we can decide is this, whether or not there should be an injunction until their rights can be finally decided. In my opinion there ought, in this case, to be an injunction. The plaintiffs here are the registered

proprietors of certain designs in which the Act gives them a copyright, and under the Act the question which we have to decide is whether this is an imitation, and if so whether it is a fraudulent imitation (I leave out the word "obvious" because there is a question which Act it is under) of the plaintiffs' design. Undoubtedly in the course which the plaintiffs have adopted they having registered a piece of their goods, all they can claim is that entire design. Now that the whole design has been taken is not suggested, but though the entire design has not been taken, yet it may be that there is an imitation of the entire design, though the entirety of that design registered is not taken. In my opinion there is such a *primâ facie* case, without deciding that the plaintiffs are right, as makes it probable that at the hearing they may succeed against the defendants; and that being so, it comes to a question of convenience, that is to say, partly of discretion, as to whether the court should grant an injunction, or simply require the defendants to keep an account. The plaintiffs are in this position, that they have got something of a *primâ facie* case before the court; otherwise one has no right to impose upon the defendants any terms at all, and ought simply to refuse the motion, but, as the judge in the court below thought that there was such an imitation as made out a *primâ facie* case in favour of the plaintiffs, that is one element which we must consider. There is another element, which is this: Who can best be compensated for any injury sustained if at the hearing it is decided that they are in the right? As regards the plaintiffs, it is obvious that not only the defendants, but others, could or might interfere, if this injunction were dissolved, with what is their registered design. The plaintiffs are in possession of the copyright of the registered design. They are in that position, and I am not at all satisfied that it will be right, under the undertaking for damages or in the jurisdiction of the court, to make the defendants answerable for the indirect consequences of the injunction not being continued; but the plaintiffs can be made answerable to the defendants for all the consequences of the injunction having been granted, and, that being so, I think that the better course, as there is a *primâ facie* case, is to continue the injunction. I should say one word as to there being a *primâ facie* case on behalf of the plaintiffs. I have assumed that in what I have said as to being able to grant an injunction. These designs obviously were seen by the defendants before they gave instructions for preparing their designs; and it is remarkable that, though there is undoubtedly a dissimilarity, yet to the eye there is, as is admitted, such a general similarity as to produce the appearance of imitation, as was said by the counsel for the defendants, when you hold it at a certain distance. Undoubtedly there are differences; but when one looks at the designs one sees that the places where the light ground is covered with the dark colour (I call all colour dark as compared with the light ground) in the intervals of what is called the dominant ornament are very much the same both in those patterns of the plaintiffs which are said to be imitated by the defendants and in the defendants' patterns; and the subordinate arrangement, although entirely old, is so arranged

with reference to the dominant as in substance to produce something like a similarity, and that I think on the evidence is a *primâ facie* case on behalf of the plaintiffs if it is fraudulent. Fraudulent imitation, to my mind, must mean this: if a man, knowing that the pattern is a registered design, goes and imitates it, and does that with out any sufficient invention on his own part, that would be a fraudulent imitation, if in fact it is an imitation. There may be an imitation which is unconscious—that is to say, not an imitation in the sense of copying—producing of the same effects without knowing of the registered design; but when the registered design is known, then, if there is imitation, the burden of proving that the registered design was not copied, is, to my mind, thrown on the person who produces the pattern like that which is imitated. It is not fashion or anything of that sort that is to be protected; the design is to be protected. In my opinion there is here a *primâ facie* case of imitation, and without such further explanation as may be given by the defendants, such *primâ facie* imitation is, in my opinion, within the meaning of the Act, a fraudulent imitation. Therefore I think there is a *primâ facie* case on behalf of the plaintiffs, and for the reasons I have already given I think in this case we ought not to disturb the injunction which has been granted until the trial of the action. I do not think it would be sufficient security to require the defendants to keep an account.

LINDLEY, L.J.—The appeal before us raises two questions: First of all, whether the plaintiffs have so far failed that the learned judge in the court below ought to have refused their motion for an injunction. Mr. Aston contended very strenuously that, having regard to the language of the Copyright and Designs Act, there had been here no infringement, and of course, if that had been made out, it would have been tolerably obvious he would have been right in contending that no order ought to be made against his clients at all. Having heard all that is to be said on the one side of the case, and not having heard the other side, it appears that the question whether there has been an infringement or not in this case is a very difficult question to decide, and impossible to decide satisfactorily on the present evidence. Nobody can be surprised at the difficulty when it is avowed candidly enough that the defendants have gone as near as they dare to infringing, though they hope they have not overstepped the boundary. Whether they have or have not we are not going now to decide, nor could we have decided it without proper materials. Therefore the main question—that is to say, infringement or no infringement—cannot be decided now in favour of the defendants. Then comes the question, What ought to be done. Chitty, J., who has heard the case, has come to the conclusion that, as between the two courses of granting an injunction or putting the defendants upon terms as to keeping an account, the plaintiffs are entitled to an injunction. The moment you find the plaintiffs are entitled to something it appears to me to be very much (not altogether perhaps) a matter of discretion as to what particular form of order should be made; and I should not be ready, at all events without very serious grounds, to depart from the order made by the judge of first instance under those circumstances, if in exercising his discretion he

thought upon the whole that an injunction was more just than keeping an account. Chitty, J. has thought, for reasons which appear to me perfectly intelligible, grounded on the conduct of the defendants, that in this case it is more just upon the whole to grant an injunction than to put the defendants on the terms of keeping an account. I do not differ from him at all, and the consequence must be that the appeal must be dismissed with costs.

**The Solicitor-General.**—I ask for costs on the higher scale. On motions for injunctions it was the rule for the costs to be allowed on the higher scale, but under the new rules it is necessary to ask for it.

**LINDLEY, L.J.**—Those old rules about the higher scale have been entirely recast and put upon different principles. You must show special reason for having costs on the higher scale.

**The Solicitor-General.**—Rules 8 and 9 of Order LXV. refer to this point. I submit the scale was revised with a view of diminishing the costs in unimportant matters, but not with the view of making it less an indemnity than it was in important matters. If the costs in all actions are to be dealt with on the lower scale, however important they are, then successful litigants will be worse off than ever with regard to the costs of litigation. This is one of the cases which ought not to be dealt with by giving costs on the lower scale. I do not say they should be given on the higher scale as a matter of course, but that if there is any sort of case in which it would be suitable and fitting that they should be given, and that the lower costs would be unsuitable, it would be such a case as this. In the court below the costs were made costs in the action, and did not deal with the question as to what they were to be at all. That will have to be determined on the hearing of the action.

**BAGGALLAY, L.J.**—We have simply decided that the appeal is dismissed with costs. Whatever the rules will give, those costs you will have. The argument you are addressing to us does not turn on the particular circumstances of this case, but merely that the rule ought not to be applied in cases of importance. This rule applies to all cases except those cases in which the court should form a different opinion.

Solicitors for the appellants, *Clarke, Woodcock, and Ryland*, agents for *Orford*, Manchester.

Solicitors for the plaintiffs, *Grundy, Kershaw, Saxon, and Sampson*.

April 24, 26, and May 30.

By BRETT, M.R., BOWEN and FRY, L.JJ.)

for DYE v. DYE AND ANOTHER. (a)

Stat'd wife—Separate estate—Agreement

An agree<sup>se</sup> signed by the husband alone—

and w<sup>ids</sup> (29 Car. 2, c. 3), s. 7.

the husband

wife's real between an intended husband

by the husband, by which agreement

the fee simple his marital rights over the

separate use. which agreement is signed

(a) Reported by A. not sufficient to affect

with a trust for her

is invalid as a

Water-at-Law.

*declaration of trust of the fee, inasmuch as the husband has not such an estate as will enable him to bind the fee, and therefore such an agreement signed by him alone does not satisfy the 7th section of the Statute of Frauds. Therefore, upon the death of the wife during her husband's lifetime without issue, her heir-at-law and not her devisees will be entitled to the lands of which she is seised in fee.*

*Judgment of Pollock, B. and Lopes, J. reversed.*

THIS was an action brought by the plaintiff to establish his title to, and recover possession of, a certain messuage and shop known as the London Porter House, and three cottages situate in the borough of King's Lynn in the county of Norfolk, and two cottages situate in the parish of Wiggenshall St. Germans, in the same county, and to recover the rents thereof, and mesne profits. By consent, and by a master's order, the questions of law arising in the action were stated in the form of a special case.

The material parts of the special case are as follows :

#### SPECIAL CASE.

1. The plaintiff is the heir-at-law of one Susanah Mann, deceased, who, before her second marriage hereinafter mentioned, was Susannah Chesson, the widow of Carter Chesson, of South Lynn, otherwise All Saints, King's Lynn, in the county of Norfolk. The defendants are the trustees appointed by the will of Susanah Mann, and devisees in trust of her real estate under the same.

2. Carter Chesson, who died on the 5th Feb. 1850, by his last will dated the 31st Oct. 1840, devised all his real estate (which consisted of and comprised the property claimed in this action) to his wife Susannah Chesson for her life, and after her decease to his son Carter Chesson, his heirs and assigns for ever, if his said son should survive his (the testator's) said wife; but in case his said son should die in the lifetime of his (the testator's) said wife, and without leaving lawful issue of his body him and his (the testator's) said wife surviving, then to the testator's said wife, her heirs and assigns, absolutely for ever.

3. The testator's said son died on the 2nd April 1870 in the lifetime of the testator's said wife without leaving any issue, and Susannah Chesson then became absolutely entitled to all the said real estate.

4. Susannah Chesson, in 1856, intermarried with Robert Mann. Shortly before, and in consideration of, the then intended marriage, Robert Mann signed and delivered to Susannah Chesson a document in the following terms :

Robert Mann, blacksmith of Wiggenshall, St. Germans, in the county of Norfolk, solemnly covenants and agrees with Susannah Chesson, widow of the late Carter Chesson, that should she become the lawful wife of the above-named Robert Mann, he here by this agreement binds himself from having any legal or lawful claim upon the plate, linen, furniture, or household effects, or with receiving or disbursing the rents of her tenements and cottages, or giving orders for the repairs of the same, nor yet with any property whatsoever she is in possession of at the time of her marriage to him; in confirmation of this covenant and agreement he here places his hand and seal.

The foregoing document was signed by Robert Mann alone, and was attested by two witnesses.

5. Afterwards, during the coverture of the said Susannah Mann, in or about the year 1873, one

Charles Miller offered, in consideration of a lease being granted to him in the messuage and shop hereinbefore mentioned, to pay Susannah Mann an increased rental in respect thereof, and thereupon, on the 11th Dec. 1873, an indenture was made and entered into by and between Robert Mann and Susannah his wife, and Charles Miller, which, after reciting that Susannah Mann was entitled to the said messuage and shop to her and her heirs in fee simple, proceeded (so far as it is material to be here set out) as follows:

And whereas the said Robert Mann and Susannah Mann have agreed to demise and lease unto the said Charles Miller, his executors, administrators, and assigns, the said messuage or tenement and hereditaments now used as a public-house, and known by the name of ' ' for the term of ten years at the rent of 30*l.*, such rent to be payable to the said Susannah Mann for her separate use, free from the debts, control, and engagements of her husband, and her receipt alone to be full discharge to the said Charles Miller, his executors, administrators, and assigns; Now this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the rents and covenants hereinafter reserved and contained, and on the part of the said Charles Miller to be paid and performed, they the said Robert Mann and Susannah his wife by this deed intended to be acknowledged by the said Susannah Mann, in pursuance of the Act for the abolition of fines and recoveries, do and each of them doth, grant, demise, and lease unto the said Charles Miller, his executors, administrators, and assigns, all that capital messuage or tenement and shop now used as a public-house, and known by the sign of the ' ' with the out-buildings, yard, and premises thereto adjoining and belonging: To have and to hold the said messuage, dwelling-house, shop, and premises, unto the said Charles Miller, his executors, administrators, and assigns, for the term of ten years from the 25th Dec. inst., rendering and paying therefor yearly and every year the rent or sum of 30*l.* unto the said Susannah Mann, her heirs and assigns, for her separate use, free from the control, debts, or engagements of her present or any future husband, and that her receipt alone shall be sufficient discharge to the said Charles Miller, his executors, administrators, and assigns, in the same manner in all respects as if the said Robert Mann signed and discharged the same, by four equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first payment to be made on the 25th day of March next, free from and clear from all rates, taxes, and charges whatsoever, parliamentary, parochial, or otherwise (land tax and landlord's property tax alone excepted); and the said Charles Miller doth hereby for himself, his executors and administrators, covenant with the said Robert Mann, his heirs, appointees, and assigns, that he the said Charles Miller, his executors and administrators, will pay unto the said Susannah Mann the said yearly rent at the times and in the manner hereinbefore mentioned for the payment thereof; and also that the said Charles Miller, his executors, administrators, and assigns, will pay all rates, taxes, and outgoings, whether parliamentary, parochial, or otherwise, chargeable on or in respect of the said demised premises (except land tax and landlord's property tax).

The said deed was duly acknowledged by Susannah Mann in conformity with the provisions in that behalf of the Act of 3 & 4 Will. 4, c. 74.

6. Charles Miller thereupon entered into possession of the said premises under the said lease, and thence until now has been and still is in possession thereof, and has paid rent for the same in pursuance of the terms of the said lease to Susannah Mann, till the time of her death hereinafter mentioned.

7. Robert Mann never interfered with the enjoyment and management by his wife, Susannah Mann, of her property, and neither before nor after her decease, hereinafter mentioned, intermeddled with the same.

8. Susannah Mann had no issue by her marriage with Robert Mann, and on the 18th May 1881 she died leaving him surviving. She had made and executed a will or testamentary appointment dated the 5th Aug. 1880, whereby, after reciting the document mentioned in paragraph 4, she bequeathed all her plate, linen, furniture, and household effects, and her rents and personal estate unto the defendants, and she also devised, bequeathed, and appointed unto the defendants, and their heirs, executors, administrators, and assigns, her messuage, cottages, and hereditaments, and all other the property of which she was in possession at the date of her marriage, upon certain trusts in the will particularly mentioned. The will or testamentary appointment of Susannah Mann was duly executed.

9. The defendants, as devisees in trust under the said will, had taken and been in possession of or received the rents of all the real estate in respect of which this action was brought since the death of the testatrix, and contended that the testatrix had power to devise her said real estate to them. And they further contended that in any case they were entitled to receive and retain the rents accruing due under the lease to Charles Miller, of the 11th Dec. 1873, from the date of the death of Susannah Mann. The plaintiff denied that the testatrix had any power to devise her real estate, and claimed to be entitled to the same as her heir-at-law.

The questions for the opinion of the court were:

1. Whether the plaintiff was entitled as against the defendant to the lands, and tenements comprised in the lease to Charles Miller of the 11th Dec. 1873, after the expiration of that lease, and to the other premises, the subject-matter of this action.

2. Whether the plaintiff was entitled to the rent received by the defendants in respect of the premises comprised in the lease of the 11th Dec. 1873, to Charles Miller, since the date of the death of Susannah Mann.

If the court should answer both questions in the affirmative, then judgment was to be entered for the plaintiff for a declaration of his title to the said premises and for 50*l.* for mesne profits, together with the costs of this action.

If the court should answer both questions in the negative, then judgment was to be entered for the defendants in the action, with costs.

If the court should answer the first question in the affirmative and the second in the negative, then judgment was to be entered for the plaintiff for a declaration of his title to the premises comprised in the lease to Charles Miller, after t<sup>1</sup> expiration thereof, and to the other premises referred to, and for 20*l.* for mesne profits in respect of the premises not included in t<sup>1</sup> lease of the 11th Dec. 1873 together with and sold.

The Queen's Bench Division (P<sup>1</sup>ol<sup>d</sup> by Lopes, J.) gave judgment for the defendant, holding that the terms of the document in question were sufficient to constitute a valid Court use in favour of Susannah Mann for want of the signature of Susannah Mann. The plaintiff appeals.



*Charles, Q.C. and Aspland* for the plaintiff.—The document executed by Robert Mann does not affect the interest which Susannah Mann took under her first husband's will. That interest was a contingent remainder in fee, and the property did not become vested in the testatrix until her son's death. There are no words in the document in question which include estates in remainder. But, even if this is not so, nevertheless the document is inoperative against the heir-at-law of the testatrix, because it has not been signed by her, but by Robert Mann alone. Without her signature it cannot operate as a settlement to bind the inheritance. By virtue of the Statute of Frauds, s. 7, all trusts as to the wife's real property must be in writing and signed by her. They cited

*Field v. Moore*, 7 De G. M. & G. 691;

*Hulme v. Tenant*, 1 W. & T. 521, 5th edit.

*Barber, Q.C. and William Wills*, for the defendants, were asked to confine their argument to the second point alone.—It is not necessary that a declaration of trust in writing should be made by the wife, for then the intended wife would have been compelled to declare a trust in her own favour, and would be at once trustee and *cestui que trust*, which would be an absurdity. In this case the intended husband gave up all marital rights over his wife's property; that is amply sufficient to create a separate use in favour of the wife and to give her testamentary powers:

*Rippon v. Dawding*, Amb. 565;

*Tyrell v. Hope*, 3 Atk. 558;

*Hall v. Waterhouse*, 11 Jur. N. S. 361.

They also cited

*Taylor v. Meads*, 4 De G. J. & S. 597;

*Pride v. Butt*, L. Rep. 7 Ch. 64.

*Charles, Q.C.* in reply.

*Cur. adv. vult.*

May 30.—The judgment of the court was read by

FRY, L.J. [His Lordship stated the facts, and proceeded as follows:—In this state of circumstances two questions have arisen. The first question, which is the only one which was discussed in the court below, was whether the language of the memorandum signed by Robert Mann, assuming it to be operative, was sufficient to affect and bind the interest by way of remainder in the freehold property, which at the date of the memorandum was contingent and not in possession. We agree with the court below in holding that the language includes every interest taken by the wife in the property then in her possession, and therefore as binding the contingent remainder, when it fell into possession by death of the son. The second question was, not by the conjoint operation of the memorandum and will the devisees took anything or the it appears to us to be plain that the ways, deprived of the beneficial interest in the heir only in one or other of two ways, a devise or by the conversion of By devise &c. We will consider subsequent case come. The ancestor was at insisted on by Mr. Barber. the Statute of Making the heir in the pre- are declared incapable, for the an- difference has been, and by 8, married women ing lands, and no branch of the

law by the statute of the Queen relative to wills. A *feme covert* has, properly speaking, no testamentary capacity. Was the heir converted into a trustee for the nominees or *quasi*-devisees of Mrs. Mann? It appears to us that the fee-simple of a wife may be affected by a trust for her separate use in one of three ways: (1) by conveyance to a trustee or a declaration of trust by the wife before marriage, if made with the husband's consent; (2) by an agreement between the intended husband and wife before marriage; and (3) by an acknowledged assurance by a wife after marriage. Now, in the present case there was, in our opinion, an agreement in fact between the husband and wife before marriage upon the terms of the memorandum signed by Mann, and we are of opinion that that agreement would have been a sufficient declaration of trust of the fee, but for the fact that the wife never signed the memorandum, and for the provisions of the 7th section of the Statute of Frauds, which enacts that all declarations or creations of trusts of any hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. We conclude that there is no evidence on which the court can proceed of the existence of an ante-nuptial agreement settling the fee to the separate use of the wife. But then it was argued that the memorandum signed by the husband was a sufficient declaration of trust by him to create a separate use of the fee. It is, however, obvious that no man can create a trust of an estate which he does not possess, or of any larger estate than he possesses, that the husband did not possess the fee, but only an estate during the joint lives of himself and his wife with a possible estate by the curtesy, and consequently that, however valid his declaration might be as regards the interests he had, it could not bind the fee which he had not. Furthermore, Mr. Barber urged us to hold that the mere renunciation by the husband of his marital rights was sufficient to clothe the wife with a testamentary power, or to constitute a valid declaration of trust of the fee. As to the first of these propositions, no authority was produced for it, and it appears to us to be entirely contrary to principle. The effect of marriage on a woman is, or was, to give certain rights to the husband over her property, and to suspend during the coverture the testamentary capacity which she previously possessed. These effects are entirely independent of one another. This incapacity to devise real estate does not arise from the husband's interest in her property, and consequently cannot be cured by his renunciation of interest. It was admitted that a *feme covert* has no power with the consent of her husband to make a will of real estate; and there appears to us no distinction between consent and renunciation in this case. The suggestion that the renunciation of the husband can create a valid declaration of trust of the fee has in fact been already dealt with; a husband who has not the fee cannot by renunciation of his rights bind the fee. The only authority in any way in conflict with the views which we have expressed appears to be the case of *Rippon v. Dawding* (*ubi sup.*), where the Lord Chancellor Camden undoubtedly treated as creating a valid trust of the fee an ante-nuptial agreement, in respect of which it is at least doubtful whether it was





1869 is incorporated with the Telegraph Act of 1863. But in the Act of 1869 "telegraph company" is defined to mean "any company, corporation, or persons for the time being engaged in transmitting, or by any instrument incorporating the same authorised to transmit, telegrams within the United Kingdom;" and in *The Attorney-General v. Edison Telephone Company* (43 L. T. Rep. N. S. 697; 6 Q. B. Div. 244) it was held that a telephonic message is a telegram. Therefore the telephone company is a telegraph company within the Act of 1869; therefore it is a company under the Act of 1863; and therefore the 12th section applies to it. To appreciate this argument it is necessary to look at the objects of the three Acts. The Act of 1863 is an Act intended principally to abbreviate legislation respecting telegraph companies authorised by Parliament, by providing a general constitution to be applied to each special case by reference, in the same way as the Lands Clauses Act and the Railways Clauses Act fulfil similar purposes for other classes of companies. The Act of 1868 gives the Postmaster-General all the powers of a telegraph company under the Act of 1863, and enables him to purchase on terms set forth in the Act the undertakings of telegraph companies. The Act of 1869 gives the Postmaster-General a monopoly of telegrams (which has been held to include telephonic messages), and makes provision in reference to certain contracts and purchases then effected or in negotiation; and no doubt this Act would operate to restrain the defendants from sending telephonic messages, if they had not been licensed to do so by the Postmaster-General. But it does not put private companies for telegraphic purposes into the position of telegraphic companies authorised by Parliament. On the contrary, the short result of all the Acts read together is to make the Postmaster-General the only telegraph company in England (exceptions excepted), and to give him all the powers for the erection of telegraphs which were by the Act of 1863 intended to be conferred on private telegraph companies incorporated by private Acts. The defendants are simply a joint-stock company licensed by the Postmaster-General to carry on a business from which they would, but for his licence, be restrained by the Act of 1869. But it is clear to me that they have none of the powers of a company under the Act of 1863. The only parts of the three incorporated Acts which apply to them are those which forbid them to carry on their business without licence from the Postmaster-General and possibly those which authorise him, if he thinks fit, to buy their undertaking. I think, therefore, that the first argument used by the plaintiffs fails. The second argument is that the effect of the Metropolis Management Act of 1855 is to give them the sole right to prevent a wire from being stretched across the roads at any height which a private person would have to prevent such a wire being suspended over his field or garden. This argument depends upon the effect given to the words of the Metropolis Management Act of 1855 (18 & 19 Vict. c. 120), s. 96. The words are: "All streets being highways, and the pavements, stones, and other materials thereof . . . shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate." The interpretation of words almost

identical with these has been considered in several reported cases, particularly in *Coverdale v. Charlton* (3 Q. B. Div. 376, and on appeal, 40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104). This case is recognised, followed, and carefully explained in *Rolls v. St. George's, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785). The words on which that case turned were: "All streets being, or which at any time become, highways . . . shall vest in and be under the control of the urban authority." They were held both in the Queen's Bench Division and in the Court of Appeal to vest the streets in the vestry in such a sense as to enable them to let the pasturage in a green lane which fell within the definition of a street. The effect of the decision appears to me to be that the words used in the Public Health Act (which in all important particulars are identical with those in the Metropolis Management Act) give to the district board not merely the control and management of the street, but property in the street itself. Moreover, it decides what is meant by the word "street." Brett, L.J. says (4 Q. B. Div. 121): "'Street' means more than the surface; it means the whole surface, and so much of the depth as is or can be used not unfairly for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise" (the Master of the Rolls, in *Rolls v. St. George's*, 14 Ch. Div. at p. 789, says this is a misprint for 'pave') "and to lay down sewers—for at the present day there can be no street in a town without sewers—and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this." Lord Bramwell, after minutely considering the language used, concludes thus: "That would show that 'street' comprehends what we may call the surface; that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." This limited view of the effect of the word "vest" is contrasted by Lord Bramwell with the wider view in which "it may mean that a man acquires the property *usque ad cælum*, and to the centre of the earth." It seems to me that the present case must be decided upon the principle here laid down. In the first place, it is to be observed that the case of *Coverdale v. Charlton* does not directly decide anything as to the extent of a street upwards. It only limits its extent downwards. It does so, however, upon grounds which seem to me to apply equally in each direction. If it can be shown that the management and care of the street require some degree of control over the air immediately above it as well as over the ground immediately below it, it seems to follow that the vesting of the street itself in the district board must involve property in part of the air above the surface of the street as well as property in part of the ground below it. Now, it is self-

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evident that in many cases the air immediately above the street may be dealt with in such a manner as to affect the safety or comfort of the street, as, for instance, if an electric wire passed across the street at such a height as to interfere with the traffic. Such a case might be dealt with as a nuisance at common law; but might it not, apart from the law of nuisance, be treated as a trespass on the property of the district board? So long as the wire is at a height which actually interferes with the traffic, the question is of no practical importance, but when it is suspended at such a height and in such a manner that it does not interfere with the traffic of the street, except possibly in some extraordinary case, the question becomes one of great importance; and, in order to illustrate this, I proceed to give my opinion as to the third ground on which the plaintiffs claim their injunction. It is that the overhead wire in question is a nuisance to the highway, and that, as such, they are entitled to have it removed. This, it was agreed, was a pure question of fact. The evidence given on both sides appears to me to show that the wire in question is nearly new, that it is properly taken care of, and has been lately examined and found to be in perfect condition, and likely to last for many, or, at all events, for several years without becoming perceptibly weaker than it now is. In the common course of things it is likely to cause no perceptible danger to the public, though it is, no doubt, possible that a violent storm might blow it down, just as it might blow down the chimneys to which it is in most places attached. There was, however, evidence that, on two occasions, wires of a similar character had, in violent storms, been blown down in such a manner as to become a source of some degree of danger to persons or carriages passing along the highway. Upon the whole, though I cannot say that absolutely no danger arises from the position of the wire, I do not think that, apart from the question of trespass, it would form an indictable nuisance. If it had been erected with the consent of the district board, and had been indicted by some inhabitant of the neighbourhood as a nuisance at common law, I should not have hesitated to direct a jury that there was no evidence of such a nuisance as would justify a conviction. This being the state of things, the question upon which the case turns appears to me to be whether the street vested in the district board extends to such a height above the ground that the suspension of the wire over it is a trespass which entitles them to an injunction. I was at first of opinion that it was not, and that the case resembled that of *The Wandsworth District Board v. London and South-Western Railway Company* (8 Jur. N. S. 691). In that case the present plaintiffs applied to Kindersley, V.C. for an injunction to restrain the South-Western Railway Company from widening a bridge over a highway called Falcon-lane vested in the plaintiffs by the same section as the one on which they rely in the present case. There are expressions in his judgment which at first might look as if he meant to say that, as the vesting of the soil in the district board was "purely for the purpose of promoting the convenience of the public," the question to be considered was, whether the way in which they proposed to exercise the rights

given to them by the Act would promote the public convenience or not; but this does not appear to me to be the real meaning of the judgment, or at least its full meaning. The railway company in that case had power under an Act of Parliament to widen the bridge, and the substantial question appears to have been whether their powers did not authorise the interference with the soil of the plaintiffs (vested in them solely for public purposes) which the railway company had to make. Upon the best consideration which I can give to the present case, it seems to me that Parliament intended to give the district board proprietary rights over the street, including in that word a certain space upwards as well as downwards, in order that they (the district board) might form a judgment as to the expediency on public roads of permitting or refusing to permit various acts which, without being actual nuisances in such a sense as to be indictable, might nevertheless be regarded as undesirable innovations. Suppose, for instance, the owner of two houses on opposite sides of the street wished to connect them by a bridge carried at a considerable height over the street, he might inflict no injury at all on the public, but, if his right to do so were unconditional, so long as he caused no positive danger or diminution of light, others might imitate his example, and the aggregate result might be injurious to the public, though it would be difficult to say at what point the nuisance began. So with regard to telegraph or telephone wires. A single wire may be no nuisance, but, if no one has a definite right, in the interests of the public, to object to its erection, such wires might be multiplied to any extent, and might collectively constitute a very appreciable nuisance. I do not suppose that the Legislature or any member distinctly thought of this when the streets were vested in the district board, yet I think that the object of the enactment was to invest the district boards with the character of owners, in order that they might use for the public convenience rights which a prudent private owner would use in his own interest and in the interest of his tenants. I am much strengthened in this view by the provisions of the Telegraph Act of 1863 already referred to. If private persons had at common law a right to suspend wires over streets, subject only to the general law of nuisance, I do not see why the Legislature should in express terms have authorised telegraph companies to do so (26 & 27 Vict. c. 112), s. 6 (2), but compelled them to obtain the consent of the body having control of the street (sect. 12). If they already possessed the power at common law, there was no need to give it. For these reasons I give judgment for the plaintiffs in the terms of their statement of claim with costs; but, as the case is one of great importance, and will no doubt be carried further, and as I think the wire causes no appreciable actual danger to the highway which it crosses, the injunction is not to issue until after the hearing of the appeal, if the defendants appeal from this judgment.

*Judgment for the plaintiffs.*

The defendants appealed.

June 12 and 13.—The appeal was argued by Webster, Q.C. and Cozens-Hardy, Q.C. (J. F. Moulton with them) for the defendants, and by

*Philbrick, Q.C. (T. L. Wilkinson and R. O. B. Lane with him) for the plaintiffs.*

BRETT, M.R.—This case depends on the true construction of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 96. A telephone wire fixed to a chimney passes diagonally across the street. The owners of the houses raise no objection, and the question is, can the local board object to the wire passing across the area of the street, and obtain an injunction to prevent the telephone company from keeping their wires there? The solution of this question depends on the Act of Parliament which gives powers to the local board (18 & 19 Vict. c. 120, s. 96). Whatever may be the extent of their powers, it is clear that if the wire were to interfere with the user of the street they would be entitled to an injunction; if it were dangerous then it would be a nuisance, and the local board would be entitled to an injunction. Whether the wire is dangerous, so as to be a nuisance, is a question of fact, as to which there is evidence on both sides. There is strong evidence that these wires, when put up with ordinary care, and made of the usual material, would not begin to deteriorate for five years, and after that a further period would have to elapse before they could become dangerous. Stephen, J. who saw the witnesses, and had an opportunity of weighing the value of the evidence, came to the conclusion that there was no appreciable danger now, and for some time to come; that amounts to saying that in law and in fact there is no danger. We cannot say that these wires interfere with the traffic; therefore there is no ground for granting an injunction, unless there is a trespass on the property of the local board. Stephen, J. decided in favour of the plaintiffs on that ground. The case raises the question whether there is a trespass. What belongs to the plaintiffs is given to them by the Act of Parliament, which is similar in its terms to the Act on which *Coverdale v. Charlton* (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104) depended. The Act (18 & 19 Vict. c. 120, s. 96) vests the street in the local board; therefore the same question arises as arose in *Coverdale v. Charlton*, namely, what is the meaning of the words "vest" and "street," and what is the effect of the Act? As to the judgment of Bramwell, L.J. in that case, I have some difficulty in following his exact view on each point. The question there was how far the property passed, and in what was the property vested in the local board. Bramwell, L.J. was of opinion that the Act of Parliament gave the local board so much property in the grass on the surface of the road which was vested in them that they could give the right to the plaintiff to pasture cattle along the side of the road. My own view then was that the Act passed the property in the street, so as to enable the local board to do what any other owner of property might do, subject to the rights of the public, and so long as they did not infringe their duty of keeping the street as a street. It was not necessary to decide there whether the property vested for ever or only for a time; but in the case of *Rolls v. The Vestry of St. George the Martyr, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785), the question was raised as to the length of time for which the right of property was conferred, and the Court of Appeal said that it lasted only while the place in question was a street. Agreeing with this second case, my opinion

of the effect of the decision in *Coverdale v. Charlton* (*ubi sup.*) is this, that the property in the street passes to the local board, and remains vested in them while it is a street. Then the question arises, what is the meaning of the word "street?" for that is what is vested in the local board. It was suggested in *Coverdale v. Charlton* (*ubi sup.*) that the word "street" only meant the right of way, but the whole court went further than that. Then it was suggested that it was confined to the surface, but we went further than that, and came to the conclusion that the property of the local board went below the surface. That is the foundation of the judgment. I am inclined to think that the real judgment of Bramwell, L.J. is contained in the passage at page 118 of 4 Q. B. Div., where he is reported as saying: "That would show that 'street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under the streets; and to that extent they had a property in it." The report in the *Law Journal* makes it still more clear that this was his real judgment; the corresponding passage in that report is as follows: "On the whole, I think that the word 'street' includes so much of the surface, and so much of the thickness or depth, as is usually needed for the ordinary works which the local authority would need to execute in or upon a street." (48 L. J., at page 131 Q. B.) That seems to me to show that the property passes to a certain depth; that is, that it includes what may be called the area of user, not accidental, but ordinary user, such as is usually needed for the ordinary works which are done in the street. I did not differ from that view. I said: "The words of the private Act in that case (*Brumfit v. Roberts*, 22 L. T. Rep. N. S. 301; L. Rep. 5 C. P. 224) were that the fee simple of the pew should be vested in the subscribers or proprietors; the court held that those words did not vest the land over which the pew was. So here, the words of this section vest the property in the street, and the street does not include the houses by the side of the street: it includes the space between the houses which is used as the footway and roadway. 'Street' means more than the surface; it means the whole surface and so much of the depth as is or can be used, not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers—for at the present day there can be no street in a town without sewers—and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not part of the street within the meaning of such an Act as this. If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of owners in the soil

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of a 'street' is of so little value, intentionally taken away that right, and have given it to the extent I have mentioned, to the local board." (4 Q. B. Div. at page 121.) I think Cotton, L.J.'s judgment is to the same effect. Therefore the groundwork of the judgment in that case is that, as to depth, where the word "street" is used, we must give it the popular meaning which it had when the Act passed. With regard to depth, it includes the area of ordinary user, and nothing beyond or below. We have to apply that principle to the present case, for I think the case of *Coverdale v. Charlton* (*ubi sup.*) is binding as an authority, with regard to the principle on which it was decided, and I think the interpretation there given to the word "street" was and is right, and was the only interpretation which could be given. Therefore "street" is that which contains the area of ordinary user. We have now to apply that principle to the space which is above the surface of the ground. It has been argued that, because the surface passes, therefore everything above it also passes *usque ad celum*. I will not question the rule laid down by Coke, which is to the effect that where land is granted by the Crown, or conveyed by one subject to another, under the term of land, every right passes, down to the centre of the earth, and *usque ad celum*. These are fanciful phrases, but they are the phrases commonly used to express the extent of the right which passes. By the common law a grant or conveyance of land passed all that, but it does not follow that the word "street" would have the same effect; I am not clear as to how this might be, but, supposing it would have the same effect in a grant or conveyance, here the word occurs in an Act of Parliament. We have to consider why the Act was passed, and with whom and what it is dealing; it deals with streets, of which the public have the use, and with the local authorities, who are the guardians of the streets. If the street includes only the area of user below the surface of the ground, why should it include anything but the same above? The logical conclusion is, that if it includes this below it should include the same above; that is, it should include that area of air which is the subject of ordinary user. I cannot say that the limit would be higher or lower according to the height of the particular carts or fire-escapes which might happen to pass. The height would be sufficient to allow the ordinary use of the streets by the things which use the streets as streets. I doubt whether it would be limited to the present height of any fire-escape which may happen to be in use, but I will not attempt to measure it in this way, for in the present case we have to apply the principle to the case of wires fixed to the tops of chimneys. Now, people do not use the street as a street at the tops of the chimneys; the chimney tops are not in the street, but over the street. I am of opinion that the Act does not pass the property in that which is over the street, but only the property in the street, and, therefore, that no property passed to the local board in the air in which these wires were placed. If the wires were dangerous, an injunction would be granted; but, in the absence of danger, the plaintiffs' case rests solely on the ground of trespass. I am of opinion that, although the property in the street is vested in the local board, these wires are not in the street,

but are only passing over the street, and therefore Stephen, J. has construed the word too largely, and was not entitled to grant an injunction on the ground of trespass. Another point was raised by Mr. Philbrick, that, by 26 & 27 Vict. c. 112, s. 12, these wires could not be placed across the street without the consent of the plaintiffs. If we were to give effect to that contention, we should be applying the words "any company" in 31 & 32 Vict. c. 110, s. 3, to an Act which says "the company." I think it would not be right to apply that interpretation. Therefore, on neither point have the respondents been able to show that the judgment of Stephen, J. is right. On the authority of *Coverdale v. Charlton* (*ubi sup.*), and agreeing with the decision in *Rolls v. The Vestry of St. George the Martyr, Southwark* (*ubi sup.*), I am of opinion that, according to the principle laid down in *Coverdale v. Charlton*, these wires are not on the property of the plaintiffs, and, as there is no nuisance, there ought to be no injunction, and the judgment ought to be reversed.

BOWEN, L.J.—I have no doubt that if any appreciable danger were shown the court would interfere. If the plaintiffs had proved any substantial risk to the public, it would have been the duty of the court to grant an injunction. It does not, however, appear on the evidence that there is any appreciable danger to the public, and the question therefore is whether, where no appreciable danger exists, the local board are entitled to put their veto upon stretching a wire across the street. Have the local board such powers as to enable them to interfere with a wire which causes no danger to the street, or to the traffic, and no interruption to the traffic? This is an important question, because, if the plaintiffs are right, the Act of Parliament confers on local boards a power to levy tolls in the air, for they are not restricted to acting in the interest of the public if the view contended for on behalf of the plaintiffs is correct. If a similar question were to arise in the case of an owner of land, I should be unwilling to suggest that the landowner had not the right to object to anyone putting anything over his land. It is not necessary to say on what theory that doctrine is founded, for this is not the case of a conveyance of land, but the local board have what the Act of Parliament (18 & 19 Vict. c. 120, s. 96) gives them, and the question is whether they have the right to insist that nothing shall be placed above what is given them by the Act. That depends on the construction of the Act. There are two rules of construction to be observed: first, that the words are to be taken in their popular sense, unless there is something to show a contrary intention; and, secondly, that, if the words are capable of two constructions, that one ought to be adopted which makes the words mean that the Act gives enough power to enable the local board to carry out their duties under the Act, and gives no unnecessary power. The street is vested in the local board, and the Act shows that the Legislature was not dealing with a simple easement, but with something material. This was the basis of the decision in *Coverdale v. Charlton* (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104). We have to construe the words "vest" and "street," and it is impossible to take the word "vest" first, and then the word "street," and construe

them separately, without seeing whether any light is thrown on the meaning of one word by the other. We must deal with the combined expression. The ordinary meaning of such an expression, in the case of land, is that a freehold estate vests, but the words may have a different meaning according to what the property is which vests. There are two views which may be suggested: first, that the Act of Parliament definitely plants in the local board something analogous to a freehold interest; or, secondly, that a statutory interest is given, so as to enable the board to carry out the purposes of the Act. I think the case of *Coverdale v. Charlton* (*ubi sup.*) decides only one thing, but the authority of that case goes beyond the actual decision. All that it decided I think is this: that the Act of Parliament vested in the local board such a statutory interest as to give them the surface of the ground and the right to the herbage. I am not quite sure that all the judges took the same view in that case. As to the judgment of Bramwell, L.J., I have some doubts as to how far he meant to go. The Master of the Rolls has just explained his own judgment, but I doubt whether Cotton, L.J. meant to say that the statute gave anything more than enough to transfer the right to the grass. In the subsequent case of *Rolls v. The Vestry of St. George the Martyr, Southwark* (43 L. T. Rep. N. S. 140; 14 Ch. Div. 785), the court had to consider the duration of the right, and had also to consider the effect of the decision in *Coverdale v. Charlton* (*ubi sup.*). Cotton, L.J. explains (14 Q. B. Div. at page 798) that he meant that some right vested, but that nothing had been decided as to the duration or extent of the right; and Thesiger, L.J. said (speaking of *Coverdale v. Charlton*): "The effect of that case is substantially this; that sect. 96 has given to these bodies, over and above the mere easement of passage which the public possess, and over and above the right of control and management of the roads which the old surveyors of highways possessed, some right of property, some possessory right which would enable the district boards or the vestries to maintain actions in respect of that property or possessory right, and the decision of the court does not seem to have gone one step beyond that." (14 Ch. Div. at p. 802). I do not think the decision in *Coverdale v. Charlton* went beyond that, although the language of the present Master of the Rolls in that case did. Now, what is the meaning of the word "street"? In *Coverdale v. Charlton* it was not necessary to say how far down the street went; therefore, on that point, the case is not binding, though it is a great authority. I think the word "street" covers the area, or zone, of user. A statutory interest of a proprietary character in and below the surface is conferred, so far as it is necessary, for carrying out the purposes of the Act. As to the space above the surface of the street I am satisfied that the local board has no proprietary interest above the street beyond what is necessary in order to enable them to protect the street, and carry out the duties imposed upon them by statute. I say this without derogating from the authority of the proposition *Cuius est solum ejus est usque ad cælum*, for the local board have not the land, but the street; and it is not within the meaning of the word "street," or within the purview of the object of the Legislature, to give more than is actually necessary for

carrying out the duties of the local board. I think, therefore, that the judgment of Stephen, J. was wrong, and ought to be reversed. On the second point, as to the statutes, I agree with the Master of the Rolls. If any appreciable danger were shown, I am clearly of opinion that an injunction could be obtained.

FRY, L.J.—The plaintiffs in this case ask for an injunction on one or other of three grounds: first, on the ground of danger; secondly, on the ground of interference with their proprietary rights; and, thirdly on the ground that they have given no statutory consent to the putting up of the wire, and they contend that such consent was required before the wire could lawfully be put up. I think no appreciable danger is shown. This depends on the evidence, and the judge before whom the case was tried saw the witnesses, and heard their evidence, and came to the conclusion that no danger was made out. I think we ought not to interfere with this finding, and I do not differ from the conclusion at which he arrived on this point. Secondly, is there any interference with the plaintiffs' proprietary right? The object of 18 & 19 Vict. c. 120, s. 96, was to give the local board something more than a mere control over the street, as is shown by the use of the word "vest." A difficulty arises because "street" is a word which is used rather in a popular than in a legal sense. The Act is silent as to the duration of the interest and the nature of the property. If there were no authority on the point I am not certain that I should not think the safer view would be to hold that the Act meant to vest the street in the local board as land, with all the rights incidental to land in the area of the street; but this was not argued, because the case of *Coverdale v. Charlton* (*ubi sup.*) is inconsistent with such a view. That case has placed a definition on the word "street." No doubt some part of what was said in the judgment was not necessary for the decision of the case, but still I think it is binding, for it is not the right way to treat a judgment to consider whether all that was said was absolutely necessary for the decision of the case. According to the judgments in *Coverdale v. Charlton*, the word "street" would include the surface of the ground, and an undefined area below and above; that is, the area, or zone, of ordinary user. The suggestion that it was the intention of the Legislature to vest in the local board the area of possible interference is answered by the case of *Coverdale v. Charlton* (*ubi sup.*). The reasons given by two of the judges who decided that case show that the street which is vested in the local board includes the area of ordinary user only; for they have given a definition which we ought not to overrule, and which has excluded the idea of the area of possible interference. I am of opinion, therefore, that the local board have some proprietary right in the area of ordinary user, and nothing more. Then, is this case within that rule? I am of opinion that it is not, and therefore that the plaintiffs must fail. I wish to throw out no doubt as to the ordinary rights of a proprietor of land, the question as to which is not before us. I think a proprietor of land may remove an obstruction at any height above his land. I say nothing as to the rights of proprietors of adjacent land. For these reasons I have come to the conclusion that no injunction ought to be granted.



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It is contended that the plaintiffs had power by sect. 12 of the Telegraph Act 1863 (26 & 2 Vict. c. 112) to refuse their consent to the putting up of the wire; but it seems plain to me that the section in question applies only to companies constituted by that Act. It is contended that, because the Act of 1863 is incorporated by the Telegraph Act 1869 (32 & 33 Vict. c. 73), therefore every company that is within the terms of the Act of 1869 is brought within the Act of 1863. I have great difficulty in following that line of argument. In my opinion the learned judge in the court below has erred, because, intending to follow *Coverdale v. Charlton* (*ubi sup.*), he has extended the area which he held to be vested in the local board to the area of possible interference.

*Judgment reversed.*

Solicitors for plaintiffs, *Corsellis, Son, and Mossop.*

Solicitors for defendants, *Waterhouse, Winterbotham, and Harrison.*

Wednesday, June 18.

(Before BRETT, M.R., BOWEN and FRY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE BETA; THE PETER GRAHAM. (a)

ON APPEAL FROM BUTT, J.

*Collision—Regulations for Preventing Collisions at Sea, Art. XIII. 1880—Moderate speed—Dense fog—Bristol Channel—Salvage—Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 16.*

*Moderate speed for a sailing ship, within the meaning of Art. XIII. of the Regulations for Preventing Collisions 1880 in a dense fog in the Bristol Channel, is the slowest speed that she can go so as to be under command, and, if she carries more sail than is necessary for this purpose, she will be guilty of a breach of the article.*

*Moderate speed, within the meaning of art. 13 of the Regulations, varies according to the density of the fog; the thicker the fog, the slower ought to be the speed.*

*Per Butt, J.: Where two ships having been in collision, one of them renders assistance to the other by towing her, being bound by sect. 16 of the Merchant Shipping Act 1873 to stand by and render assistance, quære, whether she is entitled to salvage remuneration, even though she is not to blame for the collision.*

THIS was a consolidated damage action *in rem*, instituted by the owners of the steamship *Peter Graham* against the owners of the schooner *Beta*, to recover damages arising out of a collision between the two vessels on the 26th Aug. 1883 in the Bristol Channel.

The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before midnight on the 26th Aug. 1883 the steamship *Peter Graham*, of 516 tons register, was in the Bristol Channel, about fifteen miles N. by E. of the Longships, on a voyage from Swansea to Valencia with a cargo of patent fuel. The wind was very light from the W.S.W., there was a thick fog, and the tide was ebb. The *Peter Graham* had been turned round on a N.E. by E. course to stem the tide,

and was proceeding at dead slow, making about two knots an hour. Her regulation lights were duly exhibited and burning brightly, and her steam-whistle was being duly sounded and a good look-out kept on board of her. Under these circumstances those on board the *Peter Graham* saw the boom of the schooner *Beta* about two points on the starboard bow and about 100 yards off, and, although the engines of the *Peter Graham* were reversed full speed and her helm put hard-a-port, the two vessels came into collision, the jibboom of the *Beta* striking the starboard bow of the *Peter Graham*. Both vessels sustained considerable injury. The *Peter Graham* stood by the *Beta* till daylight, and at 5.30 a.m. on the 27th took her in tow, and towed her to the Mumbles Roads off Swansea, where she cast anchor in a place of safety about 6 p.m. on the same day. The plaintiffs charged the defendants with breach of articles 12, 13, and 22 of the Regulations for Preventing Collisions at Sea 1880, and claimed judgment for the damages occasioned by the collision, together with such an amount of salvage as to the court should seem just.

The facts alleged on behalf of the defendants were as follows: Shortly before 11.50 p.m. on the 26th Aug. 1883 the schooner *Beta*, of 97 tons, was in the Bristol Channel, about twenty miles W.N.W. from Trevose Lighthouse, on a voyage from Cardiff to Devonport, with cargo of coals. The *Beta*, under all plain sail, was making about two knots, and heading about N.W. by W., close-hauled on the port tack. The wind was light from the W.S.W., the weather foggy, and the tide flood of about the force of one knot. The *Beta* had her regulation side lights exhibited and burning brightly, and her foghorn was being sounded in accordance with the regulations, and a good look-out was being kept on board of her. Under these circumstances those on the *Beta* saw the masthead light of the *Peter Graham* about three points on the port bow, and distant about 400 yards, and although the steamship was hailed to starboard, and the *Beta* was brought up into the wind, the *Peter Graham* came on, and struck with her stem and starboard side the *Beta* on her bowsprit and cutwater, doing her great damage. The defendants charged the plaintiffs with breach of articles 12, 13, 17, and 18 of the Regulations for Preventing Collisions at Sea 1880.

On behalf of the plaintiffs evidence was called to prove that the foghorn of the *Beta* was not heard by those on board the steamer. According to the undisputed evidence of a surveyor, called on behalf of the plaintiffs, the topgallant fore-castle plate on the starboard bow of the *Peter Graham* was smashed in about seven feet, and one plate further aft bulged and bent, second plate down smashed in, and also two shear stroke plates smashed in about thirteen feet from the stem, &c.

On the 5th Dec. 1883 the action came on for hearing before Butt, J. assisted by Trinity Masters.

*C. Hall*, Q.C. (with him *Bucknill*) for the plaintiffs.

*Myburgh*, Q.C. (with him *Aspinall*) for the defendants.

At the conclusion of the arguments, the learned Judge found the schooner alone to blame. In his judgment having found that the *Beta's* fog-

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.



horn was blown by bellows, he proceeded as follows:—Whether it was blown quite as often as it ought to have been, and whether it was sounded within two minutes of the time of the collision, I confess to having some doubt. So much for the foghorn. But now each vessel says the other was going too fast. I am dealing with the question of negligence on the part of the *Beta*, and I propose first to consider the question, was the *Beta* going too fast? Now, I state at once, because I think it is the fair way on these occasions, that there is a difference of opinion between my assessors as to the speed of the *Beta*. One of the two gentlemen thinks that she was going under an undue press of sail and was making more headway through the water than she ought to have been doing on this night with the weather as it was. She was under all plain sail, including two square topsails, and it is thought by one of my assessors that that, coupled with the fact of the very severe blow she delivered to the steamer and the damage she did, shows that she had more way on her than she admits and more way than she ought to have had under the circumstances. Under these circumstances it falls to my lot to decide the question. I do not deny that I have had hesitation about it, but I lean to the conclusion that she was going too fast, and so I decide. I am mainly governed in so doing by this. We have before us a survey of the steamer, and we get from it the nature and the violence of the blow that was delivered. The report says on the starboard bow the topgallant forecandle plate smashed in about seven feet from the stem, one plate further off bulged and bent, the second plate down smashed and also the two sheer stroke plates smashed in about thirteen feet from the stem, three frames broken and two twisted and bent, one forecandle deck beam broken and six forecandle deck planks, and two broad deck planks broken, lining and bunk fittings, &c. Then there is other damage mentioned, and there was evidence of the bowsprit of the *Beta* having gone through the deck of the steamer. This leads me to the conclusion that the *Beta* was going faster, and not inconsiderably faster, than she says, and that being so, I think she was carrying too great a press of sail having regard to the weather. I think that was negligence on her part, and that she is liable for it. [The learned Judge then dealt with the speed of the *Peter Graham*, and found it to have been as slow as was consistent with good steerage-way.] Now comes the only remaining point. The foghorn of the *Beta* was not heard, according to the evidence, by those on board the *Peter Graham*, and here arises a point which I have often considered, and about which I have always felt a difficulty. Ought we to find negligence against the steamer because she did not hear the foghorn before the collision? In order so to find we must be satisfied that there was not a longer interval between the blasts than two minutes—a matter upon which I have already expressed some doubt. What occurs to me is this: Here were persons on the alert on board the *Peter Graham*. The question of hearing is not like that of eyesight. People's eyes may be closed or turned away from the direction in which an object comes into view, and they may fail to see it, but their ears are not stopped, and even if they are attending to something else, a foghorn in thick weather is a thing that at once arouses their atten-

tion. It seems to me very difficult to say that merely because these people, who were on the lookout and on the alert, did not hear the schooner's foghorn, they are to blame, having regard to the fact that the foghorn, if sounded, was certainly to leeward of the steamer, and that the sound would rather be carried away from the steamer by the wind than towards her. Considering too the careful way in which this steamer was being navigated and the whole circumstances of this case, I do not think that the fact of her not hearing the schooner's foghorn is evidence of negligence for which she ought to be held to blame. In the result I must pronounce that the only blame in this case attaches to the *Beta*. Now comes the question, is the steamer entitled to salvage? I know it has been held in some cases that where a collision is brought about by the wrongful act of one of two ships the innocent ship is entitled to salvage. No doubt the steamer took the *Beta* in tow. What I have to consider is, must I administering the law imply a contract to pay for salvage services? I will not do anything of the sort, and I do not mean to give any salvage in this case. If I am wrong I must be set right elsewhere, but I do not forget that there is an Act of Parliament which renders it a positive duty upon one of two ships which has been in collision to stand by and render such assistance as may be practicable to the other ship, and that is equally her duty whether the other ship is to blame or not. I refer to the 16th section of the Merchant Shipping Act 1873. I believe in acting as the steamer did after this collision she acted most properly, and I do not believe that it ever occurred either to the captain or crew of the *Beta* or to the captain or crew of the *Peter Graham* that when they towed this little schooner they were doing it on the terms of being paid salvage. In my view of the Act of Parliament, if the steamer had not chosen to tow the schooner she would have had to stay by her a very long time, because she would not have dared to have left her. Therefore I do not think that this is a case in which any salvage ought to be awarded. I do not know why I was not addressed on this point. I have not had the advantage of any observations on either side upon it, or of having my attention called to the authorities, but I suppose the real truth of the matter is that there is a sort of feeling which I should expect on the part of the owners or legal advisers of the steamer that this is not a case in which they would care to claim salvage, even although technically they might be entitled to it.

From this decision the owners of the *Beta* now appealed, and contended that the steamer was alone to blame for the collision.

Art. 13 of the Regulations for Preventing Collisions at Sea 1880, upon which the decision turned, is as follows:

Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

*Myburgh*, Q.C. and *J. P. Aspinall*, on behalf of the owners of the *Beta*, in support of the appeal.—It was the duty of the *Beta*, under art. 13 of the Regulations for Preventing Collisions, to go at a moderate rate of speed. This she did. Though it is true that she was carrying all plain sail it is to be remembered that the wind was light, and that it is necessary for a sailing vessel to have

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some little way on so as to be well under command. Under these circumstances her speed could not be called immoderate:

*The Elysia*, 4 Asp. Mar. Law Cas. 540; 46 L. T. Rep. N. S. 840.

The fact that there is strong affirmative evidence that the foghorn was blown on the schooner, and the fact that no foghorn was heard by those on the steamer, is very suggestive of a want of due diligence on the part of those on the steamer.

Hall, Q.C. and Bucknill, for the respondents, were not called upon.

BRETT, M.R.—It seems to me that the greater part of this case depends upon what is the law with regard to these two ships. It is undoubted to my mind that by the true construction of art. 13, the steamer was bound to go as slowly as she could in such a dense fog as this was, because it is to be taken that the fog was absolutely dense, so that it was impossible to see anything until it was close upon one. Under these circumstances it seems to me that the steamer was bound to go dead slow; that is, as slow as she possibly could in order to keep herself under command. She ought to have done that, and she did it. She therefore has obeyed the rule. We now come to the sailing vessel. The rule says she is to go at a moderate speed. What is the meaning of that? Moderate speed, to my mind, must depend upon the density of the fog, because that which would be moderate speed in a light fog would not be moderate in an absolutely dense and thick fog in which one could not see at all. That which would be moderate speed in a fog through which daylight was coming would not be moderate in a fog which was absolutely thick and dark. If we take this fog to be a dense fog, this sailing vessel comes under the same conditions as the steamer, namely, that she must not go through the water faster than is necessary for her being kept under command. This schooner had all plain sail set. Under certain circumstances it might be necessary to have all plain sail set to keep her under command. The question is whether it was necessary in this case. I have put that question to the gentlemen who advise us, and they tell us that this vessel might have been under command to perform the necessary operations with less sail. I do not ask them anything else. What is the necessary inference to draw from their answer? The inference I draw is, that this schooner was going through the water faster than was necessary to keep her under command. If so, she was going at more than a moderate speed, and at a greater speed than was necessary under the circumstances. If so, she was wrong. It therefore seems to me that, not being able to overrule the learned judge upon any other point, we cannot overrule him on this, and the appeal must accordingly be dismissed.

BOWEN, L.J.—I am of the same opinion. Art. 13 says that "every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." What does the term moderate mean? It is a term of relation, and it must be used in relation to something. Now in this case the collision occurred in the Bristol Channel in a dense fog. Under these circumstances the sailing ship ought not to go at a greater rate of speed than is necessary to enable her to be under command. That being the law,

the gentlemen who assist us say that, having regard to the wind, the sails carried by the schooner, and the character of the blow, they are of opinion that the *Beta* was carrying more sail than was necessary to keep her under command. The result is, that the schooner has infringed the rule, and must therefore be held to blame for this collision.

FAY, L.J.—I am of the same opinion. There are two questions which arise in this case. The first is with regard to the speed of the schooner. On this point the conclusion of the learned judge below appears to be well founded, having regard to the fact that this collision occurred in a dense fog in the Bristol Channel. It was also said that the persons on board the steamer must be taken to have heard the foghorn of the schooner. The learned judge below has, however, found otherwise, and I think it is impossible for us to disturb that finding. The conclusion, therefore, is that the schooner is alone to blame.

Solicitors for the appellants, *Clarkson, Greenwell, and Wyles*.

Solicitors for the respondents, *W. A. Crump and Son*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

June 23 and 27.

(Before BACON, V.C.)

Re F. B. BROWN'S WILL.(a)

*Summons—Sale of mansion-house—Heirlooms—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 1, 15, 37, and 45.*

Where a testator bequeathed to his trustees certain chattels and directed that the same should be considered "As annexed to his mansion-house, Woodthorpe Hall, near Sheffield, as heirlooms, and be held in trust for the persons for the time being entitled to the mansion-house," on summons under sect. 15 of the Settled Land Act 1882, the Court made an order for sale of the mansion-house, but ordered the summons to be amended by including the heirlooms, and ordered an inventory of the heirlooms, and an affidavit verifying the inventory to be produced, and the matter to be mentioned again in the presence of counsel for the trustees.

On the directions of the court being complied with, and the matter being mentioned again, the Court made an order for sale of the heirlooms, with liberty for the tenant for life to bid at the sale, the costs to come out of the proceeds.

THIS was a summons taken out under the 15th section of the Settled Land Act 1882, by R. E. Brown-Greaves, a tenant for life, asking for authority to sell a mansion-house and lands in such manner, and subject to such particulars, conditions, and provisions, as he might think fit.

By his will, made the 11th Nov. 1871, John Bower Brown bequeathed various legacies, and appointed trustees and executors, and bequeathed to his trustees certain chattels, and directed that the same should be considered as annexed to his mansion-house, Woodthorpe Hall, near Sheffield,

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

as heirlooms, and be held in trust for the persons for the time being entitled to the mansion under the limitations thereafter contained.

An inventory was to be taken and signed, after which the trustees were not to be responsible for the heirlooms, but they were not to be precluded from interfering for the protection thereof.

The testator devised all his freeholds in Yorkshire to his trustees upon trust for his son, R. E. Brown, for life, without impeachment of waste, and after the death of his said son, upon trust for various other persons in strict settlement.

The testator directed his said son to assume and use the surname of Brown-Greaves, and, further that his said mansion-house, called Woodthorpe Hall, and the lodge, outbuildings, gardens, and certain lands thereto belonging, all which said premises contained thirty acres and nine perches, or thereabouts, and were delineated and coloured respectively blue, brown, and pink, on the plan on the back of the 16th sheet of that his will, should at all times (except during the minority of any male, or the minority and disavowment of any female, who should, or if of full age would, be entitled to the possession thereof under that his will) be kept up as a place of residence of the person for the time being entitled to the possession thereof under that his will, and be kept by such person in good and sufficient order and repair, and adequately insured against fire, and the said heirlooms thereinbefore bequeathed should be at all times (except as last aforesaid) kept in his said mansion-house. The will also contained powers to grant leases, building leases, mining leases, and wayleaves through, and to sell with the consent of the tenant for life all the testator's lands except the mansion-house and grounds.

On the 20th Feb. 1884 an order was made appointing trustees of the will for the purposes of the Settled Land Act 1882.

On the 6th May 1884 R. E. Brown-Greaves served two notices under sect. 45 of the Settled Land Act 1882 upon the trustees and their solicitors.

First, he gave notice of his intention to sell the lands other than the mansion-house and grounds. Secondly of his intention to sell the mansion-house and grounds.

For the second sale he asked the consent of the trustees, but they refused it on the ground of the special provisions of the will.

A summons was then taken out asking the court to order the sale of the mansion-house and grounds.

For the applicant evidence was produced to show that the mansion-house being near Sheffield could be sold most advantageously, and that, owing to the growth of that town, circumstances had changed in a manner that the testator never contemplated when he inserted such stringent provisions as to residence in his will.

The applicant has never lived at the place since his father's death, and his doctor said that it would be dangerous in his state of health to live there.

The place could not be let under the provisions of the will, and being unoccupied, was deteriorating in value.

*Hemming, Q.C.* and *Ingpen* for R. E. Brown-Greaves, the tenant for life.—Under sect. 3, sub-sect. 1, of the Settled Land Act 1882, the tenant

for life has power to sell the settled land. Under sect. 15 of the Act he has power to sell "the principal mansion-house on any settled land and the demesnes thereof, and other lands usually occupied therewith," with the consent of the trustees of the settlement, or by an order of the court. Proper notices have been served in conformity with the Act. The settlement is the will of John Bower Brown made the 11th Nov. 1871. The evidence shows that the sale is advantageous to all parties.

*Curtis Price* for the trustees.—The testator was dominated by the idea of keeping the mansion-house in the family, and its continuing to be used as a residence by his descendants. He gives special directions in the will that the mansion-house and lands (amounting to about thirty acres) coloured blue, brown, and pink on the plan, should be kept up as a place of residence. Then the will contains powers of leasing and sale of all the testator's lands except the premises coloured blue, brown, and pink. This shows his scrupulous desire to keep the mansion-house in hand. Then there is a gift to the trustees of certain chattels, with a direction that the same should be considered as annexed to his mansion-house as heirlooms, and be held in trust for the persons for the time being entitled to the mansion-house. An inventory was to be taken and signed, after which the trustees were not to be responsible for the heirlooms, but they were not to be precluded from interfering for their protection. Sect. 37 of the Settled Land Act deals with heirlooms; sub-sect. 1 gives a power of sale; sub-sect. 2 provides for the application of the proceeds of the sale; and sub-sect. 3 provides that "a sale or purchase of chattels under this section shall not be made without an order of the court." There is no application before the court for the sale of the heirlooms. Where are they to be kept if the mansion-house is sold? [*BACON, V.C.*—Some of the heirlooms are fixtures; if you sell the house what is to become of them? *Hemming, Q.C.*—We amend our summons by asking for a sale of the heirlooms in the nature of fixtures; the other heirlooms would be placed in the custody of the tenant for life, he undertaking to be answerable for their safety.] On the construction of sect. 15 there is no index to guide the trustees or the court as to their decision. If the fact that the tenant for life is going to sell the rest of the land is to be accepted as a reason why the mansion-house should be sold, sect. 15 might as well be struck out of the Act. It is false reasoning, "because I am going to sell the land, therefore the trustees or the court should consent to or order the sale of the house."

*BACON, V.C.*—The trustees in this case have, under the will, a power to sell all but the mansion-house and the excepted lands, which the testator directs shall be kept up as a place of residence for the tenant for life. The question is, whether it is desirable that this property should now be sold. The reason of the application is very plain. The trustees have no power under the will to sell this property, but the case is provided for by the Settled Land Act 1882, which says that the tenant for life shall have power to sell, and thus overrides the will. At the same time the Act, by requiring the consent of the trustees to an exercise of the power, gives them a discretion as to

whether that power shall be exercised or not, but the trustees are at liberty to leave the question to the decision of the court. In my opinion, the present case is met by the Act of Parliament, and is provided for by express enactment. Of course in this and in every case I should listen with the greatest attention to what the trustees have to say, but, having carefully gone through the affidavits, I find from them that the estate will be sold better if the house is sold with it. I also find that the state of health of the tenant for life prevents him from enjoying the residence which the testator has provided for him. In my opinion, upon the words of the Act of Parliament, the tenant for life has, beyond all doubt, power to sell the house, provided the court considers the case is one in which he ought to exercise the power. Now, reasons are stated before me in favour of a sale of the house, and I do not understand that the trustees present any objection to it. They do what is their duty to do, namely, take care that the matter does not pass without their being heard, although the court is at liberty, if it thinks fit, to act without their being heard. However, I have not heard the slightest objection to the expediency of the sale. The only difficulty arises from the circumstance that the testator, in creating a settlement of all his real estate, annexes a qualification that a particular house and its appurtenances forming part of the estate shall not be sold. But the Act of Parliament says that, notwithstanding the settlement, the tenant for life shall have the right to sell the property settled, but that, in the case of the mansion-house, he must first obtain either the consent of the trustees or the sanction of the court. So far as the discretion of the court is concerned, I have not heard a single suggestion that the proposed mode of selling is not a beneficial one. With respect to the heirlooms, I must have the summons amended by including them in the application for sale. I have a map before me of the land, and I must have a description and catalogue of the heirlooms also. If there is an inventory in existence, let that be made the subject of an affidavit. I will now give the tenant for life authority to sell the mansion-house and lands mentioned in the summons; but the matter is to be mentioned again, in the presence of counsel for the trustees, after the summons has been amended by including the heirlooms by reference to an inventory to be the subject of an affidavit, and then an order can be made as to the heirlooms as well as the mansion-house.

*June 27.*—*Ingpen* for the tenant for life.—In accordance with the directions of your Lordship, we have amended the summons by including the heirlooms. We have an inventory of the heirlooms and an affidavit verifying the inventory. We ask for an order for sale of the heirlooms, with liberty for the tenant for life to bid at the sale.

*Curtis Price*, for the trustees, consented to an order being made.

*BACON, V.C.*—I make an order for the sale of the heirlooms, with liberty for the tenant for life to bid at the sale, the costs to come out of the proceeds.

Solicitors: *Arnold and Co.*; *Pilgrim and Phillips*, for *Smith, Smith, and Elliot*, Sheffield.

## QUEEN'S BENCH DIVISION.

Friday, May 23.

(Before STEPHEN and MATHEW, JJ.)

VALLANCE v. FALLE. (a)

*Shipping—Seaman's remedy against master—Refusal of certificate—Discharge—Penalty—17 & 18 Vict. c. 104, ss. 17 and 524.*

*By the Merchant Shipping Act 1854, s. 172, upon the discharge of any seaman the master shall sign and give him a certificate, and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of 10*l.*, and by sect. 524 the whole or any part of the penalty may be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed.*

*In an action for damages caused by the refusal of the defendant, a master, to give the plaintiff, a seaman, discharged from his ship engaged in the coasting trade, a certificate, the County Court judge nonsuited the plaintiff.*

*Held, that the remedy by penalty was exclusive under the provisions of the Act, and that the County Court judge was right.*

THIS was an action tried in the County Court of Dorset, in which the plaintiff, a seaman, sought to recover damages against the defendant, the master of a ship called the *Brighton*, trading between Weymouth and the Channel Islands, for improperly withholding and detaining from the plaintiff a certificate of discharge to which the plaintiff was entitled on the termination of his service on board the said ship, whereby the plaintiff was unable to obtain employment in other ships.

The County Court judge nonsuited the plaintiff on the ground that his only remedy was by summons before a court of summary jurisdiction under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

By sect. 17 of that Act:

In the case of all British foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this Act, except in cases where some competent court otherwise directs, and any master or owner of any such ship who discharges any seaman belonging thereto or except as aforesaid pays within the United Kingdom in any other manner shall incur a penalty not exceeding 10*l.*, and in the case of home-trade ships seamen may, if the owner or master so desires, be discharged and receive their wages in like manner.

By sect. 171:

Every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping master, to such shipping master, a full and true account in a form sanctioned by the Board of Trade of his wages and of all deductions to be made therefrom on any account whatever, and in default shall for each offence incur a penalty not exceeding 5*l.*; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered, and the master shall during the voyage enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions as they occur, in a book to be kept for that purpose, and shall, if required, produce such

(a) Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payment.

By sect. 172:

Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge; and if any master fails to sign and give any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding 10*l.*; and the master shall also upon the discharge of every certificated mate, whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding 20*l.*

By sect. 173:

Every shipping master shall hear and decide any question whatever between a master or owner and any of his crew which both parties agree in writing to submit to him, and every award so made by him shall be binding on both parties, and shall in any legal proceeding which may be taken in the matter before any court of justice be deemed to be conclusive as to the rights of the parties, and no such submission or award shall require a stamp, and any document purporting to be such submission or award shall be *prima facie* evidence thereof.

By sect. 174:

In any proceeding relating to the wages, claims, or discharge of any seaman carried on before any shipping master, under the provisions of this Act, such shipping master may call upon the owner or his agent, or upon the master, or any mate, or other member of the crew to produce any log book, papers, or other documents in their respective possession or power, relating to any matter in question in such proceeding, and may call before him and examine any of such persons being then at or near the place or any such matter, and every owner, master, mate, or other member of the crew who, when called upon by the shipping master, does not produce any such paper or document as aforesaid if in his possession or power, or does not appear and give evidence, shall, unless he shows some reasonable excuse for such default, for such offence incur a penalty not exceeding 5*l.*

By sect. 175:

The following rules shall be observed with respect to the settlement of wages (that is to say)—

(1.) Upon the completion before a shipping master of any discharge and settlement, the master or owner and each seaman shall respectively, in the presence of the shipping master, sign in a form sanctioned by the Board of Trade a mutual release of all claims in respect of the past voyage or engagement, and the shipping master shall also sign and attest it, and shall retain and transmit it as herein directed.

(2.) Such release so signed and attested shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement.

(3.) A copy of such release, certified under the hand of such shipping master to be a true copy, shall be given by him to any party thereto requiring the same, and any such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy.

(4.) In cases in which discharge and settlement before a shipping master are hereby required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim.

(5.) Upon any payment being made by a master before a shipping master, the shipping master shall, if required, sign and give to such master a statement of the whole amount so paid, and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned.

By sect. 176:

Upon every discharge effected before a shipping master the master shall make and sign in a form sanctioned by the Board of Trade a report of the conduct,

character, and qualifications of the persons discharged, or may state in a column to be left for that purpose in the said form that he declines to give any opinion upon such particulars or upon any of them, and the shipping master shall transmit the same to the Registrar-General of Seamen, or to such other person as the Board of Trade directs, to be recorded, and shall, if desired so to do by any seaman, give to him or indorse on his certificate of discharge a copy of so much of such report as concerns him, and every person who makes, assists in making, or procures to be made, any false certificate or report of the service, qualifications, conduct, or character of any seaman, knowing the same to be false, or who forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such certificate or report, or who fraudulently makes use of any such certificate or report which is forged or altered, or does not belong to him, shall for each such offence be deemed guilty of a misdemeanour.

By sect. 524:

Any court, justice, or magistrate imposing any penalty under this Act for which no specific application is herein provided, may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings.

*Francis Turner* argued for the plaintiff.—By the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 31, any officer of the Board of Trade may take the legal proceedings under the Merchant Shipping Act, and if that were done here the plaintiff could get no compensation. In many cases it has been held that an action will lie for breach of a statutory duty notwithstanding a provision for a penalty.

*Tindal Atkinson* for the defendant.—It depends upon the construction of each statute whether the penalty imposed is the only remedy for a breach of statutory duty. Here it could not have been contemplated to make an action lie for this omission. Compensation is provided by sect. 524.

The following cases were cited and discussed:

*Beckford v. Hood*, 7 Term Reps. 620;  
*Hurrell v. Ellis*, 15 L. J. 18, C. P.;  
*Stevens v. Jeacocke*, 11 Q. B. 731;  
*Rogers v. McNamara*, 23 L. J. 1, C. P.;  
*Couch v. Steel*, 3 E. & B. 402;  
*Wright v. London General Omnibus Company*, 38 L. T. Rep. N. S. 590; 2 Q. B. Div. 271;  
*Atkinson v. Newcastle Waterworks Company*, 36 L. T. Rep. N. S. 761; 2 Ex. Div. 441.

STEPHEN, J.—I am of opinion that the judgment of the County Court judge must be affirmed. The case has been well argued on both sides, and I believe every authority has been cited. I do not intend to follow the distinctions which have been drawn between the various decisions; but the general rule to be deduced from them seems to be that every particular enactment providing a summary remedy of this kind must be considered with respect to its provisions and object in order to discover whether the Legislature intended to confer a general right, which might be the subject of an action, with a collateral remedy by summons at petty sessions, or whether the duty imposed was sanctioned only by the particular penalty, and therefore enforceable by no other than the summary remedy. We must therefore consider the provisions of this statute. The 170th section deals with foreign-going ships, and it appears to give a certificate in such cases more value than in coasting ships of the class in this

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case. The form authorised by the Board of Trade for foreign-going ships includes an entry as to character; but no effect of that kind is given by the form of certificate for coasters under sect. 172, nor does any special value appear to attach to such certificate. This 172nd section makes it the duty of the master, upon the discharge of any seaman, to sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service, and the time and place of his discharge, and the section goes on to provide that if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of 10*l*. There is a provision later on in the Act (sect. 524) that any court, justice, or magistrate, imposing a penalty for which no specific application is given, may direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. It appears therefore that this is an offence, created by the statute, for which a specific remedy is provided for any damage which may be the consequence of it. As to the cases cited, I have already said that I think every statutory remedy of this kind must depend upon itself, and can have but little authority with regard to others; it will be sufficient, therefore, if I allude only to one or two of those upon which counsel for the plaintiff relied. For instance, in *Beckford v. Hood* the question decided was whether a small and inadequate penalty given to an informer precluded an aggrieved author from obtaining damages in an action for breach of copyright. Lord Kenyon there said: "I cannot think the Legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded without redress" (p. 627). That consideration can have no weight in the case before us, because sect. 524 gives to the seaman aggrieved a right to apply to the court of summary jurisdiction for as much of the 10*l*. penalty as may be considered adequate to the circumstances, and I cannot think that any damage he could suffer would be likely to exceed that amount. On the other hand, in *Atkinson v. Newcastle Waterworks Company* it was obvious that the defendants could never have been intended, by an obligation to supply water for fire engines, to be made insurers for the whole of a large town, when a specific penalty was imposed for failure to fulfil the obligation. That case is far stronger than this, and, to my mind, is no more an authority than the other; but the conclusion there arrived at seems to me more appropriate to this case than that of the copyright, and I think, having regard to the nature of the certificate, the injury likely to result from its omission, and all the provisions in relation thereto, that the remedy, and only remedy, for the wrong of which the plaintiff complains, is by summons before petty sessions. The County Court judge therefore was right in nonsuiting the plaintiff in this action.

MATHEW, J.—I am of the same opinion, and I must say I feel no doubt about it. With regard to a statutory remedy of this description, it was observed by Willes, J. in *Wolverhampton New Waterworks Company v. Hawkesford* (28 L. J. C. P., at p. 246): "There are three classes of cases

in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-nected by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. Now it appears to me that the present case falls within such third class;" and I would interpose in this quotation to express the same view with respect to the seaman's certificate here; "and as with respect to that class it has been always held that the party must adopt the form of remedy given by the statute, so I think the company are bound here to follow the form given by this statute which creates the right." Upon the true construction of the provisions of this Act, I think the proceeding for a penalty is the exclusive remedy for any damage of which the plaintiff can complain in this action, and therefore the action was misconceived.

*Judgment for defendant.*

Solicitors for plaintiff, Cooze, Kingdon, and Cotton, for J. H. Jolliffe.

Solicitors for defendant, Wainwright and Baillie.

July 2 and 3.

(Before MATHEW and DAY, JJ.)

LANCASHIRE AND CHESHIRE TELEPHONIC EXCHANGE COMPANY (apps.) v. OVERSEERS OF MANCHESTER (resps.) (a)

*Poor rate—Telephone wires, poles, and attachments—Occupation—Rateability.*

*A telephone company were the owners of certain overhead wires, which were supported by poles fixed in the ground, and by attachments to the roofs and chimneys of buildings. The consent of the owners and occupiers of the land and buildings was in every case first obtained in written agreements, by which the company undertook to pay an annual sum as an acknowledgment, to make good any damage that might be done to the property, and to remove the wires, attachments, and poles, upon notice to that effect. The only access to the wires and attachments on the buildings was through the interior of the buildings by the permission of the owners or occupiers, and then only during business hours, the company having no key or other way of obtaining admittance thereto. Similarly the only access to the poles was by the permission of the owners or occupiers of the land.*

*Held, that the telephone company had such an "exclusive occupation" of those parts of the buildings to which the wires were attached, and of the land in which their poles were fixed, as would render them liable to be rated, and that consequently they were rateable in respect of their wires, attachments, and poles taken as one entire system.*

(a) Reported by W. P. EVERELLY, Esq., Barrister-at-Law.

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The Electric Telegraph Company v. Overseers of Salford (11 Ex. 181) *followed*.

This was a special case stated by consent for the opinion of the court under 12 & 13 Vict. c. 45, s. 11, pursuant to a judge's order.

The material parts were as follows:—

The appellants were a company incorporated under the Companies Acts 1862 to 1880 for the purpose of establishing telephonic exchanges and communications in Lancashire and Cheshire,

their principal office being at 38, Faulkner-street, Manchester.

In a rate or assessment for the relief of the poor made by the respondents on the 22nd June 1883, the appellants were inserted as occupiers of land, telephone posts, and wires in the township of Manchester, and rated in respect of such occupation. The following is a copy of the rate so far as it relates to the matters in question:

Dr.		No. 8 District.				Polling District, No.						
Progressive Number.	Number of House.	Name of Owner.	Owners assessed under the Manchester Overseers Act 1868, instead of the occupiers.	Name of Occupier.	Number of Votes.	Description of Property.	Estimated Extent.	Rent per Week.	Gross Estimated Rental.	Rateable Value.		Poor Rate at 1s. in the £.
										At £10 and under per annum.	Above £10 per annum.	
3153A.			The Lancashire and Cheshire Telephonic Exchange Limited.			Land, Telephone posts and wires.			£2400		£2000	

In the rate the appellants were rated in respect of the whole of the telephone posts, standards, or other supports or attachments for wires herein-after mentioned, and all the wires thereto attached, taken as one entire system.

In the rate or assessment the appellants were also rated as occupiers of No. 38, Faulkner-street, but no addition was made to such rate in respect of any telephone posts, standards, or other supports or attachments for wires, or wires thereto attached. The appellants paid this latter rate.

The business carried on by the appellants within the township of Manchester was of two kinds:— (A) The establishment and maintenance of a telephonic exchange by means of which any one subscriber to the exchange could communicate privately by telephone with any other subscriber. (B) The supply and erection generally of wires and telephonic apparatus (not in connection with the telephonic exchange) for the private use of firms and individuals paying a rent for the same.

For the purposes of their telephonic exchange business (A) the appellants from time to time laid wires within the respondents' township from the central office of the appellants to the business premises respectively of their subscribers. A wire was so laid from the central office (the centre of the exchange system) to the business premises of each subscriber, and was furnished at either end with telephone and all other necessary telephonic apparatus, thereby enabling any subscriber to be placed in telephonic communication with any other subscriber through the central office.

For the purpose of the other branch (B) of their business the appellants from time to time laid in the respondents' township other wires, and affixed thereto telephones and all other necessary telephonic apparatus. These wires and apparatus were used exclusively by the renters thereof.

In both branches of the business, by agreement with the subscribers and renters, the appellants kept the wires and apparatus in working order, and for that purpose had free access to the subscribers' and renters' premises, the wires and apparatus remaining the property of the company, and the subscriber or renter paying an annual sum for their use.

All the wires laid by the appellants were over-

head wires. Those laid for the (A) branch of their business were carried up through the roof of the appellants' central office, thence over buildings, streets, yards, and plots of land not built on in the respondents' township, to the respective premises of the subscribers, where they were for the most part led through the roofs to the interior of the premises. The wires laid for the (B) branch of the business were in the same way carried over buildings, streets, yards, and plots of land not built on in the respondents' township, and were led down at either end into such premises of the renters as it was desired to connect.

These overhead wires were supported and steadied either by poles fixed in the ground, or more generally by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed.

The attachments to buildings were made, in the case of a single wire, by an iron spike driven into the building, or by a bolt screwed into the lead of the ridge, or by an iron bracket nailed to the corner of the chimney, to one of which the wire was attached; and in the case of a number of wires, by means of standards or ridge saddles attached to the roofs of the buildings, the standards being fixed by iron bolts and stayed by wire stays, the ridge saddles being made to fit the lead ridge and fastened by stays.

All these attachments could be easily removed without damage to the buildings, and the appellants did, from time to time, change them from one point of attachment to another on the same building.

The consent of the owners or occupiers of land into which poles were fixed, or buildings to which attachments were made, was, in all cases, given in agreements, mostly in printed forms, called "wayleaves," by which the appellants undertook to pay a small annual sum to the owners or occupiers as rent or acknowledgment, to make good any damage done to the property, and to remove the wires and attachments upon a certain notice.

The majority of the buildings to which the attachments were made were several stories high, some of them warehouses, and the appellants obtained access to the roofs by ascending through



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the interior of the buildings, permission being in all cases first obtained from the owners or occupiers. The outer doors of the various buildings were locked and fastened except in the usual business hours, and the appellants' servants were then unable to get into or on to the buildings from the interior, as they were in no single instance furnished with a key of the outside door of the buildings, or any other way of obtaining admittance thereto. Similarly the practice of the appellants when wishing to have access to the poles fixed in the ground was to obtain permission from the owners or occupiers.

The questions for the court were :

1. Were the appellants' telephone posts, standards, ridge saddles, and other attachments and supports for wires, and the wires thereto attached, or any and which of them, rateable to the poor, and, if so, who was liable for the rate ?

2. If they were rateable, did they, or any of them, constitute a separate rateable tenement, or did they add to the rateable value of the premises respectively to which they were attached ?

3. If the appellants were rateable to the poor in respect of any land, telephone posts, and wires in the respondents' township, how was the proper amount at which they ought to be assessed to be ascertained ?

*R. E. Webster, Q.C. (Henn Collins, Q.C. and Bradbury with him)* for the appellants.—The question is, Is there any exclusive occupation of land by the appellants? The wires are only attached to the houses, and the poles fixed in the ground by the permission of the owners or occupiers. The owner did not part with the exclusive occupation of any part of his house; there was no tenancy created. The appellants must remove them whenever called upon to do so. Hence there is no exclusive occupation; it is an exclusive use or enjoyment by the licence of the owners and occupiers, but it is not such an occupation as will render the appellants liable to be rated. As to the wires, they only occupy the land by means of the posts, as accessories to the posts; therefore there is no occupation of land apart from attachment. This case is like *Smith v. Lambeth Assessment Committee* (9 Q. B. Div. 585; on appeal, 48 L. T. Rep. N. S. 57; 10 Q. B. Div. 327), where it was held that Smith and Sons' bookstalls were not rateable on the ground that only a right to an exclusive enjoyment passed by the agreement with the railway company. There is no demise by the owners and occupiers to the appellants; they have merely granted a licence to the appellants to place the poles in the ground and to attach the wires to the roofs of the houses. There are other cases in which the distinction between occupation and mere enjoyment has been recognised :

*Watkins v. Milton-next-Gravesend*, 18 L. T. Rep. N. S. 601; L. Rep. 3 Q. B. 350;  
*Grant v. Oxford Local Board*, 19 L. T. Rep. N. S. 378; L. Rep. 4 Q. B. 14.

At first sight the case of *The Electric Telegraph Company v. Overseers of Salford* (11 Ex. 181) may seem to be against this view. But there the telegraph company owned the posts and wires, and the posts were put into the ground and carried the wires from point to point, and that was held to be an occupation of the soil. This was pointed out by Lord Blackburn in *Watkins v. Milton-next-Gravesend*, where he said: "There

the Electric Telegraph Company occupied the land by means of their posts, but that does not decide that an easement can be rated." Further, the respondents have rated the telephone works as one entire system; whereas the proper mode of rating them is to rate the different works separately, having regard to their annual value under the statute of Elizabeth. He also cited

*Cory v. Bristow*, 36 L. T. Rep. N. S. 504; 2 App. Cas. 262;

*Willing v. Assessment Committee of St. Pancras*, 37 L. T. Rep. N. S. 126; 2 Q. B. Div. 581;

*Smith v. St. Michael, Cambridge*, 3 L. T. Rep. N. S. 687; 3 E. & E. 383;

*London and North-Western Railway Company v. Buckmaster*, 31 L. T. Rep. N. S. 835; L. Rep. 10 Q. B. 70.

*Ambrose, Q.C. (Smyly with him)* for the respondents.—What is to be rated in this case is not any particular wire or attachment taken by itself, and separate from the rest of the system, but the whole system of wires. The whole system belongs to the company, and must be rated together. There is here an exclusive occupation of land by the appellants for the purposes of their telephonic business. It may be that for the purpose of exercising their extraordinary right of going on to the roofs of houses where the attachments are fixed they are only entitled to go at reasonable hours; it may be that this right is a mere easement. But still the wires and attachments are there, and are being used night and day; the whole telephonic system belonging to the appellants is being used night and day; the use of them is permanent and exclusive, as none of the owners or occupiers can interfere with their use. Hence the appellants, for the purposes of carrying on their business, exclusively occupy the land over which the wires run and on which the attachments are fixed. This case is very much like the case of gas and water pipes passing along streets, which are rateable; the gas and the water being sent by one means of communication, the telephonic messages by another. [He was stopped.]

*MATHEW, J.*—The third question asked of us in the case is not a question that we should answer, and so we must decline to answer it. As to the two other questions, it appears to me that the case is concluded by the decision in *The Electric Telegraph Company v. Overseers of Salford (sup.)*. In that case the question was whether the property which was sought to be made the subject of assessment was capable of occupation within the law as to rating; and the point was made, which has been made here, that it was not property of a character capable of occupation. The court held that it was, and that it was assessable on that ground, and I am wholly unable to distinguish that case in principle from the present. What is sought to be assessed here is a system of wires used for an analogous, though it may be a different, purpose to the wires in the Salford case, and I am unable to distinguish the property in question here from that in question in that case. Mr. Webster referred to cases where it was held that there was no occupation, but merely enjoyment, and he argued that, looking at the way in which this property is used, there was here a series of quasi-easements, of enjoyments by licence only, and

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not that which was the subject of occupation. Our attention was called to the modes of attachment and the modes of support for the wires and other apparatus of the company, but I think that the answer to that argument is, that there is not here a mere licence to use in a particular case, but an exclusive occupation, limited in character I admit, but exclusive in each case. Where the wire is attached to a roof, that part of the roof where the wire is attached is used exclusively for the purpose of the support. Where the ridge-saddle is fitted on the roof, that part of the roof where the ridge-saddle is fitted on is used exclusively for the purpose of maintaining the wires by that ridge-saddle, and so, where the wire is upon a post, the post and the land in which it is fixed are used exclusively for supporting that wire. The occupation is not casual or occasional, but exclusive and permanent, though the character of the occupation is reduced in each case almost to a minimum. Now the first case that Mr. Webster relied upon was *Watkins v. Overseers of Milton-next-Gravesend*, where the person who enjoyed the right of mooring a barge to permanent moorings in the river was sought to be rated as the occupier of the river. It was held that he was not the occupier of the moorings, having only a licence to use them, but that the owner of the moorings was the occupier, and that he ought to be rated. *Cory v. Bristow* enunciated the same principle, but with a different result. There the same sort of property was used; but the person who used it was also the owner, and he was held to be properly assessed. Then Mr. Webster relied on the recent case of *Smith v. Lambeth Assessment Committee*, and no doubt that is a case where enjoyment is within a hair's breadth of occupation. In that case, although there was no legal right to the exclusive use of any part of the platform, there was practically an exclusive use; but the fact that there was no legal right to an exclusive use was held sufficient to determine that the property was not rateable. Now, is the use of the different supports and attachments here meant to be exclusive or not? It seems clear that it was intended by the parties that no part of this complicated structure should be interfered with by the owner or tenant of any one of those houses. It is true the company did not have the right to constant access to see that everything was in order; it was not necessary that they should have that right. But the company was permanently using the whole structure. The attachments and supports are, by the different instruments, declared to be the property of the company. Mr. Webster very properly referred us to the agreements—the way-leaves—to show that the enjoyment here was enjoyment by way of easement, and was not occupation. But really the question is not what is contained in those different documents, but what is actually going on under those documents. What is going on under those documents appears to me to be an occupation of the whole of this system for the purpose of conveying telephonic messages. The case is undistinguishable in my judgment from the Salford case, and on that ground the respondents are entitled to our judgment.

DAY, J.—I concur.

*Judgment for respondents; leave to appeal.*

Solicitors for the appellants, Pritchard, Engle-

field, and Co., for Grundy, Kershaw, and Co., Manchester.

Solicitors for the respondents, Johnson and Weatherall, for A. Lings, Manchester.

## House of Lords.

March 25 and April 3.

(Before Earl CAIRNS, Lords BLACKBURN, WATSON, and BRAMWELL.)

HILL v. EAST AND WEST INDIA DOCK COMPANY. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Construction of statutes—Words “deemed to have been done”—Bankruptcy of assignees of lease—Disclaimer by trustee—Liability of original lessee—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 23.*

*Where by a statutory fiction an Act of Parliament enacts that something “shall be deemed to have been done,” the court is bound to ascertain between what persons and for what purposes the fiction is to be resorted to.*

*The assignee of a lease became bankrupt, and his trustee, by leave of the court, disclaimed all interest in the lease under sect. 23 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), which provides that in such a case the lease shall “be deemed to have been surrendered” on the date of the disclaimer.*

*Held (affirming the judgment of the court below, Lord Bramwell dissenting), that this fiction of a surrender must be held to be only as between the lessor and the bankrupt and his trustee, and that the original lessee was, notwithstanding, liable to the lessor upon his covenant to pay rent. Dictum of James, L.J. in Ex parte Walton (17 Ch. Div. 746) approved.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Selborne, L.C., Jessel, M.R., and Cotton, L.J.) affirming an order of Hall, V.C. overruling a demurrer to a statement of claim in an action brought by the respondents against the appellant.

The case is reported in 22 Ch. Div. 14 and 47 L. T. Rep. N. S. 270.

The facts appear in the judgment of Earl Cairns, and in the reports in the court below, and are shortly as follows:—

The respondents, by deed dated the 2nd Dec. 1875, demised a public-house to the appellant for twenty-one years from the 25th March 1875; the deed contained the usual covenants to pay rent and not assign without consent.

By deed of even date the appellant, with the consent of the lessors, assigned the residue of the term to one Clarke, who covenanted to perform the covenants of the original lease, and to indemnify the appellant against them. Clarke mortgaged the premises for the rest of the term, but the mortgagees never took possession.

On the 10th Feb. 1881 Clarke filed his petition for liquidation, and a trustee was soon afterwards appointed, and on the 7th May 1881 the Court of Bankruptcy gave leave to the trustee to disclaim the debtor's interest and property in the premises, notwithstanding the opposition of the present respondents.

(a) Reported by O. E. MALDEN Esq., Barrister-at-Law.

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The respondents did not re-enter, and brought this action against the appellant for rent due. The appellant demurred to so much of the claim as claimed rent for the period subsequent to the appointment of the trustee, but the demurrer was overruled as above mentioned.

*W. Pearson, Q.C.* and *McSwinney* appeared for the appellant, and contended that the disclaimer put an end to the lease; if the term still exists, of course the respondents have a right of action, but the 23rd section of the Bankruptcy Act 1869 gives a disclaimer the effect of a surrender. The appellant had parted with the term, and the surrender extinguishes it in the assignee. The term itself was not dealt with before the Act of 1869, and before the old Act 49 Geo. 3, c. 121, s. 119, if the assignee disclaimed the term remained in the bankrupt lessee. See

*Smyth v. North*, L. Rep. 7 Ex. 242;  
*Ex parte Stephens*, 37 L. T. Rep. N. S. 613; 7 Ch. Div. 127;  
*Ex parte Brook*, 39 L. T. Rep. N. S. 458; 10 Ch. Div. 100;  
*Ex parte Glegg*, 45 L. T. Rep. N. S. 484; 19 Ch. Div. 7;  
*Taylor v. Gillot*, 32 L. T. Rep. N. S. 795; L. Rep. 30 Eq. 683;  
*Re Mercer and Moore*, 42 L. T. Rep. N. S. 310; 14 Ch. Div. 287.

The argument comes back to this, that the Act says that the term has come to an end.

*O'Farrell v. Stephenson*, Ir. L. Rep. 4 C. L. 715;  
*Smalley v. Hardinge*, 44 L. T. Rep. N. S. 503; 7 Q. B. Div. 524; and  
*Ex parte Walton*, 45 L. T. Rep. N. S. 1; 17 Ch. Div. 746,

which will be relied on by the respondents, are distinguishable. All that the latter case decided is that, in an application to disclaim, the court is only bound to consider the interest of the bankrupt. See *Ex parte East and West India Dock Company* (45 L. T. Rep. N. S. 6; 17 Ch. Div. 759), a case arising out of this very bankruptcy. Our contention involves no hardship on the lessors, for they can re-enter under the forfeiture clauses. See

*Harding v. Preece*, 47 L. T. Rep. N. S. 100; 9 Q. B. Div. 281, and the cases under the statute 49 Geo. 3, c. 121, s. 119;  
*Inglis v. Macdougall*, 1 J. B. Moore C. P. Rep. 196;  
*Taylor v. Young*, 3 B. & Ald. 521;  
*Manning v. Flight*, 3 B. & Ald. 211; and  
*Tuck v. Fyson*, 6 Bing. 321, under the statute 6 Geo. 4, c. 16, s. 75.

The object of this section is to merge the term in the inheritance in such cases as this. The earlier authorities are collected in

*Wilson v. Wallani*, 5 Ex. Div. 155; see also  
*Re Wilson*, L. Rep. 13 Eq. 186.

*Re Woods* (3 Ch. Div. 459) is a judgment of James, L.J. inconsistent with that in *Ex parte Walton* (*ubi sup.*), on which the respondents rely. The section should be construed literally, and may be explained by reference to the corresponding section in the Act of 1883 (46 & 47 Vict. c. 53, s. 55, sub-sects. 2 and 6). See

*Grill v. General Iron Screw Collier Company*, L. Rep. 1 C. P. 600.

*Kekewich, Q.C.* and *W. Latham* appeared for the respondents, and supported the judgment of the court below, relying on *Ex parte Walton* (*ubi sup.*), the judgments in which case, they argued, were

conclusive in favour of the contention of the respondents.

*W. Pearson, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

**Earl CAIRNS.**—My Lords: This case raises a question of considerable difficulty upon the construction of the 23rd section of the Bankruptcy Act of 1869. That section for the future has no existence, having been repealed by the statute of last year, which has substituted an enactment of a very different and much more explicit kind upon this part of the bankruptcy law. The question which is raised by this appeal is one which, at all events in this country, cannot therefore very well occur again, and it is not likely that any other question of the same sort remains over or open for decision. The way in which the present appellant raises the question, is shortly this. There was a lease of a public house made to him by the East and West India Dock Company in the year 1875. It was a lease for twenty-one years, at a rent of 300*l.* a year, and it appears that at the same time that this lease was made he made an arrangement with a person of the name of Clarke to assign the lease to him in consideration of a premium of 1150*l.* to be paid by Clarke to him, and he took from Clarke a covenant to indemnify him against the rent and the covenants of that lease, under which he of course remained liable to the East and West India Dock Company. Before, however, this assignment was made it was necessary for him to obtain the consent of the lessors, the East and West India Dock Company, for the original lease contained a proviso that there should be no assignment without their consent. He applied therefore to the lessors for their consent, and they gave it, but accompanied it with the stipulation that their consent to this assignment to Clarke should not in any way alter or affect the liability of the present appellant to them for the rent and upon the covenants. They were satisfied with him as a solvent tenant, and they did not wish to have that security infringed upon. Notwithstanding that state of things, Clarke having now become a bankrupt, and the trustee under the bankruptcy of Clarke having disclaimed the lease, which he was entitled to do, it being an onerous lease, the present appellant contends that the effect of the 23rd section of the Bankruptcy Act of 1869 is this, that not only have the trustee of the bankrupt and the bankrupt himself been delivered from the obligation of that lease, but that the lease is to all intents and purposes destroyed and put an end to, and that notwithstanding his original responsibility to the lessors for the rent and the other covenants, he is now perfectly free, and that the lessors have no recourse against him either for the rent or for the covenants. Well, of course that may be so. An Act of Parliament may have stepped in and produced consequences of that kind, but it is obvious at the outset that, if we find in an Act of Parliament a provision of that kind in words which cannot be interpreted otherwise, it is a very strong provision, and it is difficult to see upon what principle it can have been enacted by Parliament—although Parliament has the power to enact it—that is to say, that a solvent man who has entered, with his eyes open, into a covenant with the owners of property to

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pay rent to them and to be liable to them for that rent and for other covenants, and who upon an assignment has recognised that liability, and has stipulated that it shall continue, shall nevertheless be delivered from that liability, not by reason of anything which has passed between him and the lessors, but from a misfortune which has happened to the lessors, namely, that the person to whom the lease has been assigned has become a bankrupt. It is said that the 23rd section of the Act of 1869 produces this result. I admit freely that the section seems to me to be capable of that construction. No doubt, if you read it literally, it does seem to provide that "when any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants" (I pass over some words which are unimportant), "the trustee may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a lease, be deemed to have been surrendered on the same date" (the date of the order of adjudication). It says, "shall be deemed to have been surrendered;" it does not say, "shall be surrendered," but there shall be a statutory fiction gone through, the result of which is that the lease shall be deemed to have been surrendered on that date. It is possible that that may mean that to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease, and shall be altogether out of the case. But, on the other hand, is that the only interpretation? For that purpose your Lordships, I think, must consider what the object of this provision is. Why is it that there is this statutory fiction introduced? The section obviously is not one which has been prepared with much care or skill, or which shows, indeed, that the persons who were preparing it had fully present to their minds the various cases with which they had to deal. But is this necessarily the only construction of which the Act admits? I say that we must look to what the purpose is. Now, I take it that the purpose of this section, and indeed the purpose of the whole statute, is in the first place to clear and discharge the bankrupt in cases where it is proper that he should be discharged from liability; in the next place, to facilitate as early as possible the distribution of the property which is to be divided among the creditors in the winding-up of the bankruptcy; and, in the third place, to protect the trustee from any liability to which he might be subject, and to which he ought not to be subject beyond what is necessary for the purpose of accomplishing the two prior objects. If, therefore, the statute can admit of any construction limited to these particular objects, we must consider whether that is not a construction preferable to the first to which I have referred. The first construction requires us, if the section is taken literally, to do that for which there is no motive, and as to which there can be no explanation given; that is to say, to destroy the rights and property of third persons without accomplishing any beneficial object whatever for the purpose of the bankruptcy. It appears to me that, as between these two constructions, the balance is stated most fairly and most pointedly by James, L.J. in one of the cases to which we have been

referred. In *Ex parte Walton (ubi sup.)* James, L.J. says this: "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this *cessio bonorum* to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say that, when the statute says that a lease which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking) is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdity: 'shall, as between the lessor on the one hand, and the bankrupt, his trustee, and estate on the other hand, be deemed to have been surrendered.'" It appears to me that both of those constructions to which I have referred, the construction contended for by the appellant and the construction placed upon the section by James, L.J., are possible constructions; and where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the court to adopt the second, and not to adopt the first of those constructions. I think that that would have been the conclusion at which I should have arrived if the matter had been new. But the matter is not new. This statute was passed in 1869; there have been not a great number of decisions, but a substantial number of decisions upon it, beginning with the case of *Smyth v. North (ubi sup.)*, and coming down to the last of the cases which have been referred to in the argument. Those decisions, so far as they are decisions (I mean the decisions in those cases where there was an actual decision), are all on one side. There is no decision which favours the construction put upon this section of the statute by the appellant; the decisions are all the other way; and your Lordships have here a very learned judge, Hall, V.C., and three learned judges of the Court of Appeal, all concurring, taking the same view, and holding themselves bound by those decisions which have taken place. I think it would be a very strong and a very violent thing, in construing a section of this sort, which deals with property that upon every bankruptcy to a greater or less extent changes hands, and with respect to which section—in scores of cases which have not come into court at all, the decisions which the court has arrived at in other cases have, no doubt, been followed—it would, I say, be a very strong and violent thing if, without the very strongest reasons, your Lordships were now to alter that course of decision, and to say that in all the cases which have been decided, and all the cases where the parties have acted upon the authority of those decisions, although without any decision in their own particular

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cases, there has been done that which has been wrong, and which ought to be undone. That has not, I think, been a course which this House has pursued, and certainly I should not recommend your Lordships to pursue it. Therefore, for these reasons, which I have shortly given, I advise your Lordships in this case to affirm the decision of the Court of Appeal, and to dismiss the appeal with costs.

LORD BLACKBURN.—My Lords: I am of the same opinion. I think the whole question depends upon the true construction of this 23rd section, of which we have heard so much, and I quite agree that whenever the Legislature (who have perfect and absolute power to enact what they please) have trusted the drawing of this Act to someone who uses words which, to say the least, are very obscure, there must be a risk of some difference of opinion as to their construction. In this particular case the construction which has been put upon the section by the appellant, namely, that the words "shall be deemed to have been surrendered," used in their context and in the way in which they are used, amount to saying "shall be to all intents and purposes as if it had actually been so," is a construction which I am not prepared to say is the natural and ordinary sense of the words, but it certainly is a construction which the words might bear. The other construction which has been put upon them is one which the words, in my opinion, would rather more reasonably bear of the two, namely, that the lease is to be deemed to have been surrendered as far as is necessary to effectuate the purposes of the Act. That being so, the question which is really raised is, how are the words to be construed in the Act as it stands? I think that it is a question of very considerable difficulty; but, in delivering my judgment, I am myself relieved from that difficulty, because the late James, L.J., in *Ex parte Walton* (*ubi sup.*), expressed in better words than I could select exactly what I conceive to be the *ratio decidendi*. I think the words here, "shall be deemed to have been surrendered" (and a similar observation of course applies to the other expression of the same kind, "shall be deemed to be determined") mean, shall be surrendered as far as is necessary to effectuate the purposes of the Act and no further; and I think that to give them the sense which the learned counsel for the appellant contend for would be to go far beyond the purposes of the Act, and to work a cruel hardship upon persons in the position of the present lessors, the East and West India Dock Company, and on all persons who have a solvent security for their rent (in this case for a period of twenty-one years), in consequence of there having been an assignment of the lease, as is pointed out by James, L.J. in the case to which I have referred. If the assignee had died insolvent, leaving no assets, and consequently no one would have taken out administration, or, if anybody had done so, he would not have pleaded to any suit that was brought to recover—I say that under those circumstances there would have been no doubt that the East and West India Dock Company could have had recourse against Mr. Hill to make him pay the rent so long as the lease continued. If the appellant's construction is a sound one, any Act which was passed for the purpose of relieving a trustee from the liability (whether he has or has not incurred it does not appear to me

to be very material, but at all events he is entitled now to get rid of it), and for the purpose of relieving a bankrupt from the liability which he is under, would be enacted for no purpose at all that I can see if it is to relieve Mr. Hill from the liability which he has incurred, to the serious and great loss of the East and West India Dock Company, who thus lose their security for no purpose or object whatever. Of course the Legislature might have enacted that; but entertaining the opinion that the construction put upon the section by James, L.J. is, if anything, more natural and more reasonable and more correct than the construction for which the appellant contends, I certainly think it right to give effect to that construction. I have not based my opinion at all upon the fact of there having been such a continued course of proceeding that it would be right, upon the ground of what I may call the *maxim communis error facit jus*, to adhere to it. I quite agree that the principle is a very sound one that where the law has been regarded as settled for a considerable time it ought to be adhered to; but I doubt whether this case is one where that principle would apply. However, on the other ground I have no doubt whatever that the judgment of the court below is right, and should be affirmed.

LORD WATSON.—My Lords: I am of the same opinion and for the same reasons.

LORD BRAMWELL.—My Lords: The opinion that I expressed in the case of *Smyth v. North* (*ubi sup.*) is one to which I still adhere. At the same time I frankly own that, if I had to advise anybody as to whether my opinion should be acted upon, or the opinion of the noble and learned Lords who have addressed your Lordships, I should say undoubtedly the weight of authority is so against me that I must somehow or other be in the wrong, though I cannot see it. Now, in the first place, I think it is important to ascertain what is the meaning of this provision about disclaimer; and, having heard no reason to the contrary, but a very good reason from Mr. Latham for abiding by my opinion, it does seem to me that property does not vest in the trustee until he has done some act to accept it, and that, consequently, a disclaimer is only a necessary thing where he would be held to have accepted but for the power of disclaiming. I come to that conclusion for several reasons, which I will state very briefly. One is, that it was undoubtedly the law, when there was an actual assignment of the bankrupt's property made to the assignee of the bankrupt, thence so called, that it did not vest in him unless he chose to take it. Another is, that the expression used in this unhappy sect. 23 is, that he may disclaim *notwithstanding that he has done something* which would be evidence of his having accepted. And my third reason is, that I cannot suppose that the Legislature (although I am capable of supposing nearly anything with respect to this particular Act of Parliament) intended that every trumpery matter should be a subject of disclaimer; and there must be an infinity of small contracts which would, in a sense, vest in the trustee, if he chose to accept them. I cannot think that it would be necessary that in every case he should be put to the trouble and expense of making a serious disclaimer. Now, it may be said, what has that to do with the matter in

hand? Why, in the first place, it seems very much to have been the basis of the judgment of Jessel, M.R., and I cannot help thinking that, if it were investigated, it would be found to have some bearing upon this matter; because, supposing the trustee were to say, "I shall not accept the lease, and I shall not disclaim," what would be then the condition of the bankrupt? I believe that a bankrupt lessee or a bankrupt assignee of the lease would be as much discharged from the covenants and obligations in the lease as he would from any other debt; but the lease would continue in existence, and I should like very much to see what effect and operation (if it were worth while to go into it now) that would have upon the question before us. It may very fairly be said, as, I think, I put it in the course of the argument, that if in that case the lease subsists, as it undoubtedly would subsist, and if the original lessee is liable, why should the trustee, by doing what in many cases would be an act of supererogation, discharge him and effect this compulsory surrender? I therefore think it would be really worth inquiring into in order to ascertain what would be the effect upon the lessee and upon the assignee of the lease, if, as I say, it does not vest in the trustee and if he did not think fit to disclaim. However, I am not able now to go into it, for I do not at present remember enough of the matter to be able to do so. Though the Act 32 & 33 Vict. c. 71 does not itself repeal former bankruptcy Acts, they are repealed by an Act of the same session. There is therefore nothing to show that if the trustee did not take to the lease, the lease would not be in existence or would be in any way affected by the bankruptcy of the lessee or the assignee of the lease. Lord Wensleydale's rule for the construction of statutes and other writings was very much relied upon, especially by Jessel, M.R. in *Ex parte Walton* (*ubi sup.*), where he quotes it thus: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that, in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." I have often heard Lord Wensleydale lay down that rule, which he quoted from a judgment of Burton, J. in Ireland (*Warburton v. Loveland*, 1 Huds. & Br. 648), and I am content to take it as a good rule, though I heard Crompton, J. say in reference to it that he did not set any value upon any golden rule—that they were all calculated to mislead people; and I am not sure that this will not result from what is put at the end of what I have just read, namely, that you are to abide by the grammatical and ordinary sense of the words, unless that would lead to some absurdity. That last sentence opens a very wide door. I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another. This probably did not seem absurd to the drawer of this Act of Parliament, who most likely did not contemplate the conse-

quences of what he was putting down. I think it an unbecoming thing as a rule in those who have the administration of the law to speak disrespectfully of it; but I feel justified in making an exception in the case of this unhappy Act of Parliament, which is no longer law. In my opinion it ought to be construed upon the footing that the construction should lead to an absurdity rather than otherwise. I feel the very greatest difficulty in applying Lord Wensleydale's rule to this particular Act of Parliament. My judgment in this case is founded upon what to me is the plain language of this Act of Parliament. I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the Legislature to set it right, than to alter those words according to one's notion of an absurdity. Now the words of the section, to my mind, are plain. It says, "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants or unmarketable shares"—I want to call your Lordships' attention to this: it says, "unmarketable shares." It does not say shares that are pledged and not worth more than the sum they are pledged for—"in companies, of unprofitable contracts or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell," and so forth, "may by writing under his hand disclaim such property." And now I will ask your Lordships to mark the words which follow, "and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication." What is the plain sense of that? The Legislature might have said, "shall be determined from that date." What is the difference between saying "shall be deemed to be determined" and saying "shall be determined?" I cannot see. Then it goes on—"and if the same is a lease be deemed to have been surrendered on the same date." I suppose they might, although it would not have been good English or good grammar, have said, "shall be, or shall have been, surrendered as from that date;" but it would not have been the truth, for it would not have been in fact surrendered, and therefore the right expression to use, to my mind, was to say that it shall be deemed to have been surrendered as from that date—"and if the same be shares in any company be deemed to be forfeited from that date." I cannot help saying it is a striking thing if this consequence should follow, which I think I suggested in the course of the argument—that by virtue of this Act of Parliament a present might be made to a company of, say, 500*l.* worth of shares, which had been pledged to some person to the value of 500*l.*, and which were worth that and no more; but I doubt very much whether that would be within the section of the Act of Parliament, because the expression is "unmarketable shares," and those would not be unmarketable. Then the section says, "and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt;



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but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt." Now, those are the plain words. It is admitted that there is a non-natural construction to be put upon them. I should not say "construction," because it is not a case of construction; it is not what Lord Wensleydale calls a modification of the words; it is a case of positive addition to the language, and an addition to the language in this remarkable way: if it is only a case of lessor and lessee, then you add no words, and the lease is actually surrendered—that is the argument as I understand it; but if it is a case of lessor, lessee, and assignee of the lease, and the assignee becomes bankrupt, then you insert these words in the Act of Parliament, "shall be deemed to have been surrendered." I would use the forcible language of that consummate judge, James, L.J. in *Ex parte Walton* (*ubi sup.*). It must be understood as saying, "shall as between the lessor on the one hand, and the bankrupt, his trustee, and estate on the other hand, be deemed to have been surrendered." So that in the case of lessor and lessee only—that is to say, bankrupt lessee—you insert no words and there is a surrender; in the case of lessor, lessee, and bankrupt assignee, you insert those words which James, L.J. says must be put in. What justification is there for that? On the ground that otherwise it leads to an absurdity. But it leads to an absurdity if you put the words in—that is the mischief of it. If I could see that putting the words in would get you out of an absurdity and lead you into no other absurdity, then I should be inclined to put in the words too; but to my mind there is as great absurdity and as gross an injustice resulting from the insertion of those words in this particular case as there is in not inserting them in the case which he puts. I remember the Lord Justice telling me the gratification with which he had been able to get out of what he thought the mischievous consequences of this Act of Parliament. Undoubtedly it is a shocking thing to consider, as he says, that there would be the most grievous injustice and the most revolting absurdity if the Act is to be construed, as in my judgment it ought to be construed—that is to say, according to its plain language—because you might have a case of an equitable deposit of a lease for value, the trustee disclaims, and the lease is gone, to the great and unjust loss of the man with whom it has been deposited. It is hardly an argument in construing this statute; but if its framers meant what your Lordships say his words mean, he could easily have said that the bankrupt should be discharged from all the obligations of the lease. No doubt the difficulty I point out would have arisen then, but he would have said what he meant. But what this unhappy appellant is to do or suffer I cannot see, except this, that according to the judgment of this House he is to pay the rent for the rest of the lease. But is he ever to have any enjoyment of the property? I cannot see that he is. If he were to bring ejectment it would be said, "You are in this dilemma, either the lease is surrendered and then you have no title, or if it is still in existence you have assigned it to somebody else." He cannot maintain an ejectment. What is he to do? The 23rd section says, "Any person interested in any disclaimed property may apply to the court, and the

court may, upon such application, order possession of the disclaimed property to be delivered up to him," and so forth. Is he interested in the disclaimed property? Certainly not. He has parted with all his interest in it. His only interest in it is that unpleasant one of having a duty in respect of it. It seems to me that if he were to apply to the court, it would be impossible that the court would grant him possession of it. I say here is a revolting absurdity and a shocking injustice, as far as I can make it out, in the consequences, not of the construction, but of the addition which has been made to the language of the Legislature; that is to say, this unfortunate man, for anything I can see, may have to pay this rent to the end of the term, and yet have no enjoyment of the property. I do not see how he is to get it. When I say this man, I mean a lessee, because I am not arguing upon the particular merits of this case, for, I suppose, somehow or other, as a matter of mercy, some relief will be given to him. There is no doubt the respondents may give it to him by insisting upon the payment of the rent from the mortgages in possession, and I cannot see why this course was not taken. I am speaking in the abstract. I say that the consequences of the construction put upon this Act of Parliament are that the lessee may have to pay rent, and yet have no benefit from the property in respect of which he is paying the rent. There is just one word more that I should like to say, which is this: Suppose the bankrupt is not discharged, which he may not be, then unless he pays a certain amount—a certain number of shillings in the pound—(I am glad to think that in the last Act it is more onerous than it is in this Act) at the expiration of three years from the close of the bankruptcy "if the debtor has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy shall be deemed to be a subsisting debt in the nature of a judgment debt." I will not say this particular lessee, but what is a lessee to do under those circumstances? Is he to prove his debt, and to have, in effect, a judgment debt against the bankrupt assignee of the lease? That cannot be, because as between the assignee of the lease and the lessor the lease is determined. What is to happen I do not see. Now, I must say, as far as my own judgment is concerned—as far as, independently of authority, I can make up my mind upon this matter—it seems to me a plain case. I think the language of the Act of Parliament is unmistakable, and I think it is a wrong and an objectionable thing to endeavour to add words to an Act of Parliament or to any other document for the purpose of avoiding an absurdity that was not seen by nor in the contemplation of the person who drew the Act of Parliament or other document, and who therefore framed the provision in plain language, as he thought, because he knew of no better. In this particular case I cannot see but that as much mischief and injustice will result from the decision of your Lordships as would result from a decision the other way. To my mind, it comes to this: The statute says the lease should be deemed to be surrendered; your Lordships say it shall not. You do this to avoid one injustice, and in doing it you cause another. At the same time, although I speak in this way, I desire to add, with perfect sincerity, that I suppose, considering the weight



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of authority against me, I must be in the wrong in the opinion I have formed, and, although I cannot concur in the views which have been expressed, I am quite aware that it is right that the judgment should be the other way.

*Judgment appealed against affirmed, and the appeal dismissed with costs.*

Solicitors for appellant, *Soames, Edwards, and Jones.*

Solicitors for respondents, *Freshfields and Williams.*

## Judicial Committee of the Privy Council.

Feb. 27, 28, 29, and March 22.

(Present: The Right Hons. Lord BLACKBURN, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

LETTERSTEDT v. BROERS. (a)

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

*Trustees — Removal of, by court — Principles of equity — Misconduct of trustee.*

*It is the duty of a court of equity to see that trusts are properly executed, and therefore, even though no charge of misconduct is made out against a trustee, the court will remove him if satisfied that his continuance in office would be detrimental to the proper execution of the trusts.*

*Friction or hostility between the trustee and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee, but it will not be disregarded by the court, when grounded on the mode in which the trust has been administered.*

*Judgment of the court below affirmed with a variation.*

THIS was an appeal from two judgments and an order of the Supreme Court of the colony of the Cape of Good Hope in an action brought by the appellant against the respondent Broers.

The appellant was the only child of Jacob Letterstedt, who died in 1862, and the respondent was the secretary of the "Board of Executors of Cape Town," which is an incorporated joint-stock company established for the purpose, amongst others, of administering estates to which they may be appointed executors, charging a commission.

Jacob Letterstedt was possessed of considerable real and personal property, and he appointed the board and two other persons executors of his will. The other executors had died, and this action was brought against Broers, as secretary of the board, which was the sole remaining executor, for an account, and to have the board removed from the executorship on the ground of breach of trust in carrying on the business of the testator, and in charging excessive and improper commissions, and for misconduct and malversation in the trusts and administration of the estate.

The other respondent, Giddy, was added as a nominal defendant, by order of the court, to represent the interests of the reversioners after the death of the appellant.

The facts of the case, the provisions of the will

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

of the testator, and the orders appealed against, are set out fully in the judgments of their Lordships.

*H. Davey, Q.C., Jeune, and Elgood* appeared for the appellant.

*H. Matthews, Q.C., Rigby, Q.C., and H. D. Greene* for the respondent Broers.

*E. W. Byrne* for the respondent Giddy.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 22.—Their LORDSHIPS gave judgment as follows:—This is an appeal against part of a judgment of the Supreme Court of the Colony of the Cape of Good Hope, dated the 11th July 1879, an order dated the 14th Sept. 1880, and a judgment of the 2nd July 1881. These judgments and order were made in an action commenced by the appellant in June 1878 against the defendant Broers, in his capacity of secretary to "the Board of Executors of Cape Town," who are the principal defendants below, and respondents now. This is a body incorporated by an Ordinance of the Cape of Good Hope. It is not necessary to say more of them than that, by the terms of their deed, they might act as executors and trustees, on the terms that they were to have remuneration for so acting. The other respondent was added during the litigation by directions of the court below. It is not necessary to notice him further until the costs of this litigation are to be disposed of. It is desirable, before proceeding to discuss the judgments and order, to state so much of the facts as is necessary to make them intelligible. The appellant is the only daughter of Jacob Letterstedt. She was born on the 13th May 1853, and consequently attained the age of twenty-one on the 13th May 1874, and the age of twenty-five on the 13th May 1878. Jacob Letterstedt, her father, died on the 10th March 1862, leaving a will. This appeal does not require their Lordships to construe that will, and it is not necessary to state its provisions further than is required to make intelligible the questions which their Lordships are called upon to decide. The testator carried on in his lifetime a brewing, distillery, and malting business, at two places, Mariédahl and Cape Town, and he directed in his will that this business should be carried on after his death as the same was carried on by him, and that his executors should advance a sufficient capital for the purpose, not exceeding in all 10,000*l.* He makes rather elaborate provisions as to how the business should be carried on by managers; and he directs that the profits of the business should, until his child or children should attain their age of twenty-five years, be divided into six shares, "whereof four shares shall be for the benefit of my child or children, one share to the manager of the business at Mariédahl, and one share to the manager of Cape Town." He appoints David Thompson to be manager at Mariédahl. At Cape Town he appoints Per Oscar Hedelius, and failing him Tobias Spengler. And he directs that in case of a vacancy the executors shall, when requisite, appoint a fit person to be manager. If the manager at Cape Town prefers it, he is to receive an annual salary of 350*l.*, with a further allowance of 150*l.* for a clerk, instead of a share in the profits. So long as the business is carried on in the above manner, the executors are to appoint two persons to inspect the property and examine

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the accounts twice in every year, receiving two guineas a day for their trouble. The testator also at the time of his death carried on a business in partnership with Per Oscar Hedelius under the firm name of Jacob Letterstedt and Co. There is no direction in the will as to this business, but, under the terms of the deed of partnership, it is clear that the testator was not bound to carry on that business after the 1st Jan. next ensuing after the death of Per Oscar Hedelius; that is, as he died on the 6th July 1863, after the 1st Jan. 1864. What might be the obligations of the testator's executors under that deed during the twenty-one months between the death of the testator in March 1862 and the 1st Jan. 1864 it is not necessary to consider, but, after that date, they had no authority to carry on the business. The following parts of the will may conveniently be read now: "I declare that, in case my said daughter shall marry and have a son or sons, such son or the eldest son shall, upon his attaining the age of twenty-one years, be absolutely entitled to the house and premises situated No. 5, Heeren Gracht, including the stores, Nos. 3, 4, and 5, Castle-street; or, in case the same shall have been sold, the proceeds of the sale of the said house, premises, and stores, provided that, until such son of my said daughter shall attain the age of twenty-one years, my said daughter shall receive the rents of the said property, or the interest of the proceeds thereof, if sold as aforesaid. And I declare that the second son or such other younger son of my said daughter as shall take my name shall be entitled to the amount of a certain policy effected with the Alliance Life and Fire Assurance Company, London, upon my life for the sum of three thousand pounds, executed in the year one thousand eight hundred and fifty, with the interest which shall have accrued thereon from my death when he shall have attained the age of twenty-one years. And, in case there shall be no such son, the same shall fall into and become part of my general estate. And I declare that my said executors shall be entitled to administer the said house, premises, and stores in the Heeren Gracht and Castle-street, or the proceeds thereof, until the same shall devolve upon my grandchildren, and shall also administer the amount of the said policy of insurance and accumulations until my grandson herein mentioned shall become entitled thereto, or until the same shall fall into my general estate." The importance of this is that it shows that some, at least, of the trusts to be administered by the executors did not terminate on the appellant attaining the age of twenty-five years. And, in the possible event of her dying before her children attain twenty-one, the question who are to be the trustees during their minority may be of practical importance. Then, after giving some legacies, he proceeds: "And I devise and bequeath all the rest, residue, and remainder of my estate, property, and effects, as well movable and immovable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, which shall remain after payment of my just debts and funeral and testamentary expenses, and not hereby otherwise disposed of, unto my said daughter if and when she shall attain the age of twenty-five years, or marry under that age, the same to be bound with *fidei commissum*, so

that my daughter may enjoy the interest, dividends, and annual income thereof to be paid to her annually upon her receipt, or, in case of her absence from the place of residence, of my executors upon a power of attorney to be executed by her, and, with interest, dividends, or annual income, shall not be under the control of any husband whom she may marry, but shall be applied solely for her use and benefit, and after her death the said residue shall be paid and belong to her child and children upon such child or children attaining the age of twenty-one years being male, or attaining twenty-one years or marrying with consent of parents or guardians being female; and, if she shall die without leaving any child or children who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or marry, I devise and bequeath my estate, property, and effects, subject to the legacies and bequests hereby given, to the person or persons who, according to the law at the Cape of Good Hope, would be entitled thereto if I died intestate and unmarried. If I should leave any child or children hereafter born, who, being a son or sons, shall attain the age of twenty-five years, or, being a daughter or daughters, shall attain that age or marry under it, I declare that such child or children shall participate in all the legacies, bequests, and benefits hereby given to my said daughter in equal shares with her, and in that case I revoke and withdraw from this will the last clauses hereinbefore contained. And I direct that all moneys and effects which shall accrue by way of rent, profits of business, or otherwise, shall be paid to the Board of Executors, as follows, that is to say, the said rent within six months after the same shall become due, and the said profits within six months after the books shall be closed, and the profits of the business ascertained. I appoint Stads Kadet Carl Johan Malmsten, of Stockholm, Iven Gustav Letterstedt, and Rich Antiquarian B E Hildebrand, guardians of my daughter and of any other child I may leave during their minority; and in case of the death, resignation, or incapacity of any such guardians, or of any guardians to be appointed under this power, I empower the surviving or continuing guardian or guardians, or the executors or administrators of the last surviving or last acting guardian, to appoint a new guardian or guardians in the place of the guardian or guardians so dying, resigning, or becoming incapable. It is my wish that my said daughter, or any other child I may have, shall be educated in the Lutheran religion, and shall reside in Sweden after she or they shall have attained the age of thirteen years. I appoint Tobias Spengler, Per Oscar Hedelius, and the Board of Executors, Cape Town, the executors of my will and testament, and administrators of my estate, with all such power and authority as is required in law, and especially the power of assumption, substitution, and surrogation. I give to the said Board of Executors an annuity of one hundred pounds sterling so long as the business at Mariedahl shall be carried on. I declare that if any dispute should arise between the executors hereby appointed the same shall be decided by the vote of the majority, the Board of Executors having in such case one vote as if consisting of one person. I desire that an inventory shall be made of my

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estate within six weeks after my death, or if I shall die while absent from the Cape of Good Hope within six weeks after information of my death shall be received within the colony. I direct that my executors shall render to the guardians a full and particular annual account of all receipts and payments in respect of my estate, with proper vouchers for the same." The will was proved on the 19th May 1862 by the three executors, Per Oscar Hedelins who died in 1863, Tobias Spengler who died in 1866, and the board. No fresh executors were appointed under the power of assumption, substitution, and surrogation which the testator especially conferred on his executors, and so in 1866 the board were the sole executors and trustees under the will. After the death of Spengler, certain directors of the board took the management of the Cape Town business. The testator, who was by birth a Swede, and by his will desired that his daughter, after attaining the age of thirteen, which she did in 1866, should reside in Sweden, appointed as guardians Swedish gentlemen, no one of whom resided in the colony, or had, as far as appears, any connection with it. It can hardly be supposed that, if the testator had foreseen what was going to happen in 1866, he would have wished the trusts of his will to be administered thus; and it is not surprising that in 1871, when the appellant was growing up, the state of things became such that she was, or her advisers were, discontented. On the 11th April 1872 the guardians announced to the board that, one of the guardians having resigned, they had appointed Madame Lydia de Jouvencel, the mother of the appellant, to be co-guardian in his room. This information was conveyed in a long and ably argued letter, which, though signed by and in the name of Mr. Malmsten, one of the Swedish guardians, bears internal evidence of having been, in part at least, drawn up by a lawyer, probably Mr. C. A. Fairbridge, who represented the appellant in the subsequent litigation. This letter may be considered as the commencement of the litigation between the appellant and the respondent. In Oct. 1872 the other guardians resigned, leaving Madame Jouvencel sole guardian. An action was commenced in the name of Mr. C. A. Fairbridge as curator *ad litem* of the appellant, then a minor. On her attaining the age of twenty-one it was amended, so as to make the appellant herself the plaintiff. The object of the action was to surcharge the executors with sums stated as amounting to 28,512l. 2s. 4d., which they had allowed to themselves in the accounts of the business carried on by them. Had that action been tried out to the end and a regular judgment obtained, the plaintiff and defendant would have been bound by its result as to the matters involved in that action, but either might, if so advised, have brought other actions for other matters. But a compromise was come to, the terms of which were sanctioned by the court. The Board of Executors rendered liquidation accounts subsequent to the 31st Dec. 1872, which have been investigated in this action. The appellant, during the interval between the compromise and the commencement of this action, succeeded in establishing a claim to "her legitimate portion." The effect of this was greatly to reduce the amount subject to the trusts of the will. The appellant, on attaining the age of twenty-five, commenced the action in which the judgments

and order now appealed against were made. By the first eighteen paragraphs of the declaration the appellant sought an investigation of the accounts from the date of the appointment of the executors, and relief thereupon, and she claimed the right of conducting the testator's business. By the 19th paragraph she charges the board with various acts of misconduct and malversation, mostly before 1873, and these are so expressed as to impute to the board, or at least to those for whom the board was civilly responsible, that they were instigated by a corrupt motive. And then, in the 20th paragraph, she prays that the said board may be removed from the said office of executors under the said will, and that proceedings for the appointment of another executor or executors in the place of the board may be directed to be taken. This statement is, their Lordships think, all that is necessary to render intelligible the first judgment appealed against. That judgment is as follows:—"First judgment.—1st. That the compromise effected in 1874, in terms of which judgment was given by consent on the 26th Nov. 1874, was a final settlement of everything before the 31st Dec. 1872 inclusive, and cannot in this action be reopened or set aside. 2nd. That the accounts after the 31st Dec. 1872 be referred to James Rose Innes, Esq., advocate, assisted by Mr. Syfret, the accountant. 3rd. That plaintiff is absolutely entitled to the four-sixths of the profits claimed by her. 4th. That plaintiff is absolutely entitled to take over the business for her life, and to manage it as she thinks proper, proper inventories to be taken, and also to the use of the ten thousand pounds sterling invested in the business. 5th. That the question of the removal of the executors be reserved until the report is presented. Question of costs also reserved." The appellant had not at any time taken steps to set aside the compromise on any ground whatever. It has been contended on her behalf that the compromise should be construed as only applying to the questions raised in the action. But their Lordships think that the court below rightly held that it was impossible to construe the compromise in so narrow a sense. This was, indeed, hardly contested on the argument before their Lordships. They think therefore that the first paragraph of the judgment of the 11th July 1879 was right. The third and fourth paragraphs are not complained of, and their Lordships are not called upon to say more as to them than that the four-sixths of the profits to which the plaintiff is declared to be absolutely entitled must mean the four-sixths from the time when the business began to be carried on by the trustees. The second paragraph of the judgment was right, as far as it went, but at the very first meeting before the referee it appeared that it did not authorise the referee to investigate a question which, as it did not affect the liability or responsibility of the respondents, was not settled by the compromise, viz., how much of that sum which, on the assumption that every item of the accounts before the 31st Dec. 1872 was correct, the respondents had in hand belonged absolutely to the plaintiff, and how much was part of those sums in which she had only a life interest. The plaintiff asked the referee to determine that question; the executors objected; the referee could not act; and the plaintiff moved the court in the

terms mentioned in the next order. On the 14th Sept. 1880, it was ordered "that the plaintiff's application for an order on the said first-named defendants to make and deliver to the plaintiff an account, supported by vouchers, showing the amount of the four-sixths share of profits, commencing with their administration of the estate as executors, be refused, with costs." This is the order secondly appealed against. The judges' reasons for this order nowhere appear. The argument in support of it at the bar was that the order applied for was too large, and that as prayed for it was to have an inquiry not limited, as the proposal made before the referee was limited, by having the inquiry made on the assumption that every item of the accounts before 1878 was correct, and that it was intended to open the questions which by the first paragraph of the judgment of the 11th July 1879 were settled, or at least that an order granted in the terms prayed for would have had that effect. This seems to their Lordships a sufficient ground for not granting an order in the terms prayed for, but not a sufficient ground for refusing an inquiry as to how much the plaintiff held in her own right absolutely, and how much was only to be enjoyed by her for life. Their Lordships therefore think that this order should be varied. It seems probable that when the inquiry is made it will require nothing more than a dissection of the figures, but this cannot be certainly known, and the court should take whatever steps are necessary for making the inquiry effectual, and do whatever is proper when its result is known. Their Lordships will afterwards state what they conceive should be the form of inquiry. The final judgment of the 2nd July 1881, after confirming the final report of the referee, directs that the prayer for removal of executors be refused, plaintiff to have her costs out of the estate up to the first hearing. Defendants (the executors) up to that time to pay their own costs, and also the costs of the reference as to accounts, and of this final hearing, with the exception of the costs of the last reference as to the 4396*l.* 12*s.* 3*d.* which are to be paid by plaintiff. The curator to have his costs out of the estate." Their Lordships have felt much anxiety about this judgment. The whole of the matters which have been complained of, and the whole that, if this judgment stands, may yet have to be done by the board, are matters which they had to do, as having accepted the burthen of carrying out the trusts which on the true construction of the will were imposed upon them, and so become trustees. What they had to do as executors merely, such as paying debts, collecting assets, &c., have long ago been over, and by the terms of the compromise the plaintiff cannot now say they have not been done properly. There may be some peculiarity in the Dutch colonial law, which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice; the whole case has been argued here, and as far as their Lordships can perceive in the court below, as depending on the principles which should guide an English court of equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said in Story's Equity Jurisprudence, sect.

1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles. Story says, sect. 1289, "But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity." It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty—to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate. The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the court below, for, as far as their Lordships can see, the board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated. In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case. The first and most obvious fact that arrests

the attention is the entire change which events made in the position of the board from that which the testator assigned to it. His will is marked by much caution. He appointed three executors. If they differ the majority is to prevail, the board voting as one person. The different branches of the business are to have each its own manager, with a substantial remuneration. Paid commissioners are to examine the stock and the accounts at frequent intervals. On failure of executors powers are given to appoint new ones. It is quite conceivable that the testator thought that, with such safeguards, it would be for the benefit of all that the board should perform, and be paid for performing, the necessary work. But it is difficult to suppose that he would wish it to be the sole executor, as it became and remained, managing one branch of the business through its own directors, and appointing no examining commissioners except persons connected with itself. It is true that at the present time the functions of the trustees are of a simple character, perhaps extending little further than the safe custody of the trust estate. But the death of the plaintiff leaving infant children would alter that state of things; and questions might then arise both concerning the brewery business and the rest of the estate, not far differing from those which have caused so much dissatisfaction. From the course which has been pursued below there has been no full inquiry into what took place before the 1st Jan. 1873, and the charges in the first head of paragraph 19, of *mala fides* and corrupt motive, cannot perhaps be said to be disproved, but they certainly are not proved, and are such as ought not to be assumed without proof to be well founded. The terms of the compromise bind the plaintiff to treat the result of the breaches of trust to have been such that she elected as most for her benefit to adopt them, and take the things as they stood, rather than undo the whole and take an account. Their Lordships see no reason to doubt that her advisers exercised a sound discretion in advising her to take that course, but it is enough to say that she elected to take it. And the same remark applies as to the 4th, 5th, 6th, and 7th heads. The compromise equally binds the defendants in so far as they admit that a very considerable sum beyond what they were entitled to had been taken by them. The third head seems to be true so far as that the accounts rendered to the guardians were not so full as they ought to have been, and did not disclose the amount of commission taken by the board, though before the first action, which resulted in the compromise, or at all events before the compromise itself, the appellant and her advisers had the deficient information supplied. The latter part of the third head, though, as already said, it cannot perhaps be said to be disproved as to what took place before 1873, is certainly not proved, and is of such a nature as not to be assumed without proof. As regards the accounts after 1872, their Lordships find it difficult to understand how it was possible for men of business to think themselves entitled to the large sums charged by them in the liquidation accounts for commission, and disallowed under the second and third exceptions. Again, it is impossible to suppose that the executors could really have thought themselves entitled to the sums charged by them, but never paid, for taxation in the master's office. It has

been imputed to the executors at the bar that the disallowed charges for commission have been entered in the accounts in such a way as to amount to concealment and bad faith. Their Lordships do not accept that imputation. But though their Lordships acquit the board of concealment in these accounts, the spirit which permits such charges is naturally offensive to the appellant and unfair towards the trust estate. They can only be made by persons who are themselves exasperated by the course pursued towards them, and determined to try somehow or other to get remuneration of which they conceive themselves to have been unjustly deprived. The making of such charges, and the vexatious course pursued by the board in opposing the perfectly reasonable inquiry which the plaintiff asked before the referee, are calculated to introduce additional irritation into a relation which was disturbed enough before. And they have an important bearing on the question whether, in view of the future welfare of the trust estate, it is expedient that the board should remain trustees. It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded. Looking, therefore, at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties which may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the board should no longer be trustees. Probably if it had been put in this way below they would have consented. But for the benefit of the trust they should cease to be trustees, whether they consent or not. Their Lordships think therefore that the portion of the final judgment which is, "That the prayer for removal of the executors be refused," should be reversed, and that in lieu of it the court below should be directed to remove the board from the further execution of the trusts created by the will, and to take all necessary and proper proceedings for the appointment of other and proper persons to execute such trusts in future, and to transfer to them the trust property in so far as it remains vested in the board. The rest of the judgment should stand. It only remains to dispose of the costs of the appeal. Their Lordships think that the appellant not having succeeded in what was one main ground of her appeal, and having persisted in charges of fraud which the evidence does not sustain, ought to bear her own costs of the appeal. The board having good grounds for thinking that to submit to the appeal would be derogatory to their character, and so injurious to their business, ought not to be made to pay costs; but as they are wrong in resisting the inquiry concerning the profits, and as their removal is held to be necessary, ought to bear their own costs of the appeal. The nominal respondent, Mr. Giddy, whom the court have appointed to represent the interests of the reversioners, should have his costs of this appeal out of the estate. Their Lordships will

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humbly advise Her Majesty in accordance with this opinion.

Solicitors for the appellant, *Venning, Sons, and Mannings*.

Solicitors for the respondent *Broers, Flux, Son, and Co.*

Solicitors for the respondent *Giddy, Watney, Tilleard, and Freeman*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

*Friday, May 30.*

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

PONSONBY v. PONSONBY. (a)

*Divorce—Practice—Variation of settlements—Capital—Jurisdiction—22 & 23 Vict. c. 61, s. 5—Appeal—Discretion of judge.*

*A wife, who had obtained a divorce from her husband, having applied for variation of the settlements, the judge refused to give her any part of the capital of the fund, which had all been settled by the husband, although there were no children of the marriage, and he gave her a portion only of the income.*

*Held, by the Court of Appeal, that his decision must be affirmed, as, although the court had jurisdiction to deal with the capital, it would not be for the benefit of the wife to give her any part of it, and the court refused to interfere with the discretion of the judge as to the amount of income to be paid to her.*

On the 22nd May 1883 a decree was made absolute for the dissolution of the marriage of Mr. and Mrs. Ponsonby, the suit having been instituted by the wife on the ground of the husband's cruelty and adultery. There were no children of the marriage.

On the 18th March last a motion was made on behalf of the wife that the marriage settlements might be varied.

The registrar made a report by which it appeared that by a post-nuptial settlement, dated the 8th Oct. 1873, the respondent assigned all his real and personal estate (with certain trifling exceptions) to trustees to raise 2000*l.* for the benefit of himself for life, with remainder to the petitioner for life, with an ultimate remainder to himself absolutely on failure of issue. He also covenanted to pay the said sum of 2000*l.* and to effect a policy of insurance upon his own life for 1000*l.*

The policy was never effected, and the only funds that had come to the hands of the trustees was a sum of 300*l.* and accumulations amounting to 24*l.* 17*s.* 4*d.*

It appeared that on the death of the respondent's father he would be entitled to a sum of 1700*l.* which would be available for making up the 2000*l.*

The respondent was also entitled to a life interest in 2500*l.*, which was not included in the settlement, but he had charged this so that he only derived an income of 20*l.* from it. He had

no other means of support as he had been dismissed from the navy.

The petitioner had no means, and was entirely dependent upon her friends and relatives for support.

*Searle*, for the petitioner, applied to the court to extinguish the respondent's interest in the settlement, and to order that the sum of 300*l.*, together with the accumulations, be paid to the petitioner for her costs, and that the trustees be empowered from time to time to apply any portion of the 1700*l.* to her for her own use.

*Middleton* for the respondent.

*BUTT, J.*—The object of the settlement was to make a provision for the wife during her life, but the effect of the order asked for would be to give her the money absolutely and at once. This I think I ought not to do, nor ought I to make any order as to the 300*l.*, as this would have the effect of giving the money to the husband, by relieving him of his liability for the costs of the suit.

The Court ordered that the petitioner should receive the income of the trust fund so long as the fund did not exceed 1000*l.*, and that the respondent should retain the income of the rest of the fund.

From this decision the petitioner appealed.

*Searle* for the appellant.—The 22 & 23 Vict. c. 61, s. 5 gives the court power to deal with the capital as well as the income. That Act enables the court to make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit. It having been held that the court had no power to interfere under that Act unless there were children of the marriage, the Act was extended to cases where there are no children, by 41 Vict. c. 19, s. 3. There being no children here, there is no reason why the capital and income should not be dealt with. The husband has not performed his part of the covenant. He has not provided the funds promised or insured his life. The wife therefore asks that a part of the capital may be paid to her or a larger share of the income. If the money remains tied up now, it will only be for the benefit of the husband, who has misconducted himself, as after the death of the wife he has an absolute power of appointment.

*Middleton* for the respondent.—There is no precedent for this application. Besides, if any of the capital is paid to the wife, it will not benefit her, as it will be expended in paying the costs of this suit. The amount of income paid to the wife should not be increased as the husband is almost without means of support. The judge in the court below has exercised his discretion in the matter, and the court will not interfere with it unless there is some great miscarriage of justice:

*Wigney v. Wigney*, 46 L. T. Rep. N. S. 441; 7 P. D. 177.

*Searle* in reply.

*BAGGALLAY, L.J.*—I am of opinion that, beyond a doubt, we have jurisdiction to deal with the capital as well as the income. But we must have regard to the interest of the lady, and we do not think it would be for her interest to give her any portion of the capital. The next question is as to the amount of income to be given her. I do not say what I might have thought right to do if the

(a) Reported by W. O. Biss, Esq., Barrister-at-Law.



case had been before me in the first instance. But the judge in the court below has exercised the discretion conferred on him by the Act, and he thought it reasonable to give the petitioner the income of 1000*l.* only of the fund. If the fund had been originally the wife's property it might have been different, but, under the circumstances of this case, I am not disposed to interfere with the exercise of the judge's discretion. The appeal must therefore be dismissed.

COTTON, L.J.—I am also of opinion that we have undoubted power under the 22 & 23 Vict. c. 61, s. 5, to deal with the capital of the settled fund. The word "property" extends not only to income, but to capital, and the court has jurisdiction to deal with the capital in the same way as the income, for the benefit of the husband, wife, and children, if there are any. In any case of emergency I should not hesitate to do so. But in the present case I do not think it would be for the benefit of the wife to pay her any portion of the capital. As regards the income, I do not think it is a case in which we ought to interfere with the discretion of the learned judge. If he had given the whole income I might not have differed from him; but, as he has given part, I see no reason for overruling his discretion.

LINDLEY, L.J.—I agree.

Solicitors for the petitioner, *Prideaux and Sons*.  
Solicitors for the respondent, *Guscotte and Co.*

Monday, Feb. 11.

(Before COTTON, and LINDLEY, L.JJ.)

Re EVANS; WELCH v. CHANNELL (a)

*Guardian and ward—Maintenance of infants—Payment of income to co-guardian—Liability—Vouchers.*

*C. and H. were trustees and executors of a will and guardians of the testator's daughters, who during their infancy were maintained by C., and H. allowed him to receive the whole of the income of the estate. The daughters, having attained their majority, obtained a judgment for the administration of the estate, by which the usual accounts as to the personal estate were directed, and an inquiry how and by whom each of the daughters was maintained during infancy, and what was proper to be allowed, and to whom, out of the income of her share for her maintenance and education.*

*H. afterwards applied for a declaration that the receipt by C. of the income of the shares of the daughters for their maintenance was a good discharge to H., and that he ought not to be called upon to produce any vouchers in respect of the particular manner in which such income was applied.*

*Held, that H. was not discharged by evidence of the payment of the income to C.; but, if it were shown that the infants had been properly maintained and educated by C., a proper sum would be allowed for that purpose without the details of the expenditure being vouched.*

By his will, dated the 25th June 1862, William Evans appointed F. Channell, who was his brother-in-law; J. Quick, since deceased; and W.

Hickman, his executors and trustees and guardians of his infant children, and bequeathed to them his personal estate upon trust for conversion, and directed them to hold the residue, after payment of his debts, funeral and testamentary expenses and legacies (including a legacy of 800*l.* to his son) upon trust for his three daughters as tenants in common, settling the share of each upon trusts for herself and her children.

In May 1863 the testator died, his daughters being then infants. After his death they all went to school, spending their holidays with Channell, their uncle, and after leaving school they continued to reside with him until Aug. 1877, when they all left his house. The eldest attained the age of twenty-one in Nov. 1871, and the youngest in Dec. 1875.

In 1880 the eldest daughter, who was then married, commenced this action against Channell and Hickman for the administration of Evans' estate. Hickman, by his defence, alleged that Channell had maintained and educated the daughters, and that Hickman and Quick had paid to Channell, or permitted him to receive, the income for their maintenance and education during their infancy, and submitted that they were justified in so doing, and that Channell had expended more than the income on their maintenance and education, and he submitted that no detailed account of the application of the income could be called for.

On the 6th Dec. 1881 judgment was given, directing, amongst other things, an account in the usual form, of personal estate of the testator come into the hands of Channell and Hickman, or either of them, alone or jointly with Quick, the plaintiff waiving any account against Quick's estate; and also an inquiry how and by whom each of the three daughters was maintained after the testator's decease and during her infancy, and what was proper to be allowed, and to whom, from and out of the income of her share of the testator's estate, for her maintenance, education, or advancement from the testator's death until she attained twenty-one.

Channell died after this judgment without having rendered any account of his receipts and payments.

The chief clerk's certificate being in draft Hickman desired, under Order LV., r. 69, to take the opinion of the judge on the questions set out in a note of the chief clerk, by which, after stating that in account No. 1 he disallowed all items of payment alleged to have been made by Hickman to Channell for the maintenance and education of the infant children, he stated the following questions:—

"The defendant Hickman contends that so long as the plaintiff and her sisters respectively resided with and were properly maintained and educated by the defendant Channell, and were infants, the receipt of the same defendant, as one of the guardians of such infants, of the income of their respective shares, was a sufficient discharge to the defendant Hickman in respect of such income, and that he is not accountable for, and should not be called upon to produce any vouchers in respect of the particular manner in which such income was applied, nor the detailed items of expenditure thereof." The other point referred to the account.



of the income after the daughters respectively attained twenty-one.

The case was adjourned into court, and was heard by Kay, J. on the 19th Jan. 1884.

*E. T. Holland*, for Hickman, referred to

*Hora v. Hora*, 33 Beav. 88;

*Re Pensonby*, 3 D. & War. 27;

*Jodrell v. Jodrell*, 14 Beav. 397.

*Hastings*, Q.C. and *Badnall*, for the plaintiff, were not called on.

KAY, J.—There was a special direction given for an account on behalf of the infants, as against the guardians and trustees, and of course they must go into the question of each particular item of expenditure. The meaning of the order is, has or has not the income been properly expended, or how much of it has been properly expended? Payment by trustees or a trustee to a particular guardian may absolve them or him, but it does not absolve the guardian, and where the infants require an account to be taken as against the guardian, he must show he has properly expended the moneys. The court will require him to show that he has properly maintained the infants. This account must be taken as an infant and guardian account, and the chief clerk will know perfectly well how to take it, and he will be quite right in requiring that all the items of expenditure be proved. It is not enough to say that the income was paid to one of the trustees and guardians. If the surviving guardian had been only a trustee, perhaps the payments to the guardian deceased would have been a sufficient discharge, but it is not so, he being a guardian; for, being a guardian, he could not delegate his office to the other guardian, but he was bound to see that the income was properly applied. The surviving trustee is in error in supposing that, if he shows that the income got into the hands of his co-guardian and that the infants have been properly maintained, he is discharged where an account like this has been directed. The chief clerk has to investigate whether the infants have been properly educated and maintained, and he can do that only by ascertaining how much of the income has been actually expended for those purposes. From the time when the infants attained their majority the account will be taken as between them and their trustees, and if the accounts were wrongly taken there must be a motion to vary the certificate of the chief clerk. The application being quite unnecessary, the summons must be dismissed with costs.

The following order was drawn up: "The application of the defendant Hickman that it might be declared:" [Here followed Hickman's contentions as set out in the chief clerk's note, and a statement as to the application being adjourned into court and heard.] "The court, being of opinion that the accounts of the defendants the trustees should be taken as directed by the said judgment as between guardian and ward, doth not think fit to make any other order upon the said application," except an order for Hickman to pay the costs of the adjournment into court.

From this order Hickman appealed, and by his notice of appeal asked for directions "that the inquiry with reference to the maintenance, education, or advancement of the testator's three daughters until they respectively attained the age of twenty-one years, and also the account to

be taken under the said judgment of the income of their respective shares paid to and received by the defendant Channell, so long as they respectively resided with him after attaining the age of twenty-one years, may be taken in accordance with the contention of the defendant Hickman, set out in the note of the said chief clerk upon the following principles:" [Here followed Hickman's two contentions as set out in the chief clerk's note.]

The appeal was heard on the 11th Feb. 1884.

*W. Pearson*, Q.C. and *E. T. Holland* for the appellant.—The income paid by Hickman to Channell ought to be allowed in his account. The receipt of a guardian is a good discharge (23 & 24 Vict. c. 145, s. 26). Channell died before he could be examined with reference to his account of the expenditure of the income. The order appealed from leaves us in a very uncertain position. It refers to taking accounts as between guardian and ward as directed by the judgment, but no account is there directed to be taken in those terms, and such an account is never directed. The chief clerk required every item to be vouched, and this was upheld by Kay, J. But if the infants were properly maintained, a sum must be allowed without the necessity of vouching it.

*Hastings*, Q.C. and *Chadwyck Healy* for the plaintiff.—If Channell had been sole guardian his receipts would have been a good discharge; but Hickman being one of the guardians, it was his duty to see that the income was properly applied, and he is not discharged by allowing his co-guardian to receive the whole of it. If Hickman proves that the infants were properly maintained and educated, we admit that a reasonable sum must be allowed for that purpose under inquiry 13 without the items being vouched.

*W. Pearson*, Q.C. in reply as to costs.

COTTON, L.J.—In this case a great deal of expense has been occasioned by misapprehensions on both sides. The decree directed the ordinary accounts against the defendants, who were trustees and guardians, and an inquiry how and by whom each of the infants was maintained after the testator's decease, and what was proper to be allowed, and to whom, out of the income of her share of the testator's estate for her maintenance, education, or advancement till she attained twenty-one. That is not an account, but an inquiry for the purpose of ascertaining what, having regard to the position and income of these young ladies, was proper to be allowed for their maintenance and education; to be allowed, that is, to the executors, out of the balance found due on the account. On proceedings being taken in chambers under the decree, Hickman contended that, as to the income received by him, it was a sufficient discharge to show that he paid it to Channell for the maintenance of the infants. In that I think he was wrong; he was not only a trustee but a co-guardian, and we cannot lay down that he could discharge himself by payment of the income to his co-guardian. To decide that would be to hold that he could discharge himself from his duty as guardian to see that the infants were properly maintained. In my opinion, therefore, Hickman was wrong in his contention as to the mode of taking the account No. 1. But under the inquiry No. 13 I think that it was competent to Hickman to show that, though he was

answerable under account No. 1 for the payments he had made to Channell, the sums so paid were applied in such a way that the court would not call upon him to enter into the details of their application. Under that inquiry it would be enough to show that the infants were properly maintained by Channell, and Hickman would then be allowed the amount which was found the proper amount to be allowed for their maintenance without showing the details of the expenditure. I think that the chief clerk here took a different view, and considered that the details must be vouched. I think that he fell into an error owing to the attempt which Hickman had made to set up the payments to Channell as an absolute discharge. I think that the chief clerk would never have submitted these questions to the judge unless he had been of opinion that Hickman must produce vouchers for Channell's application of the income. The matter went before the judge, and an order was drawn up which, whatever the judge meant, is not very happily expressed. It expresses his opinion that the account should be taken as between guardian and ward. I conceive that the chief clerk would take that to mean that he was right in requiring the details of expenditure to be vouched, and some of the expressions used by the judge in the court below favour the idea that vouchers were to be carried in. I think that, having regard to these expressions, we ought not to allow the order to remain as it at present stands, but ought to express an opinion in these terms—that under account No. 1 Mr. Hickman, as trustee, is not to be discharged by mere evidence of payment to Channell, his co-guardian, of the income of the infants respectively, and that under inquiry No. 13 the defendant Mr. Hickman is not bound to go into evidence as to the items of expenditure by Mr. Channell, his co-guardian. It is hardly necessary to add to what I have already said, that under inquiry No. 13 it must be seen what was the position of these infants, and what was the proper sum to be allowed for their maintenance and education in a reasonable and proper manner, and whether Mr. Channell did maintain and educate them in a reasonable and proper manner. If he did so, then, in my opinion, whatever may be found a reasonable sum for the purpose ought to be allowed as against the balance under account No. 1 which has been found due from Mr. Hickman. But then comes the question as to costs. I said during the argument (and I have not changed my opinion) that a great deal of this unfortunate litigation and expense has been occasioned by the efforts of Mr. Hickman to get more allowed in his discharge under account No. 1 than he was entitled to have allowed, and that may have caused a confusion in the mind of the chief clerk, and possibly in the mind also of the learned judge, between inquiry 13 and account No. 1. I think it is to be gathered from the materials before us that the other side also contended for too much, and so misled the chief clerk as to inquiry No. 13. These considerations led me to suggest in the course of the argument that there should be no costs on either side. But a trustee is in this position: unless he misconducts himself he is entitled to be paid his costs, and though, in my opinion, Mr. Hickman did not behave in the best possible manner, and in some respects was wrong, I cannot say that in the contention he has raised

he did anything which can be considered misconduct. In my opinion, therefore, the costs both here and in the court below ought to be costs in the action.

LINDLEY, L.J.—I am of the same opinion. I am satisfied, now that we have heard the matter out, that if this matter had gone back to chambers, where Kay, J. left it, Mr. Hickman would have been in a difficulty from which he ought to be relieved. I am not satisfied that we are differing from Kay, J. He used some expressions in his judgment which tend to show that we do differ from him; but he also used other expressions which tend to show that he meant the same thing as we do. But, be that as it may, I feel satisfied that, if the matter had gone back to chambers as Kay, J. left it, Mr. Hickman would have been prejudiced. I take the same view as my brother Cotton. I think the whole of this unfortunate misunderstanding has arisen from confusing the account No. 1 and inquiry No. 13, and, treating the inquiry as an account, Mr. Hickman has, I think, insisted upon more than he is entitled to in taking the account No. 1, and the plaintiff appears to me to have contended for too much under the inquiry No. 13. I cannot say that Mr. Hickman was wrong in coming here to get out of the difficulty in which he was placed. I thought at one time that the right order to make as to costs would be that each party should pay his own costs; but I agree with my brother Cotton that Mr. Hickman has not been guilty of any misconduct to deprive him of his costs, and I therefore agree with the way in which he has proposed to vary the order.

Solicitors for the plaintiff, *Sole, Turner, and Knight*.

Solicitors for Hickman, *J. and R. Gole*.

Friday, Feb. 15.

(Before BRETT, M.R., COTTON and BOWEN, L.JJ.)

*Ex parte ROGERS; Re PYATT. (a)*

*Bankruptcy—Bankrupt's wife tenant for life—Custody of title deeds—Trustee in bankruptcy.*

*Under the will of her father, the wife of a bankrupt was tenant for life of some land, though not for her separate use. The trustee in bankruptcy of the husband applied to the court to order the title deeds of the property, which were in the custody of the registrar by order of the County Court judge, to be delivered up to him in order that he might sell the life interest, and hand over the deeds to the purchaser. It appeared that the wife was about to apply to the Divorce Court for a divorce.*

*Held, that the trustee had no absolute right to the deeds, and the court having a discretion in the matter, under the circumstances ordered the deeds to remain in court.*

*Per Cotton, L.J.: Whether, under ordinary circumstances, a husband has a right to transfer to the assignee of his interest in his wife's life estate in land his right to the custody of the title deeds, quære.*

By his will, dated the 4th Jan. 1854, Joseph Terry devised certain freehold houses in Nottingham to his daughter Ann Terry, for and during

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her life, with remainder to her issue living at her death. After the death of the testator, Ann Terry married William Pyatt.

On the 1st May 1883 Pyatt was adjudicated a bankrupt in the Nottingham County Court. Before the presentation of the petition on which the adjudication of bankruptcy was made the title deeds of the houses remained in the possession of Mrs. Pyatt, but after the presentation of the petition, William Terry, her brother, who was trustee and executor under her father's will, went to the bankrupt's house and took possession of them, the receiver under the petition being in possession of the bankrupt's property.

The trustee in the bankruptcy applied to the County Court for an order directing W. Terry to deliver the deeds to him. Mrs. Pyatt's solicitor filed an affidavit in opposition to this application, in which he said that in April 1883 the bankrupt had deserted his wife, leaving her, with a son who was almost blind, absolutely unprovided for; that he had been instructed by Mrs. Pyatt to commence proceedings in the Divorce Division for a dissolution of the marriage, and that he was in communication with his London agents with a view to the commencement of such proceedings. He added that he had already assured himself of being able to obtain evidence in support of these proceedings amply sufficient, in his opinion, to obtain a decree for the dissolution of the marriage.

The County Court judge adjourned the application *sine die*, but directed the deeds to be forthwith lodged in the custody of the registrar of the court, with liberty for the trustee and his solicitor and for Mrs. Pyatt and her solicitor to inspect the same at any time.

The trustee appealed to the Chief Judge, and the appeal was heard on the 23rd July 1883.

Winslow, Q.C. and Macaskie for the appellant; W. P. Beale for the wife.

BACON, C.J. varied the order, by giving liberty to the trustee to apply to the court as he might be advised.

From this decision the trustee appealed, and the appeal was now heard.

Winslow, Q.C. and Macaskie for the appellant.—During coverture the wife's interest in the property belongs to her husband, and it has passed from him to the trustee. There is no necessity for the trustee to go to the expense of another motion to obtain a declaration to that effect. In order to prevent the trustee from realising the life interest for the benefit of the creditors, the wife must show she has taken some steps to obtain a divorce, or she must give an undertaking to commence such proceedings. As a general rule the legal tenant for life of freeholds is entitled to the custody of the title deeds:

*Allwood v. Heywood*, 7 L. T. Rep. N. S. 640; 1 H. & C. 745;

*Lenthes v. Leathes*, 36 L. T. Rep. N. S. 646; 5 Ch. Div. 221;

*Davies v. Vernon*, 3 L. T. Rep. O. S. 300; 6 Q. B. 443.

[CORRON, L.J.—No doubt, if a wife is tenant for life of land, her husband in her right would be entitled during the coverture to receive the rents and to have possession of the title deeds. But, if he assigns his right to receive the rents, has it ever been decided that he can hand over to his assignee the right to the custody of the title

deeds?] In *Warren v. Rudall* (2 L. T. Rep. N. S. 693; 1 J. & H. 1) the deeds were in court. Here they were only deposited when the judge made the order on the hearing of the application. *Jenner v. Morris* (4 L. T. Rep. N. S. 347; L. Rep. 1 Ch. App. 683) is the only case where security has been required, and there the circumstances were peculiar. The trustee may be able to find a purchaser of the bankrupt's interest in the property, and he ought to be able to hand over the deeds to him. The remainderman does not object to the application, and there is no evidence of any danger to the deeds. They also referred to

*Ex parte Cochrane; Re Mead*, 32 L. T. Rep. N. S. 508; 44 L. J. 87, Bank.

W. P. Beale for the wife.

BRETT, M.R.—I cannot see that there is any authority for saying that the court is bound to order the title deeds to be handed over to the trustee in order that he may hand them over to a hypothetical purchaser. There is ample doubt whether he is entitled to have the deeds at all. There is sufficient doubt as to the law, and there is sufficient doubt as to the propriety of his having the deeds for the avowed purpose of handing them over to a purchaser of a mere risk, to enable the court to decline in this case to make the order.

COTTON, L.J.—I am of the same opinion. The husband himself would be entitled to the custody of the deeds, because in law he and the wife are one person during the coverture. I do not intend to decide the point now, and it must not be supposed that I express any opinion, one way or the other, as to the right of a husband under ordinary circumstances to transfer to the assignee of his interest in his wife's life estate in land his right to the custody of the title deeds. In the present case there is a probability that the wife will shortly commence proceedings in the Divorce Division to obtain a dissolution of the marriage. The deeds are now in court, and I think they ought to be kept there at present. If they were not already in court I think we should order them to be brought there.

BOWEN, L.J.—I am of the same opinion. As to the general right of a husband and of his trustee in bankruptcy to the custody of the title deeds of land, of which the wife is tenant for life, I will say nothing. It seems to me clear that the trustee has not shown that he is entitled *ex debito justitiæ* to an order to hand over the deeds to him. The court has a discretion in the matter, and I think that discretion has been properly exercised in the present case.

Solicitors for the trustee, *Taylor, Hoare, and Co.*, agents for *Maples and McCraith*, Nottingham.

Solicitors for the wife, *Torr and Co.*, agents for *Wells and Hind*, Nottingham.

Thursday, March 27.

(Before COTTON, BOWEN, and FRY, L.JJ.)

Ex parte MATTHEW; Re MATTHEW. (a)

*Bankruptcy — Notice — Receiving order — Conditional payment of the debt — Promissory note — Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 4, sub-sect. 1 (g).*

A debtor, being served with a bankruptcy notice, within seven days gave the creditor a promissory note, payable two months after date, for the amount of the debt, which the creditor accepted.

Held, that the note being accepted was a conditional payment of the debt, and that during the currency of the note the creditor could not avail himself of the bankruptcy notice to obtain a receiving order against the debtor.

On the 16th Feb. 1884 a bankruptcy petition was presented against J. D. Matthew by C. T. Reid, in the name and on behalf of a firm of Matthew and Reid, which had consisted of Alexander Matthew and C. T. Reid, but they had dissolved partnership on the 29th Sept. 1881. J. D. Matthew had formerly been a member of the firm.

The act of bankruptcy alleged in the petition was the failure of J. D. Matthew to comply with the requirements of a bankruptcy notice which Reid, in the name and on behalf of the late firm, had served on him on the 22nd Jan. 1884. The notice was served in respect of a debt of 3818*l.*, for which sum the late firm had recovered a final judgment against J. D. Matthew on the 25th May 1883.

On the 24th Jan. 1884 J. D. Matthew gave to Alexander Matthew, on behalf of his late firm, a promissory note payable two months after date for 3380*l.* 10*s.* 7*d.* the amount of the judgment debt with interest, which note was accepted by Alexander Matthew on behalf of his late firm. Reid was on bad terms with his late partner, and he was not aware that this promissory note had been given until just as the petition was coming on for hearing. It was heard by the Registrar of the Wandsworth County Court on the 11th March 1884, who refused to look at an affidavit of J. D. Matthew proving that he had given the promissory note, and made a receiving order.

From this decision J. D. Matthew appealed.

Willis, Q.C. and Herbert Reed for the appellant. —The creditors having accepted the promissory note cannot be allowed to proceed with their bankruptcy notice. [FRY, L.J.—Is the giving of the promissory note payment of the judgment debt, or securing or compounding for it within the meaning of sect. 4, sub-sect. 1 (g) of the Act of 1883?] It is a payment in accordance with the agreement between the parties. [FRY, L.J.—The judgment requires a present payment in cash. BOWEN, L.J.—The promissory note was a conditional payment of the debt: (*Currie v. Misa*, L. Rep. 10 Ex. 153, 163.) FRY, L.J.—Must there not be an unconditional payment according to the judgment?] The words payment in accordance with the judgment in sub-sect. 1 (g) simply mean payment of the amount in accordance with the terms of the judgment. The payment need not be in cash. If anyone accepts a promissory note in payment of a debt, he is estopped from saying that it is not payment.

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

Sidney Woolf, for Reid, admitted that Alexander Matthew had authority to bind his late partner.

COTTON, L.J.—I think that the receiving order must be discharged. The case stood in a very different position before the registrar, for it appears that he did not look at the affidavit, which was made to prove the giving of the promissory note. I do not think that was a right course, for the question whether an act of bankruptcy had been committed was one of fact, which, if it was disputed, could only be decided on evidence of the facts. It now appears that the debtor had, within seven days after service of the notice, given the creditors in payment of the debt a promissory note payable two months after date. It is now admitted that the partner to whom the note was given had authority to accept it on behalf of his late firm. The effect of the acceptance of this note was a conditional payment of the debt. If a judgment creditor who has served a bankruptcy notice on his debtor chooses to accept from the debtor a promissory note or a bill of exchange as a conditional payment of the debt, he cannot, so long as the bill or note is current, be heard to say that the debtor has committed an act of bankruptcy by not paying the debt, or securing it, or compounding for it. The promissory note having been accepted as a conditional payment of the debt, the receiving order must be discharged.

BOWEN, L.J.—I am of the same opinion. I think that a creditor who, after he has served a bankruptcy notice, takes from the debtor a bill of exchange or a promissory note for the debt cannot, during the currency of the bill or note, obtain a receiving order. Till the bill is dishonoured it must be treated as payment of the debt.

FRY, L.J.—I agree.

COTTON, L.J.—I wish to add that our decision might have been very different if an adjudication of bankruptcy had been made, for in that case the other creditors would have acquired an interest. But, as it is, I think we can discharge the receiving order.

*Appeal allowed.*

Solicitor for the appellant, C. R. Steele.

Solicitors for the respondent, *Spyer and Son.*

Friday, April 4.

(Before BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.)

REG. v. THE OVERSEERS OF THE PARISH OF TONBRIDGE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Burial board—District having a separate burial ground—18 & 19 Vict. c. 128, s. 12.*

By 18 & 19 Vict. c. 128, s. 12, the vestry, or meeting in the nature of a vestry, of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval, and sanction in relation to such burial board and such other powers as are vested in the

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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*vestry of a parish separately maintaining its own poor.*

*Held, that this section applies to a district having a separate burial ground, but not separately maintaining its own poor, which is part of a district already having a legally constituted burial board.*

*Judgment of Field and Mathew, JJ. reversed.*

This was an appeal on behalf of the Southborough Burial Board from the judgment of Field and Mathew, JJ. discharging a rule for a *mandamus* directing the overseers of Tonbridge to levy and pay the sum of 292l. 10s., the expenses of the said board, on the ground that the inhabitants of Southborough had no power to constitute a separate burial board for the district of St. Thomas and St. Peter.

The facts were stated in a special case, which is set out in the report in the court below, 49 L. T. Rep. N. S. 170.

Sir H. S. Giffard, Q.C., F. Meadows White, Q.C., and Archibald, for the appellants.

Charles, Q.C., Lumley Smith, Q.C., and Candy, for the respondents.

The arguments are sufficiently noticed in the judgments.

BRETT, M.R.—The longer I sit as a judge the more strongly I come to the opinion that in construing an Act of Parliament the safest mode of interpretation is to construe the words according to their ordinary meaning and construction in the English language, as used with reference to the subject-matter with which they deal. There is hardly any Act of Parliament, certainly none in which the language is not absolutely plain, where difficulties, inconvenience, and alleged injustice may not arise, and the moment one allows oneself to go into those considerations one inevitably gets into a state of doubt, and unless there is something which prevents one from reading the language according to its ordinary interpretation, both as to words and as to construction, interpretation, and use by people who deal with the subject-matter of an Act of Parliament, it seems to me that it ought to be so read. The section to which we are called upon to-day to give an interpretation is the 12th section of 18 & 19 Vict. c. 128. That section says that "The vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district"—now that district is clearly a district which is distinguished from the parish or township—"not separately maintaining its own poor, and which has heretofore had a separate burial ground"—that is, before the passing of this Act has had a separate burial ground—"may appoint a burial board." Now it is admitted that those words, used in their ordinary grammatical sense, and idiom and construction, apply precisely to this district of Southborough. They apply exactly in terms. But it is urged that nevertheless we are not to apply them exactly in their terms, that they are not to be read as their terms would require one to read them if there is nothing to prevent their being so read. It was argued before us that there were two lines of consideration which obliged us to read them and to apply them otherwise than in their ordinary sense as applied to parishes, burial grounds, and burial boards. In the first place, it was urged that, if they are

considered according to their ordinary grammatical construction, they would be found to be practically in contradiction to other sections in a series of Acts of Parliament which are to be read as one, and which apply to burial boards and districts. If it had been found that reading them in their ordinary sense they would contradict other enactments, but reading them in a sense which they are capable of being read, though not in an ordinary sense they would not, then I agree that the proper construction would be to read all the enactments together, so that they should not contradict each other. But I have been unable to discover that, by reading this enactment in its ordinary sense, it would be found to be practically contradictory to any other enactments. Therefore the argument comes to this, that if it is read in its ordinary sense it would produce great inconvenience; and it is also urged that if read in its ordinary sense it will produce a great injustice. Now, with regard to the question of inconvenience, I think it is a most dangerous doctrine. If an enactment is such that by reading it in its ordinary grammatical sense a palpable injustice is produced, whereas by reading it in a sense in which it is capable of being read, although not exactly its ordinary sense, no injustice is produced, then I admit at once that it must always be assumed that the Legislature intended the Act to be so read as to produce no injustice, and that it should not be read, if possible, so as to produce a palpable injustice. The question seems to me to be reduced to this, does the reading of this section in its ordinary sense as applied to the subject-matter produce any absurd inconvenience or palpable injustice? The alleged inconvenience is that there will be two burial boards, that a minor board will be dealing with this district, and a larger board can also deal with the district. But what is the inconvenience? The only inconvenience that is suggested is this, that it is inconvenient that the people living in the district should have to pay for the maintenance and construction of both grounds. Therefore the inconvenience alleged is the same thing as the injustice that has been suggested. There is no inconvenience of working. In this case it cannot be said it is inconvenient that the one board should manage one ground and the other board should manage the other ground. The inconvenience, if examined, is the same as the injustice in this case. Now, what is the injustice? The alleged injustice is, that people may be obliged to bear a double burden. Now, which people would be obliged to bear a double burden, if either? Not the people of the larger district; they do not bear any double burden. It was suggested by Mr. Charles that there was an injustice on the larger district, because it might render the people of the minor district less able to contribute to the whole. That is too infinitesimal for any practical application. There is no danger of such a thing. The alleged injustice is upon the inhabitants of the minor district. Now, of course, if the effect of allowing them to appoint a burial board of their own is, *ipso facto*, to get rid of the burial board of the larger district with regard to them, then there is no injustice at all; therefore, if we should come to the clear conclusion that by appointing a board in their own district they get rid altogether of the board of the larger district, then there would be no possible injustice. But

we must decide this case on the assumption, which I think myself it is very likely will be the result, that after the appointment of a district burial board the inhabitants of the minor district will be still liable to pay rates in respect of the larger burial board for its maintenance, and for the maintenance and perhaps the charges of further purchases of burial ground for the larger district. I assume and take that to be so. Where is the injustice? It is said that there is an injustice upon these people because they will have to pay double rates. But is it not an obligation upon them? It is their own choice by their own free will. There is no injustice in allowing people to pay double rates, but there might be an injustice if they were prevented. It has been suggested during the argument that, if there be a large parish and a district at one end of it which becomes rich and populous, because there has been a board at one time appointed for the whole parish when circumstances were different, which board cannot be got rid of, therefore the rich district at one end of the parish, for its own purpose and for its own convenience clearly desiring to have a separate board of its own and a separate ground, never shall be allowed to do so; and because when the circumstances were different there was a burial board for the whole parish, the district, the circumstances of which have altered, is to be prevented from exercising its own will which otherwise it might. It seems to me that upon a balance of injustice it is more unjust to prevent people from doing what they want, without interfering with other people, subjecting themselves only at their own will and pleasure to pay an increased amount, namely, double rates. The injustice seems to me to cut against the argument for which it has been brought forward. I can see no injustice at all which will be occasioned by reading this section in its ordinary grammatical English sense, as applied to the subject-matter. Therefore, in my opinion, we ought to stand by the golden rule, and read this section according to its ordinary sense as applied to the subject-matter. And if we do, it applies in terms and in construction precisely to this district. And, if so, this district was entitled to form a burial board, and a board so formed is a legal burial board. I do not pretend to say it is not difficult; these things are always difficult. I cannot gather from the judgment of Field, J. exactly whether he acted upon the view that there was something in the statutes inconsistent with this section read in its ordinary terms, or on the ground that this was unjust. If he came to the conclusion on the ground that it was unjust, I confess that the injustice does not strike me as it must have struck him. I cannot see that any of the cases which have been cited are at all in conflict with the decision we now come to. There are some expressions in the judgment of Blackburn, J. in *Reg. v. The Overseers of Walcot St. Swithin* (6 L. T. Rep. N. S. 325; 2 B. & S. 571) which seem to be in favour of the view that a double burial board and the results of it would be absurd, and there are some expressions of Crompton, J. in the same case that seem to show there was still a lingering doubt in his mind whether they might not be unjust. But, as I say, I cannot see the absurdity, and after due consideration I cannot entertain a doubt, and I do not think there is anything in that judg-

ment which ought to overrule the opinion which I have formed.

BAGGALLAY, L.J.—As the other members of the court have a clear opinion that this appeal should be allowed, my dissent, even if I expressed any, would be immaterial to the decision of the case; but I feel bound to say that throughout the argument I have entertained considerable doubts, and those doubts have not been altogether removed. At the same time my doubts are not sufficient to induce me to say that I dissent from the judgment which the other members of the court think should be pronounced. I am desirous of stating what my doubts are. The original Act of Parliament (15 & 16 Vict. c. 85) had for its main object the discontinuance of burials within the metropolis, and making provision for other burial grounds. That Act of Parliament was confined to parishes in their integrity. I look to the definition of the word parish, and I find that a parish is a particular place having separate overseers of the poor, and separately maintaining its own poor. Then I also look for the definition of the word overseer. It is explained as any person authorised to collect the rate for the relief of the poor. Then came the Act 16 & 17 Vict. c. 134, which in effect extended all the provisions of the Act which previously applied to the metropolitan burial grounds. There again it was limited to parish. Then we have 18 & 19 Vict. c. 128, a provision which deals with parishes as a whole. And it is considered desirable to extend or to alter those provisions, and therefore this 12th section of the Act of 18 & 19 Vict. c. 128 provides that burial boards may be appointed for districts forming portions of a whole parish in such cases as where the district is not separately maintaining its own poor, and has heretofore had a separate burial ground. There can be no question at the present time that the Southborough district had its own separate burial ground, and it is not separately maintaining its own poor. If I follow the circumstances a right, from what appeared in the case of *Viner v. The Overseers of Tonbridge* (2 E. & E. 9; 28 L. J. 251, M. C.) the Southborough district had had its separate burial ground, namely, a yard adjoining the church, for twenty odd years before any of these Acts were passed, and there cannot be a doubt that it is a matter of considerable inconvenience that the inhabitants of this district should only have a burial ground two, three, or four miles from their own church away from where most of them live. I suppose they were outvoted at the meeting. Now I think it must be admitted that, if this section stood by itself, considered entirely by itself, it would be sufficient to embrace the case which has arisen, and would entitle the board actually appointed for the district to call upon the overseers of Tonbridge for the amount of the expenses of enlarging the Southborough ground. But, although in construing these provisions in Acts of Parliament I fully assent to what the Master of the Rolls has said as to giving words their simple meaning and interpretation, still where you have one Act with express provisions to be read with another, its interpretation may be affected by reference to those other Acts of Parliament. I should rather treat them together. It is argued by Mr. Charles and Mr. Smith that when a burial board is appointed for the whole of a district there is no provision for the appointment of a burial board

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or ground or the maintenance of a ground for a portion of an entire district. Certainly that doubt has pressed upon my mind all the way through. That doubt is to some extent removed when I come to take into consideration the 5th section of the still later Act (20 & 21 Vict. c. 81), which gives an express power of dealing with portions of a district for the appointment of a burial board. It indicates the general view of the Legislature that there was a power of dealing with portions of a district even if a board were appointed for the whole. I have to read sect. 5 of that later Act in connection with the other sections, and to some extent that removes the doubts which, if sect. 12 of 18 & 19 Vict. c. 128, and those preceding had stood alone, I should have entertained. The doubts upon my mind have not been wholly removed. They do not amount to sufficient to cause me to say I dissent. I may perhaps say that the case has been so thoroughly and completely argued that no advantage would have been obtained by adjournment for further consideration.

LINDLEY, L.J.—It is impossible to read these Acts of Parliament without saying that there are obscurities and difficulties. Now the question which we have to decide is one very easily asked, but not so easily answered. We have got this state of things: An ecclesiastical district was carved out of the old mother parish of Tonbridge under 1 & 2 Will. 4, c. 38, that is, St. Peters, Southborough. St. Peters, Southborough, has a burial ground. Southborough is subdivided for some purposes by having another district carved out of it, St. Thomas, which was done in 1871. I do not think myself the last point is material to the question we have to solve, because, for all the purposes with which we have to deal with the district, St. Peters was a district with a burial ground, and not maintaining its own poor. Now the rest of the facts which are material are these: Tonbridge Wells is also a district which was a long time ago carved out of the same old mother parish of Tonbridge. Tonbridge Wells has a burial ground of its own. Now the Acts of Parliament which were passed before 1855 relating to these matters applied to parishes. As the Act of 1855 expressly states, it was found necessary to amend these Acts and make further provision for the burial of the dead. And provision is made in sect. 12 for districts which were not parishes. If we look only at the language of sect. 12 it is impossible to deny that this case comes within its terms. The language of that section exactly meets the present case. Tonbridge is the mother parish *minus* Tonbridge Wells. Is that any reason why a district in the mother parish of Tonbridge should not have another burial board? I can see no reason for drawing the distinction between the real old mother parish having its own burial board, and such a district as Tonbridge *minus* Tonbridge Wells. In either case it appears to me, if you once find it falls within sect. 12, that there is none. The fact that there may be two jurisdictions appears incidentally from that Act of 1860 (23 & 24 Vict. c. 64), to which Mr. Charles has referred. Sect. 5 runs thus: "Where any parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry, or

meeting in the nature of a vestry, for such entire parish or place to appoint a burial board without the approval of one of Her Majesty's Principal Secretaries of State." I infer from this that such a thing was possible, that there could be a burial board in a district and also one for the whole parish. It is said that the Act of 1857 (20 & 21 Vict. c. 81), and the second case of *Reg. v. The Overseers of Walcot St. Swithin (ubi sup.)* were opposed to our construction of 18 & 19 Vict. c. 128, s. 12. It is very true that 20 & 21 Vict. c. 81, s. 5 having been passed, inconveniences were perceived, and an attempt was made to prevent certain inconveniences which might flow from the construction we put upon 18 & 19 Vict. c. 128, s. 12. But it seems strange that, if there can be a district in a parish which has a burial board under 20 & 21 Vict. c. 81, s. 5, it should not have the same privilege under 18 & 19 Vict. c. 128, s. 12. Under 20 & 21 Vict. c. 81, s. 5, possibly the inconveniences are obviated. Now let us see what the inconveniences are. The inconvenience will be this, that the inhabitants of the district of Southborough will, as regards their burial board, be subject to a double rate, they will have two burdens upon them. That will be the worst. Who imposes those burdens? They impose them upon themselves. I do not see any particular injustice in that. I cannot see that there is any sufficient reason for saying that this case is not within sect. 12. For these reasons it appears to me the true construction to be put upon the statute is that given by the Master of the Rolls.

*Appeal allowed. Order for a peremptory mandamus suspended for a month.*

Solicitors for the prosecution, *Tilleard, Godden, and Holme.*

Solicitors for the defendants, *White and Sons.*

Monday, Aug. 4.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

CRIPPS v. JUDGE AND ANOTHER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Employers' Liability Act 1880 (43 & 44 Vict. c. 42), s. 1 (1), s. 2 (1)—Defect of machinery or plant—Negligence of employer.*

*By the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), s. 1 (1), "where, after the commencement of this Act, personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." By sect. 2 "a workman shall not be entitled under this Act to any right of compensation or remedy against the employer . . . (1) under sub-sect. 1 of sect. 1 unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."*

*Plaintiff, a carpenter, was employed by defendants,*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



who were builders, and in the course of his employment had to descend a ladder. A scaffold, which was put up under the direction of one of the defendants, rested on and was supported by the ladder. When plaintiff stepped on the ladder it broke in two and he fell and was injured. In an action to recover damages for the injury the jury found that the ladder was insufficient for the purpose for which it was used.

*Held (discharging a rule for a nonsuit or new trial), that there was evidence to go to the jury of a defect in the condition of the machinery or plant within the meaning of sect. 1 (1), and evidence of the negligence of the employer within the meaning of sect. 2 (1).*

ACTION under the Employers' Liability Act 1880 (43 & 44 Vict. c. 42) to recover damages for personal injury.

The plaintiff, a carpenter, was working for the defendants, who were builders, in a house which they were erecting. His work was on an upper floor, and as the staircase was not yet put up he had to go up and down by a ladder. One of the defendants directed a scaffold to be put up for plasterers to stand on while engaged in plastering the ceiling. The scaffold consisted of a platform of boards, one end of which rested on a trestle, which stood on the upper floor; the other end of the boards was supported by a piece of wood, of which one end was let into the wall, while the other end rested on one of the rungs of the ladder, which stood inside the house leaning against the wall. The plaintiff stepped on the ladder to get down from the upper floor, and as soon as he did so the two sides of the ladder broke in two, and the plaintiff fell, and was injured by the boards of the platform, which fell on him.

At the trial in the Watford County Court the following questions were left to the jury:

If the ladder was fit to be used for the purposes for which it was being used at the time of the accident.

And if it was so placed and used under the directions or instructions of Mr. Judge (the defendant) at the time.

The jury intimated that they assessed plaintiff's damages at 15*l.*, considering the ladder insufficient for the purposes for which it was being used at the time of the accident, and seeing also that the platform and ladder had been placed and was being used under the directions and instructions of Mr. Judge, one of the defendants.

A rule was refused by the Divisional Court. Afterwards the Court of Appeal granted a rule *nisi* to set aside the verdict and judgment, and enter a nonsuit, or for a new trial, upon the ground that no evidence of any negligence on the part of the defendants was given by the plaintiff to support the verdict in his favour.

*Morten*, for the plaintiff, showed cause.—There was evidence of a defect in the condition of the plant, and of negligence on the part of the defendants. It is clear from the way in which the ladder broke that it was unfit for the purpose for which it was used, namely to support the scaffold, and it was used for that purpose under the direction of one of the defendants. *Heske v. Samuelson* (12 Q. B. Div. 30) is conclusive in favour of the plaintiff.

*Ruegg*, for the defendants, was called on to support the rule.—The decision in *Heske v. Samuelson* (*ubi sup.*) is not binding upon this court. Even if there was a defect in the condition of the plant or machinery within the meaning of sect. 1 (1), the plaintiff cannot recover unless the case comes within sect. 2 (1), and there is no evidence of negligence of the employer within the meaning of that provision.

BRETT, M.R.—I am of opinion that there was evidence in this case which it was right to leave to the jury. The scaffold, which rested on the ladder, was proved to have been put up under the personal control and superintendence of the defendant Judge, and although there was no evidence that each part was not sound, the question was whether the whole arrangement as it was used was in a safe condition, and that question was left to the jury. In my opinion there was evidence on which it could rightly be left to them, and they have found that the ladder was insufficient for the purpose for which it was being used at the time of the accident. The question as to the interpretation of the statute was brought before the court in the case of *Heske v. Samuelson* (12 Q. B. Div. 30), where Lord Coleridge, C.J. said in giving judgment: "The question is whether the fact that the machine was unfit for the purpose for which it was applied constitutes a defect in its condition within 43 & 44 Vict. c. 42. The question really almost answers itself. If it was not in a proper condition for the purpose for which it was applied, there was a defect in its condition within the meaning of the Act." I think the decision in that case was right, and that it governs the present case. Although each part might be sufficient, if the whole arrangement was defective there was a defect in the condition of the plant or machinery for which the defendants are liable under the statute.

BOWEN, L.J.—I am of the same opinion. I agree that *Heske v. Samuelson* (*ubi sup.*) was rightly decided, and governs the present case. It was the only logical decision possible.

FRY, L.J.—I am of the same opinion. I think there was evidence to go to the jury of a defect in the condition of the plant or machinery, and also evidence of the negligence of the employer within the meaning of sect. 2 (1).

*Rule discharged.*

Solicitors for plaintiff, *Shaen and Boscoe*.

Solicitors for defendants, *Watson, Sons, and Room*.

Thursday, April 29.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

THE WINSTON. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Collision—Compulsory pilotage—Passing through the limits of a pilotage district—Exemption—Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 41.*

*Where a steamship puts into a port within a pilotage district for the purpose of coaling whilst bound on a voyage between two places outside*

(a) Reported by J. P. ASPINALL and F. W. BAILEY, Esqrs., Barristers-at-Law.

*such district, although she is only passing through such district, she is not exempt from compulsory pilotage under the provisions of sect. 41 of the Merchant Shipping Act 1862, as that section provides that the exemptions shall not extend to ships loading and discharging therein, and such loading and discharging is not confined to cargo but extends to coaling.*

THIS was an appeal from the judgment of Sir James Hannen in a damage action *in rem* against the steamship *Winston* for damages arising out of a collision between that vessel and the steamship *Warwick Castle* in Dartmouth Harbour, by which he had found that the *Winston* was exempted from blame on account of her being compulsorily in charge of a pilot.

The facts of the case are fully set out in the report of the case in the court below (49 L. T. Rep. N. S. 403; 5 Asp. Mar. Law Cas. 143).

The question at issue which had been decided against the plaintiffs in the court below, and from which the plaintiffs now appealed, was whether a vessel which is passing through a district where pilotage is compulsory, stops within that district for the purpose of coaling only, and not for taking in cargo, is by the provisions of the Merchant Shipping Act 1862, s. 41, compelled to take a pilot; that is, whether the words "loading and discharging" in that section are, or are not, to be construed as relating strictly to cargo.

The section of the Act is as follows :

41. The masters and owners of ships passing through the limits of any pilotage district in the United Kingdom on their voyage between two places, both situate out of such districts, shall be exempted from any obligation to employ a pilot within such district: Provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or at any place situate above such district on the same river or its tributaries.

*Cohen, Q.C., Bruce, Q.C., and J. P. Aspinall* for the appellants.—The 41st section of the Merchant Shipping Act 1862 would certainly not apply if the vessel had put in for the purpose of getting a new sail or a new anchor, and it ought not to apply to a loading of coals. The following cases were also cited :

*Clyde Navigation Commissioners v. Barclay*, L. Rep. 1 App. Cas. 790; 3 Asp. Mar. Law Cas. 390;

*The General Steam Navigation Company v. British and Colonial Steam Navigation Company*, L. Rep. 3 Ex. 390; 3 Mar. Law Cas. O. S. 168, 237; 19 L. T. Rep. N. S. 357; 20 Ib. 581; 37 L. J. 194, Ex.; 38 Ib. 97;

*The Lion*, L. Rep. 2 P. C. 525; 3 Mar. Law Cas. O. S. 138, 266; 18 L. T. Rep. N. S. 803; 37 L. J. 39, Adm.

*W. G. F. Phillimore and Raikes*, for the respondents, were not called upon.

BRETT, M.R.—The sole question here is, what is the meaning of 25 & 26 Vict. c. 63, s. 41, as applied to this case. Now, it certainly applies to a place within a pilotage district, which was not the original port of loading or the original port of discharging the ship. It deals with the case of some intermediate part of the voyage. What is the difficulty here? It has been thought extremely hard that, because a ship passed through a portion of the district without any intention of stopping there at all (because the words of the original Act of Parliament speak of being bound to make a signal for and to take a pilot whilst

within the district), a pilot should go on board, not for the purpose of amusing himself, but for the purpose of getting pilotage fees, and therefore the present Act superseded the 379th section of the Act of 1854, where it was made a part of the exemption that if the ship was passing through she was exempt, but if she anchored she would not be exempt. Now I have no doubt that some ingenious person immediately argued thus upon some given case: that if a ship dropped her anchor for the purpose of turning her round, not for the purpose of doing anything in the place, but merely because the wind was adverse or too light, and she got under a headland, that nevertheless she was bound to have a pilot; and some ingenious person arguing thus thought it was intended to impose the liability by way of proviso on the exemption, so that, although the ship is in the district in an intermediate part of her voyage, and in that sense is passing through, that nevertheless if she does something, although she is passing through in one sense, she must take a pilot. Then it was found that these words, "whilst at anchor," would not do, and so they were obliged to look for something else, and they have looked for something else which is substantial. It would not do to say "using a port," that might be misunderstood, because they have said that where a ship (though in one sense she is passing through) goes into a port for a definite purpose, such as loading or discharging, then she must have a pilot. If they had meant to say loading or discharging mercantile cargo, nothing would have been so easy as for them to have said so. If it only applies to cargo on board a ship for freight purposes, it would not apply to a yacht or to a mere passenger ship. Why should it not? It merely means that this is the test of her not being merely passing through; it is not a mere momentary stoppage, it is not a mere stoppage which they cannot help by stress of weather, it is one in which she must obviously and necessarily bring herself to an anchor. It is going in for a definite purpose to load or unload. There is nothing in the language of the section which confines it to loading or discharging mercantile cargo. Why should there be, the reason of the thing being to the contrary, the words not being put in to limit, the reason of the thing not being limitation? Therefore it seems to me you must give a plain meaning to the words. If a ship is loading or discharging, whichever it may be, and goes into the district, she is bound to have a pilot on board. That is the meaning of the statute. A case has been suggested where the ship has been brought up and substantially brought up for a long period in the port, and yet did not take a compulsory pilot. It is unnecessary to give my opinion upon this, and I shall reserve my opinion till such a case comes before me.

Fry, L.J.—I am authorised by Lord Justice Bowen to say that he concurs with the opinion of the Master of the Rolls. It seems to me that the natural construction of the word "loading" applies to the present case, and that it was exactly this kind of loading which was in the contemplation of the Legislature in making this 41st section of the Act of 1862, and I have therefore no hesitation in saying that I am of opinion that in this case pilotage was compulsory.

Solicitors for the appellants, *Parker, Garrett, and Parker.*

Solicitors for the respondents, *Pritchard and Sons.*

Thursday, June 19.

(Before BRETT, M.R., BOWEN and FRY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE JOHN MCINTYRE. (a)

ON APPEAL FROM BUTT, J.

*Collision—Regulations for Preventing Collisions at Sea 1880, arts. 13, 18—Dense fog—Steamships—Steam whistle.*

*Where those on a steamship in a dense fog hear the whistle or foghorn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing them, it is their duty, under art. 18 of the Regulations for Preventing Collisions at Sea, to at once stop and reverse her engines, so as to bring their vessel to a standstill in the water.*

THIS was an appeal by the defendants in a damage action in rem from a judgment of Butt, J., by which he, on the 19th Dec. 1883, had found the steamships *John McIntyre* and *Monica* both to blame for a collision in the North Sea on the 14th Sept. 1883.

The facts alleged on behalf of the plaintiffs were as follows:—

Shortly after 3.30 a.m. on the 14th Sept. 1883 the steamship *Monica*, of 853 tons net, was in the North Sea, off Seaham, on a voyage from Newcastle to Hamburg. The wind was light from the east and there was a dense fog. The *Monica* was heading about S.E. by E., and was making about three knots an hour. Her regulation lights were duly exhibited and a good look-out was being kept on board her, and her whistle was sounded regularly. In these circumstances the whistle of a steamer was heard on the starboard bow and replied to. After three or four blasts had been heard and replied to the helm was put to starboard. Immediately afterwards the masthead and red lights of the *John McIntyre* were seen broad on the starboard bow, and although the helm was hard-a-starboarded and the engines reversed full speed astern, the stem and port bow of the *John McIntyre* struck the starboard side of the *Monica* about midships.

The facts alleged on behalf of the defendants were as follows:—

About 3.40 a.m. on the 14th Sept. 1883 the steamship *John McIntyre*, of 629 tons registered, was in the North Sea, off the coast of Durham, on a voyage from London to the Tyne. The wind was light from the N.N.E., and there was a thick fog. The *John McIntyre* was heading about N.N.W., and making about two knots an hour. Her regulation lights were duly exhibited, a good look-out was being kept on board of her, and her whistle was sounded from time to time. Under these circumstances the whistle of the *Monica* was heard about four points on the port bow, and then heard twice again, when it appeared to those on the *John McIntyre* that the *Monica* was approaching on the port bow so as to involve risk of collision, and although the engines of the *John McIntyre* were reversed, and immediately afterwards reversed

full speed astern, the starboard side of the *Monica* struck the stem and bows of the *John McIntyre*.

Dec. 19, 1883.—The action came on for trial before Butt, J., assisted by Trinity Masters.

*Myburgh*, Q.C. (with him *Phillimore*) for the plaintiffs, the owners of the *Monica*.

*Webster*, Q.C. (with him *Stevenson*) for the defendants.

After hearing the evidence and the arguments on both sides the learned Judge found both ships to blame for breach of article 18 of the Regulations for Preventing Collisions at Sea. With regard to the navigation of the *John McIntyre* his Lordship dealt as follows:—Now as to the evidence of the *John McIntyre*, I cannot accept her captain's evidence as to speed. I utterly disbelieve, and the Elder Brethren agree with me, that she was still in the water, or anything like still in the water, at the moment that the blow was delivered. We think that, when she delivered the blow and sank the *Monica*, she herself was going at a considerable rate of speed. I think the nature of the blow shows it to be so. One has only to hear what admittedly happened to the *Monica*, only to look at the photograph of the *John McIntyre*, and the evidence of the surveyor who surveyed her, to be quite satisfied that she was going very much faster than the defendants allege. Now her captain says: "We heard her (that is the *Monica's*) whistle five minutes before the collision. I gave an order to stop and reverse one minute before the collision. We kept our engines going ahead for four minutes after we heard her whistle, and before we gave any order to stop our engines." It must have been apparent long before the lapse of those four minutes, they having heard the whistle several times, that there was danger. The engines of that vessel ought to have been stopped long before they were, and if necessary also reversed. In conclusion I have no hesitation in pronouncing both these vessels to blame.

From this decision the defendants appealed, and on June 19, 1884, the appeal came on for hearing. It was admitted that the *Monica* was to blame.

Article 18 of the Regulations for Preventing Collisions at Sea 1880 is as follows:

**Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.**

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Webster*, Q.C. (with them *Stevenson*) for the appellants.—The learned judge below was wrong in finding the *John McIntyre* to blame for not stopping and reversing sooner. With the first whistle four points on the port bow it did not become necessary to stop and reverse until the third whistle had been heard. To hold otherwise would be to lay it down that a steamer in a dense fog the moment she hears a whistle is to at once stop and reverse, a manœuvre which might in many cases bring about the collision instead of avoiding it.

*Myburgh*, Q.C. and Dr. *Phillimore*, for the respondents, were not called upon.

BRETT, M.R.—The question in this case is as to the application of article 18 of the Regulations for Preventing Collisions at Sea 1880 to the *John McIntyre*. The case of the other ship is hopeless, her navigation being most improper and reckless.

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

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We have to apply article 18 to the *John McIntyre*, a vessel navigating in a dense fog. The *John McIntyre* was a steamer approaching another vessel in a dense fog. If, then, the circumstances were such that the officer in charge of the *John McIntyre* ought to have come to the conclusion that, in order to avoid danger or risk of collision, he was bound to stop and reverse his engines sooner than he did, why then he broke the rule. The next question is, were the circumstances such that he ought to have concluded that if he did not stop and reverse his engines there would be risk of collision? because, if he ought to have concluded that, then according to the rule it was necessary that he should not merely slacken his speed, but also stop and reverse his engines. The circumstances of this case seem to me to be, that these vessels were approaching in a thick fog, and that under the circumstances it was the duty of the *Monica* to keep out of the way of the *John McIntyre*. Nevertheless, it was palpable to the officer in charge of the *John McIntyre* that she was approaching another vessel in a fog. It was the whistle of the other vessel which told him not exactly where she was, but about where she was, and that she was in a position in which he could not consider her to be an absolutely safe vessel with regard to him; i.e., he could not consider that he had passed her or that she had passed him either ahead or astern, while he was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; but having heard the first whistle, which was about four points on his port bow, he hears another and another whistle, and I cannot help thinking that the evidence shows that it was something like three or four whistles that he heard. The sound of these whistles obviously did not, because they could not, appear to him to be going further astern of him or broader on his beam. What is the inference to be drawn from that? Why, that each of those whistles as they came ought to have told him that the vessel was coming nearer to his bow. He could not see the other ship. What is the conclusion to which he ought to have come? Ought he to have come to this conclusion—that, taking the fog and taking it that he himself was not going dead slow through the water (for I think the learned judge found, and found rightly, that he could not have been going at what is called dead slow), taking into account the pace at which he himself was going, which I think will be shown was faster than he puts it at, ought he not then to have concluded that unless he stopped and reversed his engines there would be, not collision, but risk of collision? If a steamer in a thick fog—so thick that she can hardly see before her—hears another vessel in her neighbourhood on either bow, not being able to see her, and she herself not going at her slowest pace, the question is, whether under those circumstances the officer in charge of the steamer ought not to conclude that it is necessary, in order to avoid risk of collision, that he should stop and reverse. I do not hesitate to lay down the rule, not strictly as a matter of law, but as a matter of conduct, that the moment such circumstances as these happen it is necessary, under the article, to stop and reverse. I am not saying that every time those on board a steamer hear a whistle or a foghorn on their bow they are at once to stop and reverse, but if they

hear a whistle or foghorn on either bow getting nearer to their bow, or being in anything like near neighbourhood on either bow, I do not hesitate to lay down the rule that, if the fog is so dense that they can see nothing, then the necessity has arisen for them to stop and reverse. We do not say that she must have stern way on her, but we say she must stop and reverse her engines, so as, if necessary, to bring herself to a dead standstill in the water. How are we to conclude anything as to the rate at which the *John McIntyre* was going? I will assume that the *Monica* was crossing the *John McIntyre* at a very considerable speed, and that she was under a starboard helm. But then it is clearly proved, in my opinion, that the *John McIntyre* was made by something or other to enter into the side of the *Monica*, a distance of from 7 feet to 12 feet. The next thing one has to do is to look at the injury done to the *John McIntyre*. Now, we have the evidence of the surveyor that she was injured on one bow from the stem downwards some 11 feet, and on the other bow some 7 feet. We have asked the gentlemen who assist us, having regard to the evidence of the surveyor, of the photograph produced in court, and the angle of the blow, what is their opinion as to the speed of the *John McIntyre*, and they tell us that they think she was going at a considerable rate of speed at the moment of collision. I have already said that, in my judgment, the circumstances were such as made it her duty to stop and reverse, and that it was necessary for her to stop and reverse in order to avoid risk of collision if she was going at any considerable speed. If she was going at considerable speed at the moment of collision, it is obvious that she was going at considerable speed before the moment of collision. If she was doing that, it seems to me that we must decide that she ought to have stopped and reversed before she heard the last whistle, which was almost immediately before the collision. However difficult it may be for persons in command of steamers to do what the law directs, in my opinion we must hold strictly that in a dense fog the moment another vessel is found on the bow or in near vicinity on either bow, and she herself is going at any speed, it has then become necessary, under the 18th rule, not merely to slacken speed, but instantly to stop and reverse. That is a rule of conduct which seems to me to be the result of the statutory regulations, and that has been broken by the officer in command of the *John McIntyre*. Therefore the judgment of the learned judge was correct, and this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. I think, as I have said before, that where two ships are approaching so as to involve risk of collision they are bound to slacken speed, and if that is not sufficient they are bound to stop and reverse if it is necessary to avoid risk of collision. Although it may not be possible to say as an absolute matter of law that a vessel in a fog ought to stop the moment she hears the whistle of another vessel in her neighbourhood, yet, as the Master of the Rolls has already pointed out, it seems to me that in this case the officer in charge of the *John McIntyre* could not have concluded that it was safe to have gone on, and therefore it was necessary to stop and reverse. This the *John McIntyre* did not do until a later period, and she must therefore be held to

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blame. With regard to the other points urged before us, I entirely concur with the Master of the Rolls, and therefore think the appeal must fail.

Fry, L.J.—I am of the same opinion. In this case two questions have been raised. With regard to the speed of the *John McIntyre*, the learned judge below has found as a fact that she was going at a greater rate of speed than the witnesses on her behalf have stated. In the first place I, not having seen the witnesses, should in the absence of strong reasons be unwilling to come to an adverse conclusion. Moreover, those gentlemen who assist us are of the same opinion as the learned judge below. Therefore I think that it must be taken that that finding was correct and cannot be impeached. Now, assuming that speed to be greater than was allowed by the appellants, was it not necessary for the *John McIntyre* to have stopped and reversed her engines at an earlier time than she did? I think it was, and that under the circumstances it was the duty of the *John McIntyre* to have earlier taken steps to come to as near a standstill as possible. That being so, I think the *John McIntyre* must be held to blame.

*Appeal dismissed.*

Solicitors for the appellants, *Gellatly, Son, and Warton.*

Solicitors for the respondents, *Botterell and Roche.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

May 13 and 14.

(Before BACON, V.C.)

THE UNITED TELEPHONE COMPANY v. THE LONDON AND GLOBE TELEPHONE AND MAINTENANCE COMPANY. (a)

*Patent — Infringement of — User — Injunction — Instruments not ordered to be delivered up — Disclaimer of patent — Fiat of Attorney-General.*

The L. and G. T. and M. Company became possessed of 800 telephone transmitters, which were proved to be an infringement of the "*Blake patent*," belonging to the U. T. Company. The transmitters had been kept dismantled and unused in the warehouse of the L. and G. T. and M. Company. When the case of another similar patent belonging to the plaintiff company (the *Edison patent*) was before the Attorney-General, he had issued his fiat allowing the plaintiff company to disclaim certain parts of the specification of that patent, on condition that no proceedings should be taken against the defendant company in respect of these 800 instruments in question, which were also an infringement of the "*Edison patent*."

Held, that the fact of the defendant company being in possession of instruments which infringed the plaintiffs' patent, was of itself enough to give the plaintiff company a right to an injunction to restrain the user and sale of such instruments; but the court would not order them to be delivered up.

Held further, that the instruments were not protected by the fiat of the Attorney-General, which related only to the *Edison patent*.

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

This was an action for an injunction to restrain the defendant company from manufacturing, selling, supplying, letting on hire, or using any telephones, or telephonic apparatus, which infringed, or were only colourably different from the plaintiff company's patent, and for the delivery up to the plaintiff company of all such apparatus.

The patent claimed by the plaintiff company was granted in 1879 to William Robert Lake.

On the 8th Jan. 1880 he assigned it to Francis Blake, who, on the 27th May 1882, assigned it to the United Telephone Company. The invention claimed by the patent was: (1) A method described in the specification for holding the diaphragm of the telephone by means of springs pressing against one of its sides; (2) a spring to maintain and regulate the initial pressure between the two electrodes in the circuit of a telephone; (3) an adjusting lever for regulating the spring; (4) the combination of the two electrodes by means of springs acting against each other; (5) a yielding weight to modify by its inertia the variations of pressure between the two electrodes.

The plaintiffs alleged in their statement of claim that the defendants had purchased large quantities of telephones in imitation of, or only colourably differing from the invention described in the plaintiffs' patent, and in particular that the defendants had recently imported a large number of Blake transmitters, and had sold or intended to sell the same.

By their statement of defence, the defendants relied upon the fact that upon the 16th Aug. 1882 the Attorney-General had issued his fiat allowing the plaintiffs to disclaim certain parts of the specification of letters patent granted to Mr. T. A. Edison (which patent Fry, J. had declared to be bad in May 1882, in the case of *United Telephone Company v. Harrison, Cox, Walker, and Co.* (21 Ch. Div. 720), but nevertheless, upon condition that no proceedings for infringement be taken against the London and Globe Telephone and Maintenance Company or against any persons using any such instruments as were made in pursuance of certain *bona fide* contracts. The Attorney-General having inquired into the *bona fides* of contracts entered into by the defendant company, made an award on the 7th June 1883 exempting the defendants from any proceedings for infringement at the suit of the plaintiffs, in respect of the 800 instruments which were the subject of this action.

It was admitted in the statement of defence that the mounting of the electrodes in question in the action was in accordance with Blake's patent; but they denied that the patent had been infringed in any other respect.

On the 10th Nov. 1883 the defendants offered by letter to remove from the 800 instruments all those parts which were an infringement of the plaintiffs' patent, if it were valid. The plaintiffs replied by letter of the 14th Dec. 1883, and said that they would be satisfied if the instruments were re-exported. This the defendants refused to do, but they did in fact dismantle the instruments, which were lying unused in the defendants' warehouse.

Theodore Aston, Q.C., R. E. Webster, Q.C., and J. F. Moulton for the plaintiffs.—We claim an injunction in the terms asked, as the infringement is practically admitted on the pleadings. In their letter of the 10th Nov. 1883, offering to

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dismantle the instruments, the defendants said that they did not desire to dispute the validity of the plaintiffs' patent, but they refused to re-export, as we suggested. We now ask, as we are entitled to do, that the instruments may be delivered up to us or be destroyed in our presence. Similar orders have been made in other cases, such as *Cropper v. Smith*, reported upon another point in 24 Ch. Div. 306. Also in

*Frearson v. Los*, 9 Ch. Div. 48;

*Tangye v. Stott*, *Seton on Decrees*, vol. i. p. 353.

*Hemming*, Q.C. and *Goodeve* appeared for the defendants.—We bought these instruments in the market, in the belief that all the royalties had been paid. We have kept them in our possession unused, and do not intend to use them. Mere possession without user cannot be an infringement of a patent for which an injunction will be granted. We have never made, used, exercised, or vendred these instruments within the meaning of the Patent Act. We rely upon the cases of

*Minter v. Williams*, 4 Ad. & El. 251;

*Nobel's Explosives Company*, 48 L. T. Rep. N. S. 490; L. Rep. 8 App. Cas. 5;

*Nielson v. Betts*, 5 H. of L. 1;

*Betts v. Nielson*, 12 L. T. Rep. N. S. 489, 719; 3 De G. J. & S. 82.

Further, we are protected by the fiat of the Attorney-General, which gave the plaintiffs leave to disclaim, but only on condition of not bringing any action against us. [BACON, V.C.—The Attorney-General's fiat only related to the patent which was before him, namely, Edison's patent.] We submit that it applies to these instruments. The court will not, in a case of this nature, order the instruments to be destroyed:

*Needham v. Ozley*, 8 L. T. Rep. N. S. 604; 1 Hem. & Mil. 248.

*Moulton* in reply.

BACON, V.C.—This is really a very simple question, but it has assumed a remarkable shape. That the defendants are in possession of instruments made in infringement of the plaintiffs' patent is confessed by them and proved beyond the possibility of question, and that, of itself, gives to the plaintiffs a right to ask for an injunction to restrain the defendants from making use of that which, by their own confession, is an unlawful possession, and would be, if used, I presume, an unlawful use. The cases which Mr. Hemming has referred to do not, in my opinion, apply to the case of an injunction in any degree. No doubt, taking the case of the "capsules" (*Neilson v. Betts*, *ubi sup.*), the use was established for the reason which is there given. In the case of *Nobel's Explosive Company Limited* the case was decided upon totally different grounds, and, though there may be expressions in the course of the judgment showing that the Custom House clerk never had the use or possession, but that another man had the possession and use, the decision was that, although the Custom House clerk went down to the docks and got the goods cleared and sent to the place on deposit, that was no reason why the action should be brought against him. That is all the case of *Nobel's Explosives Company* decides. The other case is a case of *Minter v. Williams* upon special pleading, where the decision of the court went upon the record as it stood. There was an allegation of breach, which was not of itself enough to sustain the general allegation in the declaration,

and the demurrer prevailed upon that. I do not think that any of the authorities, therefore, have the slightest application to the case before me. Then it is argued that the Attorney-General's fiat has disposed of this question. I cannot so read it. An application was made to the Attorney-General in a branch of the law in which he is a judicial authority. He was asked to permit a disclaimer from the old patent, because it had been found to be erroneous, and he permitted a disclaimer to be lodged. That restored validity to the patent, which it would have wanted if the defect had not been cured by that means. But he did it having regard to the equitable rights and equitable circumstances which prevent the party who succeeds in getting the disclaimer being let loose to bring actions against everybody who has committed infringements of the original patent. But that was only with respect to the old patent. No other was before him, and I do not know how it could be. No application was made by the present plaintiffs to protect their new patent. They did not desire to disclaim anything in their new patent; and I cannot conceive any authority that the Attorney-General would have to deal with that specification; at all events he did not. His fiat was confined wholly to the specification of the old patent—I call it the old patent for the sake of distinction—and that has been properly carried into effect, and nobody thinks of disputing it. The facts turn out now to be, that the defendants have in their possession 800 machines which are themselves, as I think they confess sufficiently upon the record, infringements of the plaintiffs' patent; and they excuse themselves from it, first, on the ground of the fiat, which, I think, gives them no protection, and next, that it is not their intention to use the instruments. Well, if it is not their intention to use them, then the injunction asked for can do them no harm. That would not be enough to dispose of the case, but it is the right of the plaintiffs to have an injunction against the defendants, who have the means, to the extent of these 800 machines, of injuring their patent rights. Now, the defence has a certain air of candour about it, which is, of course, entitled to great respect. They say the question of the *bona fides* of certain contracts was inquired into before the Attorney-General, and that he exempted the defendants from any proceedings for infringements at the suit of the plaintiffs in respect of the 800 instruments which have been the subject of this action. That is proved in evidence to be untrue. The defendants were not protected respecting the 800 instruments which are the subject of this action, except so far as they related to the old patent, in which respect they were protected, and which the plaintiffs in this suit do not seek in the slightest degree to assail. Then, in the fifth paragraph of the statement of defence, the defendants say, "The mounting of the electrodes in the said instruments is admitted by the defendants to be in accordance with the method of mounting described in the specification of the patent of W. R. Lake, of 20th Jan. 1879, No. 209," Blake's patent, with which the Attorney-General has nothing to do; "but in no other particular do the said instruments come within the description and claims of the said specification." Then paragraph 6 states that "the defendants believe that the last-named

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patent is invalid for want of novelty;" they do not join issue about want of novelty, but they say, "they do not admit its validity, but they have no wish to use instruments constructed according to the specification of the said patent, and they are ready and willing, in accordance with a notice to that effect, given to the plaintiffs' solicitors on the 10th Nov. 1883, to remove from each of the said 800 instruments, the subject of this action, all and each of the parts, the use of which would be an infringement of the said patent if it were valid." I cannot conceive a more ample admission of the right of the plaintiffs to institute this suit, which is instituted solely for the protection of their patent rights against the use of these things which are called "the mounting of the electrodes," and which have been proved by Mr. Imray to be within the last four clauses of the specification in which the nature of the plaintiffs' claim is distinctly specified. The whole of the instruments are lying in the defendants' warehouse at the present time. To the extent of the injunction, therefore, I think the plaintiffs are entitled, upon the facts proved, upon the unquestionable law of the subject, and upon the ample admission contained in the defendants' answer. But then the defendants say they offered enough when they said they were willing to remove the parts complained of. If that had also carried with it an undertaking never to use them again, that might be something, but they might be removed to-day and restored to-morrow, and the whole 800 might be sold, used, and exercised in the way the terms of the patent refer to. Against that danger, or possibility of danger, the plaintiffs, in my judgment, are entitled to protection in the shape of an injunction. As to the delivery up, I cannot say I see my way to make any order in that respect. It might be to do more mischief; it might be merely to destroy. All I have to do in this suit is to entertain the plaintiffs' application that they may be protected against a wrong which is imminent, unless prevented by injunction, and therefore, to that extent, I grant the injunction in the terms in which it is asked, namely, "that the defendants be restrained from manufacturing, selling, &c., the telephones or telephonic apparatus described in the said specification or only colourably differing therefrom." There my present order stops. I do not make any further order. If there should be any infraction of that injunction, the parties who make it will have to account for it, and I think the plaintiffs must have the costs. [*Hemming, Q.C.* having referred to the offer of the defendants, as contained in the letter of the 10th Nov., as a reason why costs should not be given against them, *Bacon, V.C.* proceeded:] I cannot accept that view, because I do not forget that the plaintiffs also offered, if the defendants chose to export the machines, to put an end to the action.

Solicitors: *Waterhouse, Winterbotham, and Harrison; Davidson and Morris.*

Saturday, June 21.

(Before BACON, V.C.)

Re HUBBACK; INTERNATIONAL MARINE HYDROPATHIC COMPANY v. HAWES. (a)

*Executor and trustee—Retainer by—Right of—Judgment and specialty debt.*

*A testator having died on the 6th Sept. 1883, on the 27th the official liquidator of a company, to whom the testator was indebted as a contributory, obtained an order against him in the Palatine Court for payment of 225l. in respect of a previous call.*

*On the 10th Oct. 1883 the liquidator commenced an action for the administration of the testator's estate, and on the 16th Oct. obtained an order against the executors for the payment of the 225l.*

*On the 24th Oct. H., one of the executors, gave the liquidator notice of his claim to retain a sum of 306l. 10s. This sum was entered in the accounts furnished in the administration action as of the date of the 2nd Nov. 1883, and was claimed in respect of a mortgage made by the testator to two other persons and H., as trustees.*

*Held, that H. was not entitled to retain the 306l. 10s. in respect of his specialty debt, but was bound by the balance order to satisfy the debt of the liquidator.*

THIS was the further consideration of an action for the administration of the estate of Joseph Hubback. The writ in the action was issued on the 10th Oct. 1883 by the International Marine Hydropathic Company on behalf of themselves and other creditors of the deceased, against Alexander Travers Hawes and Georgina Hubback, as the executors and trustees of the testator.

On the 5th April 1883 the plaintiff company was ordered to be wound-up in the Palatine Court at Liverpool, and the testator was settled as a contributory in respect of 500 shares. The testator died on the 6th Sept., and shortly afterwards a call was made.

On the 27th Sept. an order was made upon the testator for payment of the sum of 225l. in respect of the call. The liquidator having heard of the testator's death, commenced the above action, and on the 16th Oct. 1883 obtained an order for the payment by the executors of the testator of 225l. out of the assets in their hands.

On the 24th Oct. A. T. Hawes gave notice to the liquidator that he claimed to retain a sum of 306l. 10s. The usual accounts were directed in the administration action on the 9th Nov. By the certificate of the chief clerk, dated the 6th May 1884, he disallowed the 306l. 10s. as an item of disbursement, finding that sum to be due from the defendants, and also finding the debt of 225l. due to the official liquidator. The entry of the disbursement in the account was as follows:

1883, Nov. 2, Messrs. S. Cartwright, G. W. Bell, and A. T. Hawes, on account of mortgage of testator's freehold property, Hoscoote, West Kirby, Cheshire, 306l. 10s.

The mortgage in question was dated the 27th June 1882, and was made between the testator and J. D. Wake and others, and was transferred in March 1883 to S. Cartwright, S. W. Bell, and A. T. Hawes. The property had been sold.

On the 16th May 1884 A. T. Hawes issued a summons to vary the chief clerk's certificate by disallowing the debt of 225l., and allowing the



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disbursement of 306l. 10s. The argument was mainly addressed to the latter amount.

*Marten, Q.C. and Parkin for Mr. Hawes.*—Mr. Hawes has an undoubted right of retainer as against all debts of equal degree, at the death of the testator. The fact of his being one of three trustees does not make any difference, nor can he be affected in his right of retainer by the order of the 16th Oct. 1883, obtained by the official liquidator after the testator's death:

*Williams on Executors*, 6th edit. vol. 2, p. 972;

*Sander v. Heathfield*, 31 L. T. Rep. N. S. 400; L. Rep. 19 Eq. 21;

*Crowder v. Stewart*, 16 Ch. Div. 368.

*S. Hall for the official liquidator.*—The debt of the official liquidator is a debt of record by virtue of the judgment of the 16th Oct. 1883; and is therefore of higher degree than the specialty debt arising on the mortgage. [BACON, V.C. asked for more information as to the mortgage, and the sale of the property comprised therein.] The property mortgaged was sold by the first mortgagees with the concurrence of a second mortgagee, after the date of the judgment; but the amount realised was not sufficient to pay the mortgage debt. The retainer by Mr. Hawes being on the 2nd Nov. 1883, cannot affect the previous judgment.

*Marten, Q.C. in reply.*

BACON, V.C.—Now that the matter is somewhat more clear—I do not say quite as clear as it ought to be—I think there is no reason to doubt that the balance order made after the testator's death is in fact a judgment against the estate of the testator in the hands of his representatives. If the executor had any right to make a retainer in respect of any moneys in his hands, and had thought fit to exercise than right before any order had been made, a different state of things might have presented themselves than those which have now to be considered. In my opinion, however, there is no doubt about the matter as it now stands. From the date of that balance order of the 16th Oct. 1883 the executors were bound to obey, and do that which it directed, namely, to apply the estate of the testator in their hands in satisfaction of the debt directed to be paid by the terms of that balance order. The right of retainer by an executor is perfectly clear and well settled. But the executor here, having in his hands moneys enough to satisfy the exigencies of the order which was made, some time later on, pays off a debt of the testator's by retaining it for himself, and then says that he has a right to do that for his own benefit, being a creditor by speciality, as against the right of the judgment creditor to his debt. In my opinion he has not a right to make any such retainer, and it cannot be set up except in opposition to the finding of the chief clerk that this executor has in his hands a sum of 306l. 10s. which is due to the testator's estate. I must dismiss the summons with costs.

Solicitors for the plaintiffs, *Pritchard, Engelfield, and Co.*, for *Brook and Morris*, Liverpool.

Solicitor for the defendants, *H. C. Blaker*.

Thursday, Aug. 7.

(Before KAY, J.)

Re HADDAN'S PATENT. (a)

*Practice—Interrogatories—Revocation of patent—Petition—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 26—Rules of Court 1883, Order XXXI., r. 1—Order LXXI., r. 1—Judicature Act 1873, s. 100.*

A petition was presented under sect. 26 of the Patents, Designs, and Trade Marks Act 1883 to procure the revocation of a patent, on certain grounds, which were stated in the particulars of objections.

A summons was subsequently taken out, in pursuance of leave specially reserved for directions as to the further conduct of the petition, asking that the petitioner might be at liberty to deliver to the respondent interrogatories, or, in the alternative, that the respondent might be ordered to furnish particulars of his answer to the petition.

The question was whether the practice as to delivering interrogatories applied to a petition of this kind.

Held, that interrogatories might be delivered upon the usual terms of making a deposit.

A PETITION was presented, under sect. 26 of the Patents, Designs, and Trade Marks Act 1883, to procure the revocation of a patent on six grounds, which were stated in the particulars of objections, one being fraud.

The case was ordered to go into the general paper, with liberty for either party to apply at chambers as to the mode of procedure, pleading, or otherwise.

A summons was subsequently taken out, in pursuance of the leave specially reserved, asking that the petitioner might be at liberty to deliver to the respondent interrogatories, or, in the alternative, that the respondent might be ordered to furnish particulars of his answer to the petition.

The summons was adjourned into court, and now came on to be heard.

*Ashton Cross* for the applicant.—The practice as to delivering interrogatories applies to a petition of this kind. In any action, and in "every other cause or matter," a plaintiff may, by leave of the court or a judge, deliver interrogatories: (Rules of Court 1883, Order XXXI., r. 1.) The word "plaintiff" includes every person asking any relief, otherwise than by way of counter-claim as a defendant, against any other person by any form of proceeding: (Judicature Act 1873, sect. 100.) The Judicature Act 1873 applies to the New Rules: (Rules of Court 1883, Order LXXI., r. 1.) It has been held that, notwithstanding the provisions of sect. 41 of the Patent Law Amendment Act 1852 (15 & 16 Vict. c. 83), the court has jurisdiction, in a patent action, to give leave to administer interrogatories directed to matters contained in particulars of objections delivered:

*Birch v. Maier*, 74 L. T. p. 208; W. N. 1883, p. 2.

The applicant has taken all the steps required by sect. 26 of the Patents, Designs, and Trade Marks Act 1883. The provisions of that section are so meagre that the court, in its inherent jurisdiction, must have some means of bringing the parties face to face. [He was stopped by the Court.]

*Thomas M. Goodeve* for the respondent.—The procedure is defined by sub-sects. 5 to 7 of sect.

26 of the Patents, Designs, and Trade Marks Act 1883, and the ordinary practice as to discovery is not appropriate or applicable to such procedure. Moreover, there is nothing to interrogate the respondent about. It is assumed that he denies the whole thing. If the applicant can show that the respondent has infringed his patent, then the respondent's patent is gone. By coming into court, producing his patent, and defending it, it is equivalent to a joinder of issue.

No reply was called for.

KAY, J.—I think I must grant this application. It is a new practice, and therefore I will refer to the particular sections of the Acts of Parliament and Rules of Court which govern the matter. By the 26th section of the Patents, Designs, and Trade Marks Act 1883 the proceeding by *scire facias* to repeal a patent is abolished, and revocation of a patent is henceforth to be obtained on petition to the court. Then the section provides, in sub-sect. 5, that the plaintiff must deliver with his petition particulars of the objections on which he means to rely, and no evidence shall, except by leave of the court or a judge, be admitted in proof of any objection of which particulars are not so delivered. By sub-sect. 6 particulars delivered may be from time to time amended by leave of the court or a judge. By sub-sect. 7 the defendant shall be entitled to begin, and give evidence in support of the patent, and if the plaintiff gives evidence impeaching the validity of the patent the defendant shall be entitled to reply. Subject to that, the new Act leaves the practice to be governed by the ordinary practice upon a petition to the High Court. Then rule 1 of Order XXXI. of the Rules of Court 1883 provides that in certain actions, which it describes, and "in every other cause or matter the plaintiff or defendant may, by leave of the court or a judge, deliver interrogatories in writing for the examination of the opposite parties." By Order LXXI., r. 1, which interprets the terms used in the rules, the provisions of the 100th section of the principal Act—that is, as thereby defined, the Supreme Court of Judicature Act 1873—is to apply to the rules; and by that 100th section of the Act of 1873 the word "plaintiff" shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise. Therefore, clearly the plaintiff in Order XXXI., r. 1, means petitioner, and that rule applies to petitions of this kind just as much as to any other kind of petition. No doubt the practice is, if the court thinks fit to give leave, to allow the petitioner, on the application for the revocation of a patent, to exhibit interrogatories to the opposite party, of course on the usual terms. The petitioner asks for the revocation of this patent on six grounds, which are stated in the particulars of objections, and he seeks to exhibit interrogatories to the respondent. I am not at all sure that the exhibition of interrogatories in such a case may not save a great deal of trouble and delay. I am bound to suppose that the present application is made with that view, and, therefore, on the usual terms of the petitioner making the usual deposit, I shall allow him to administer interrogatories to the respondent. It is said that the interrogatories may be

wrong. If they are, then the respondent has got an appropriate remedy. The costs will be costs in the action.

Solicitor for the applicant, *John Clear*.

Solicitors for the respondent, *Laundy, Son, and Kedge*.

July 1, 2, 3, 4, 5, 7, and 8.

(Before NORTH, J.)

CRADOCK v. ROGERS. (a)

*Solicitor and client—Mortgage—Unqualified power of sale.*

*A solicitor took a mortgage from his client containing a power of sale without the usual proviso that the power of sale should not be exercised unless there was default in payment of the principal after six months' notice, or some interest should be in arrear for three months. This omission was not brought to the mortgagor's notice. The mortgagees (without notice) sold part of the property at a time when interest was in fact three months in arrear, and other part when some interest was in arrear less than three months.*

*The mortgagor brought an action against the mortgagees, claiming damages for wrongful sales.*

*Held, that both the sales were wrongful as between the mortgagor and mortgagee, but the first sale not being at an undervalue, the Court gave the mortgagor no damages in respect of it. The second sale, though not improperly conducted, was shown to have been in fact at an undervalue, and the Court gave damages in respect of it.*

THIS was an action by a mortgagor against his mortgagee, who had, as the plaintiff alleged, wrongfully sold the mortgaged property, and the plaintiff claimed an account of what was due under the security and of the sale moneys, and of the rents received by the mortgagee, and damages in respect of the sale of the property, which the plaintiff alleged to have been wrongfully conducted. The plaintiff was the owner in fee of certain property in Truro, which, in the year 1879, was in mortgage by him to certain persons, hereinafter called Buck's trustees.

The plaintiff having applied to the defendant, a solicitor, to find him the money to pay off Buck's trustees, a mortgage of the property, dated the 29th Sept. 1879, was executed to the plaintiff, to secure in all 860*l.*, made up as follows: 750*l.* paid to Buck's trustees in discharge of their claim; 20*l.* paid to the plaintiff; and 80*l.* retained by the defendant in respect of costs claimed by him in respect of previous litigation between the plaintiff and Buck's trustees.

The defendant alleged that the money advanced by him was in reality the money of some clients of his, though the mortgage was taken by him in his own name. The judge, however, held that the plaintiff was not aware of this, and that, as between themselves, the plaintiff and defendant were mortgagor and mortgagee.

In the preparation of this mortgage, the defendant (as the learned judge held at the trial) acted as the plaintiff's solicitor.

The mortgage contained an absolute power of sale to the mortgagee without the usual qualifying clause providing that the power should not be exercised unless some principal money should be

unpaid six months after notice, or unless some interest should be three months in arrear. As to this the learned judge held, as a matter of fact at the trial, that it had not been explained to the plaintiff that the power of sale was not in the usual form.

A portion of the property was sold by the defendant in Jan. 1882 for 800*l.*, and the rest thereof in July 1882 for 375*l.* The plaintiff alleged that the sales were made without notice to him, and the defendant denied this, but submitted that under the mortgage deed no notice was necessary. The plaintiff also alleged that the sales were improperly conducted, and made at an undervalue, and further that no interest was due on the mortgage at the time of either sale. As to this the learned judge held at the trial that the sales were not improperly conducted, though the second sale did not realise the value of the property; also, that at the time of the first sale there was interest three months in arrear, and at the time of the second sale some interest due, but not three months in arrear.

A further part of the plaintiff's case was that he had allowed the appropriation of the 80*l.* by the defendant towards his costs on his promise to furnish a bill of costs, which had not been done.

The plaintiff also pleaded that the defendant had refused to account for the balance in his hands after the sale.

The action now came on for trial. The greater part of the time occupied in argument was as to the facts of the case and the state of the accounts; the principal legal point discussed being as to the effect of the omission by the defendant to insert the usual qualification in the power of sale without directing the plaintiff's attention to the fact.

*Willis, Q.C.* and *Richard Nevill* for the plaintiff.—It was the defendant's duty as the plaintiff's solicitor to explain to him the unusual power of sale, and it is not open to him to say that if interest was in fact three months in arrear he is entitled to such rights as he would have had if he had not omitted the qualifying clause from the power of sale. The view of the late Master of the Rolls was against such a contention:

*Cockburn v. Edwards*, 45 L. T. Rep. N. S. 500; 18 Ch. Div. 449.

They cited also

*Macleod v. Jones*, 49 L. T. Rep. N. S. 321; 24 Ch. Div. 289.

The Defendant, in person, submitted that *Cockburn v. Edwards* (*ubi sup.*) was a case where no interest was in fact in arrear at the time of the sale, and the money advanced was the money of the solicitor himself, whereas in the present case the advance of 750*l.* was the money of the defendant's clients, although the mortgage was taken in the defendant's own name, whereas in the present case there was interest three months in arrear which would have authorised the mortgagee to sell if the mortgage had contained the usual clause qualifying the power of sale. The plaintiff therefore had suffered no damage from its omission. He also dealt with the evidence, submitting that the plaintiff understood the provisions of the deed, and that nothing had been established against himself showing improper conduct. He cited, on the subject of costs,

*Turner v. Hancock*, 46 L. T. Rep. N. S. 750; 20 Ch. Div. 303;

*Cotterell v. Stratton*, 28 L. T. Rep. N. S. 218; L. Rep. 8 Ch. 295;  
*Re Sarah Knight's Will*, 50 L. T. Rep. N. S. 550;  
26 Ch. Div. 82;  
*Re Watts; Smith v. Watts*, 22 Ch. Div. 5.

*Willis, Q.C.* in reply.

July 8.—*NORTH, J.* (after stating the circumstances under which the mortgage was executed, and deciding that as between themselves the plaintiff and defendant were mortgagor and mortgagee, and also that the defendant had acted as the plaintiff's solicitor in the matter) proceeded:—We then come to the consideration of the mortgage executed, and in respect of that I may say it contains a power of sale in general terms, but it omits the usual qualifying clause that the power shall not be exercised until six months notice in writing has been given to pay the principal, or until the interest is three months in arrear. Now let us see whether the form in which the document was actually prepared was the usual form. The defendant says in his affidavit: "The plaintiff was well versed in the provisions of mortgage deeds, and stated that he had been a solicitor's clerk for forty years. The mortgage is quite in the usual form." But it is a singular thing that the draft shows beyond all question that it is not. The draft is prepared by the defendant's son acting as his solicitor, and he prepared the bulk of the draft. [His Lordship then referring to the draft drew attention to the fact that it originally contained the usual clause qualifying the power of sale, which clause had been struck out, and referred to the defendant's evidence, when he said that such was not always the form, but only in cases where the security was not good, and continued:] In addition to that the case of *Cockburn v. Edwards* (*ubi sup.*) has been cited, and it appears that in that case a doubt was raised by the late Master of the Rolls whether such a clause as a qualifying proviso is usual in a second mortgage or not. But it must be remembered that what he was dealing with was a simple case of second mortgage. That was all he had any doubt upon, and that doubt was resolved by the court deciding that even in a second mortgage it was not usual to omit that clause, and there could be no doubt whatever that in a first mortgage the qualification is usual, and always put in. Then what is the duty of a solicitor who is preparing a mortgage for his client? The late Master of the Rolls said, in *Cockburn v. Edwards* (*ubi sup.*), that if the power of sale was in an unusual form, and the plaintiff when he executed the mortgage deed was not aware of this, then the defendant who had acted as his solicitor in the mortgage transaction was guilty of a breach of duty; and his Lordship said (18 Ch. Div. 456): "The sale then was improper unless there was interest three months in arrear, and I think that there is great weight in the argument for the respondent, that it was improper whether there was interest in arrear or not, for that the client had a right to be informed what the terms were upon which the estate could be sold, and that the absence of such information made the sale improper. I am disposed to think that this argument ought to prevail." That means unless it was explained, and then the question arises, was it explained? [His Lordship then examined the evidence which established in his Lordship's view that the unusual nature of the

power of sale had not been explained by the defendant to the plaintiff, and proceeded:] There is one other matter to be noticed: from beginning to end this new mortgage is spoken of and represented by the defendant as being a transfer of the mortgage and the securities for the same. It is so called at least ten or a dozen times, and it is so called in the statement of defence. The original mortgage deed did contain this qualifying clause, and if the defendant was representing to the plaintiff that this was a transfer, it was all the more incumbent upon him to call attention to the fact of the non-existence of this qualifying clause. It is admitted that no notice to call in the principal was given, but it is said that as a matter of fact the interest was three months in arrear, and that therefore if the power had been restricted then the sale might well have been proper and legal; that is to say, that if this deed had been in some other form, then a compulsory sale, if it had taken place, might have been justifiable under the power of sale. As to the first sale, the fact that the interest was in arrear three months at the time of the sale in dispute is admitted, so that the question is very fairly raised. In considering the question, I have no authority before me bearing upon this except the case of *Cockburn v. Edwards* (*ubi sup.*), and in the judgment there the late Master of the Rolls says: [His Lordship read the passage above set out.] Then the Master of the Rolls went on to deal with the second topic—was there any interest in arrear?—and came to the conclusion that there was not. Brett and Cotton, L.JJ., in the course of their judgments, both put it that the sale was improper unless six months' notice was given in writing or interest was three months in arrear. And, in reading very carefully the judgments they gave, it appears to me that they put it on that second branch of the case, and that they did not notice the first point which the Master of the Rolls had noticed. And I come to the conclusion that they were simply deciding as they did, being satisfied to put it on the view that the interest was not in arrear; but I find nothing in their judgments at all calculated to throw doubt upon the observations made by the Master of the Rolls. In considering this question I had the defendant in person before me. He is himself a solicitor of great experience and ability, and he conducted his own defence very skilfully. In the course of the argument I put to him this case: Take the case of a mortgage by a client to a solicitor, not containing any power of sale. Suppose that six months' notice had been given to pay off the principal, or the interest was three months in arrear, and the mortgagor was not in a position to pay, and thereupon the mortgagee sold; could such a sale be justified on the ground that although he sold without there being properly inserted in the mortgage deed a power of sale in the common qualified form, yet, if it had been so inserted, the sale which had taken place would, under the circumstances, have been strictly within the law? The defendant admitted that such a sale in the absence of any power in the deed could not be justified, and I take the same view. But in the case I have put the power of sale is no part of the contract, and the contract must be construed according to what is to be found in the deed and not with reference to what might have been put into it. In the present action it is not a question of rectifying the contract on the

ground that something has been omitted by inadvertence; the defendant's contention is, that the contract is correct as it stands, and to support that he must prove either that no explanation by him was necessary, or that a proper explanation was given. So far as a mortgagor and mortgagee are concerned, I see no distinction between a case in which a power of sale is wholly wanting, and a case in which the power of sale is expressed as it is here. It appears to me, therefore, that, no rectification being sought, as the deed stands it does not authorise the sale so as to make it binding between mortgagee and mortgagor. I have dealt with the first sale because it is said more than three months' interest was in arrear; but in the second sale that is disputed. [With reference to the second sale, his Lordship decided that there was a sum due in respect of both principal and interest at the date of the sale, but that the interest was not three months in arrear; and he also decided that neither of the sales was shown to have been conducted in an improper manner, and that as to the first sale neither was it at an undervalue.] The first and second sales seem to me to stand upon different footings. The ground of complaint is that the defendant has committed a breach of duty—not in inserting an unqualified power of sale, but in omitting to insert a proviso: in other words, that the defendant did wrong in not putting in the deed a clause as to the terms of the notice to call in. If a qualifying proviso had been inserted in the mortgage deed, the plaintiff would not have suffered any injury. If what the defendant has done would have been justified if the qualifying proviso had been put in, has the plaintiff sustained any damage from the defendant's breach of duty in omitting this clause, even though the sale had been a sale below the real value of the property? Now, as I said before, the evidence has not satisfied me that this first sale was at an undervalue. The second sale stands upon a different footing. A balance of about 154*l.* was left owing on account of principal carrying interest which was payable at the end of June or on the 1st July. Therefore there was not three months' interest in arrear at the time the second sale took place. If that is so, then the property ought not to have been offered for sale. Was it then sold for less than its real value? If the defendant did sell it for less than its real value, then he would be liable to pay substantial damages. I am of opinion that it was sold for less than its real value, and I put the damages at 105*l.* Following the course adopted by the late Master of the Rolls, in the case of *Cockburn v. Edwards* (*ubi sup.*), I shall abstain from saying how I arrive at that sum further than this: [His Lordship then stated some circumstances which weighed in his mind on the subject.] It is only fair to the defendant to say here that I do not think there was anything improper or irregular in the conduct of the sale itself. I consider that everything in reason was done by him with the view of getting the best price. [His Lordship then dealt with the question of the appropriation by the defendant of 80*l.* out of the money towards his costs, and decided upon the matter, and continued:] The only question which remains is the costs of the action. Those are divided into two heads—the costs incurred by reason of the improper sales, and the costs with respect to the

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account. With regard to the first I have decided that the defendant failed in his duty to his mortgagor; that the mortgage was improperly drawn, and that the sales were improper. I must, therefore, order the defendant to pay the costs of that part of the action with this exception, that the plaintiff having failed to show that the sales were improperly conducted, the defendant must have his costs of that issue. After the sale the plaintiff was entitled to an account. I find that the defendant deliberately kept back an account he knew he was bound to render, and was deliberately retaining money he knew he was bound to hand over. The defendant, therefore, must pay the costs of the action other than those of the issue I have mentioned.

Solicitor for the plaintiff, *Charles Turner*.

Solicitor for the defendant, *F. Clift*, for *Henry Montague Rogers*, Helston.

Thursday, July 24.

(Before NORTH, J.)

SUGG AND CO. v. BRAY AND CO. (a)

*Practice—Trial of action—Document—Notice to produce—Secondary evidence.*

*Action to restrain alleged libel to the effect that the plaintiff was infringing the patent rights of the defendant, a rival tradesman.*

*The defendant, in cross-examination, stated that he had been in the habit of consulting A., an engineer (one of his witnesses), as to his patents, and had received from him a written report. The plaintiff had not required from the defendant an affidavit of documents, and on the twelfth day of the trial notice was given by leave to the defendant to produce the report next day. The report not being produced next day the plaintiff's counsel, after the evidence for the defendant was closed, asked leave to recall the defendant or A. to be examined as to the contents of the report, or that A. might produce a copy of it.*

*The Court refused to allow parol evidence to be given at that stage of the trial, with respect to a document as to which no proper notice to produce had been given.*

THE plaintiffs, Sugg and Co., and the defendant, Geo. Bray, trading as Bray and Co., were rival manufacturers of gas burners for street lamps and other gaslights, and the plaintiffs brought an action to restrain the defendant from publishing certain alleged trade libels and slander by advertisements and communications to the plaintiffs' customers; the substance of the alleged libels being that the plaintiffs had infringed certain patents taken out by the defendant in the year 1879, and that the defendant threatened legal proceedings against the plaintiffs' customers. The first charge of infringement was made by the defendant against the plaintiffs by letter of the 16th March 1880, and the alleged libel and slander was continued until Sept. 1881. The writ in the action was issued in Oct. 1881. The defence was that the plaintiffs had in fact infringed the defendant's patent, and that whether or not that was the fact, yet the defendant *bona fide* believed such to be the case.

The trial of the action began on the 10th July

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

1884. On the twelfth day of the trial the defendant, during his cross-examination, stated that Mr. Imray, an eminent engineer, had advised him as to his patents, as he believed, from some date early in 1881; that his communications were chiefly oral, but that he had given him a written report on his patents generally, the patent in question in this action being referred to in the written report. The exact date of this report, however, was not fixed, nor whether it was written before or after the 16th March 1880, when the parties became at issue through the defendant's letter of complaint. On the counsel for the plaintiffs putting a question to the defendant as to the substance of the written report, it not being produced, and proper notice to produce it not having been given, he was stopped, but formal notice to produce it was given. On the next day of the trial, after the defendant's evidence was closed, the written report was again called for, and not produced, whereupon

*Aston, Q.C. (Webster, Q.C., Chadwyck Healey, and Whinney with him), for the plaintiffs, asked leave to recall Mr. Imray or the defendant to ask what were the contents of the written report, or that Mr. Imray might produce a copy of it if he possessed one.*

*Davey, Q.C. (Barber, Q.C., Lockwood, Q.C., and Ingle Joyce with him), for the defendant, objected to fresh evidence being now put in. He submitted also that the document, if prepared since the 16th March 1880, was privileged.*

NORTH, J.—I cannot allow any further evidence to be given on that point, for this reason: the parties did not choose to take the ordinary means of obtaining information as to documents in the possession of another party, namely, to apply for an order for production. On the twelfth day of the trial something is said about a report. It is called for and not produced, and it is said there is nothing of the sort here. Notice to produce is given by leave. It is asked for this morning, and it is not produced. Now I know as a fact that the defendant is a person carrying on business in Leeds, and he is employing a solicitor who is, I believe, a solicitor in Leeds also. This is not a document, if it exists, to which the attention of the parties has been called before at all, and in my opinion there has been no such notice given as is proper to entitle the plaintiff at this time to have it produced. The question of privilege I do not go into at all. I am not prepared to say at present whether it would be privileged or not. I should like to see the document myself before deciding whether the other parties are entitled to see it. I cannot have the evidence taken in that way without the parties hearing it too. It seems to me to be an attempt made to obtain information that was got from Mr. Bray, looking at it from the plaintiffs' point of view, at the time when the parties were at arm's length, and there were these disputes as to their business and articles sold by them actually going on between them. Under these circumstances it is unnecessary for me to decide, having regard to what the parties were, whether the document is strictly privileged or not. That I do not deal with at all, but I see no reason why, at this stage of the matter, I should allow an unusual course to be adopted of parol evidence being asked for and given as to the contents of a document in respect

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of which, in my opinion, no proper notice to produce has been given.

Solicitors for plaintiffs, *Bedford and Monier Williams*.

Solicitors for defendant, *Torr and Co., for Simpson, Leeds*.

Friday, July 18.

(Before PEARSON, J.)

THE TRUSTEE IN THE BANKRUPTCY OF A. G. POOLEY v. WHETHAM AND OTHERS. (a)

*Practice—Security for costs—Order LXV., r. 6—Trustee in bankruptcy—Official name—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 83—Insolvent trustee.*

*There is no absolute right to security for costs from a trustee in bankruptcy suing in his official name.*

*Seemable, security will be required from a trustee in bankruptcy, although suing in his official name, if it is shown that the trustee himself is in insolvent circumstances.*

*Denston v. Ashton (21 L. T. Rep. N. S. 20; L. Rep. 4 Q. B. 590) disapproved.*

This was an application by the defendants in the action that the plaintiff might be ordered to give security to the satisfaction of the judge for the defendants' costs of the action.

There were two sets of defendants, each of whom made an application to the same effect. Both motions were heard together, there being no distinction in the cases.

The action was brought by the trustee in the bankruptcy of Alexander Gopsall Pooley against the Metropolitan Bank Limited and the Royal Exchange Bank Limited for the purpose of setting aside certain orders pronounced in other proceedings, on the ground of fraud and collusion, and to restrain any dealings by the defendants with certain moneys.

The plaintiff sued in his official name as "the trustee of the property of Alexander Gopsall Pooley, a bankrupt," under the provisions of the Bankruptcy Act 1883, s. 83, in effect repeating the Bankruptcy Act 1869, s. 83, sub-sect. 7.

The application was supported by evidence which showed that in the year 1874, or thereabouts, the trustee himself was an absconding bankrupt, that he had afterwards paid a dividend of 10d. in the pound, and that he was discharged by order dated the 22nd June 1881. The evidence also showed that in the year 1880 he entered into a liquidation by arrangement or composition with his creditors.

No evidence was filed in answer to the application, but it was stated at the bar that, with regard to the liquidation by arrangement, the debtor had obtained his discharge at the first meeting of creditors, and had since paid all his debts in full, with the exception of those owing to two creditors.

*Napier Higgins, Q.C. and Northmore Lawrence*, for the Metropolitan Bank Limited, in support of the motion of those defendants.—This is a proper case for ordering security to be given. The jurisdiction and practice have been enlarged by Order LXV., r. 6:

*Mortana v. Mann*, 42 L. T. Rep. N. S. 890; 14 Ch. Div. 419;

(c) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

*Lydney v. Wigpool Iron Ore Company v. Bird*, 48 L. T. Rep. N. S. 893; 23 Ch. Div. 358.

The court has an inherent jurisdiction to demand security in a proper case. It is not contended that mere poverty, apart from other circumstances, is sufficient ground for requiring security. The analogy of executors not being called upon to find security does not apply; they are personally liable for costs, whereas a trustee in bankruptcy would, if unsuccessful, be entitled to say he was suing only as trustee. The trustee in bankruptcy ought not to be in any better position than the bankrupt himself. The evidence, as it stands, sufficiently shows that the plaintiff is not in a solvent position; but, if necessary, leave should be given to file an affidavit proving present insolvency. The rule is clearly laid down by Blackburn, J. in *Malcolm v. Hodgkinson* (L. Rep. 8 Q. B. 209), namely, that "where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs."

*Cozens-Hardy, Q.C. and Grosvenor Woods* for the Royal Exchange Bank Limited.—We claim the benefit of the argument already addressed to the court. The trustee is liable to be removed by the creditors; if he were, there would be no person or fund to look to for costs:

*Ex parte Sheard; Re Pooley* (2), 44 L. T. Rep. N. S. 280; 16 Ch. Div. 110;

and submitted that a trustee in bankruptcy is not exactly in the same position as an ordinary litigant, seeing that he is liable to be removed by those who employ him.

*Cookson, Q.C. and Emden* for the plaintiff.—It is clear that a trustee in bankruptcy if unsuccessful in litigation would not be entitled to shield himself behind the bankruptcy if the assets were insufficient to pay the costs. He is liable in the same way as any other plaintiff:

*Ex parte Angerstein; Re Angerstein*, 30 L. T. Rep. N. S. 446; L. Rep. 9 Ch. App. 479.

Therefore the mere fact of the trustee suing as such in his official name is no ground for ordering security from him. It has been decided that the court will not require security to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate, although he is in insolvent circumstances:

*Denston v. Ashton*, 21 L. T. Rep. N. S. 20; L. Rep. 4 Q. B. 590.

Here there is no evidence whatever, nor is it the fact, that the plaintiff is now insolvent, whatever may have been the case three or four years ago.

PEARSON, J.—This case no doubt raises a very important question, and a question which, to my mind, whenever it should be raised before the Court of Appeal, will have to be very seriously considered. An action has been instituted in the name of the trustee of a bankrupt, Alexander Gopsall Pooley, against several defendants, and there is now an application made to me in that action that the plaintiff so described, and not by his own name but simply by his official title, may give security for costs. Among other suggestions that have been made has been this, that, inasmuch as he has described himself simply by his official title, and not by his own name, the defendants will have no right to an order for costs against him personally if he shall fail in his action and be ordered to pay costs. To that argument I cannot

accede. The right to sue by his official title is given by the Bankruptcy Act of 1869, which authorises the trustees in bankruptcy to sue and be sued by his title. I do not understand that that section of the Act in any way relieves the trustees in bankruptcy from personal liability under which he was before to pay any costs which may be ordered to be paid by him, simply because he sues by his official title and not by his individual name. I think the court would have the same jurisdiction to order him personally to pay the costs it had before. That seems to me to be confirmed by the case which Mr. Hardy has just cited to me of *Ex parte Sheard* (*ubi sup.*), before the Court of Appeal, in which, so far as I can make out, the trustee had made his application and appealed in his own name, and although he had sued in his own name, the court held that, inasmuch as he had had no opportunity of arguing the appeal, because he had been removed pending the appeal, and a new trustee had been appointed in his place who declined to go on with the appeal, they could not order him personally to pay the costs. Now, it seems to me that that case goes a long way to show that in every case in which a trustee in bankruptcy sues, if there be the slightest reason to doubt his solvency, the court ought to have jurisdiction, and probably has it, to require him to give security for costs, because that case seems to me to determine that, if he is removed and a new trustee appointed who does not choose to go on with the suit, it does not follow as a matter of course that the trustee who has been removed is personally liable for the costs of the action; and, inasmuch as any trustee is liable to be removed by the Court in Bankruptcy without the knowledge or consent or privity in any way of the defendants to the action, who have no control and may not have any *locus standi* in the Court of Bankruptcy, it seems to me that that would furnish a reason, and a very strong reason, why the defendants in any action should be at liberty to require security for costs from any trustee who brings an action against them. But the case here is supported, as far as the trustee is concerned, by the decisions of the common law courts, and one of them in particular—the case of *Denston v. Ashton* (*ubi sup.*)—which seems to me to show that, at all events, the opinion of the common law courts in the year 1869 was that you cannot require security for costs from a trustee in bankruptcy, even if he be insolvent, on the ground that he is insolvent, that poverty is no ground for requiring security for costs from a trustee, inasmuch as it is no ground for a defendant requiring security from a plaintiff who sues in *propria personâ*. If I may be allowed to say so, with all respect to the learned judges who decided that case in opposition to the opinion of Willes, J., whose decision they overruled, I prefer the opinion of Willes, J. to the opinion of the Court of Appeal, and, when they give as their reason another case in the Court of Common Pleas, in which they had overruled the decision of the present Master of the Rolls, who required security to be given, and compare the case of executors to the case of a trustee in bankruptcy and say that if you cannot require security from executors, so you cannot require security from a trustee in bankruptcy, I am bound to say I cannot follow that reasoning. An executor seems to me to stand in a very different position from a trustee in

bankruptcy. The executor represents the testator, who may possibly have begun an action in his own lifetime, and would not have been required to give security. And if you could not require the testator himself to give security, I can see no principle why you should require the executor to give security. But when you come to the case of a trustee in bankruptcy, it is admitted that the bankrupt would not have proceeded with the action because you might at once have pleaded bankruptcy, and there would have been an end of it, and you are then dealing with the case where the trustee is not suing for his own benefit at all, but where *ex necessitate rei*, if there be a bankruptcy, your right is to go against the bankrupt's estate for your costs if the trustee cannot pay you, and you have, practically speaking, no chance of being paid those costs. These would not take precedence of all the debts of the creditors, and you would only be entitled to a dividend with other creditors. It strikes me that the case of an executor and the case of a trustee in bankruptcy are not *in pari materiâ*. If the case were left to me to decide, without any regard to authority on the point, I should be very much disposed to say that, if there be the slightest suspicion of the trustee not being able to pay the costs, the trustee ought to give security, and I am not at all sure that, if such a case were brought before me, I should not make that decision, stating it as my opinion that in that case the trustee ought to be bound to give security, and leaving it to the Court of Appeal, if they thought I was wrong, to reverse me. But the case I have to deal with is this: a trustee has been appointed in Mr. Pooley's bankruptcy; I cannot assume that the Court of Bankruptcy has done wrong in appointing him trustee. I must assume everything was done as it ought to have been done in the Court of Bankruptcy, and I must assume, therefore, that the particular trustee was properly and rightly, according to the exercise of a just and right discretion, appointed in Mr. Pooley's bankruptcy. That being so, he is a proper plaintiff in this action, if he has any right whatever in respect of the bankrupt's estate against the defendants. Then it is said, that being so, you must look at the particular trustee, and knowing that he is not suing for himself, but suing as trustee for another person, in the same way as you would, if you were inquiring into a suit by the next friend on behalf of a married woman, require security from the next friend if he were insolvent, you ought to require security from this trustee. But the only evidence before me is evidence which comes down to at least four years ago. The trustee himself has been bankrupt once, and, I understand, has paid a dividend of 10*d.* in the pound; he was concurrently in liquidation, but whether he paid anything in that liquidation or not, is not before me. Those circumstances undoubtedly are very suspicious. But he got his discharge in bankruptcy in 1881. The order was made in June of that year, though not passed and entered till September. A trustee in this bankruptcy was appointed in 1883; and there is not in the affidavits filed in this case the slightest suggestion that if the costs are given against the trustee, who is plaintiff in this action, he is not able to pay them. Under those circumstances I must refuse this application, but refusing this application under circumstances so suspicious as these, I do not hesitate to



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say that, under the present jurisdiction of the court, which allows applications for security for costs to be made from time to time, and at any time, if at any later period it should be brought before me upon a similar motion to this with proper evidence to show that the trustee is not a solvent man, I shall certainly have no hesitation whatever in entertaining that motion, and then deciding whether, under the circumstances then brought before me, I ought to require security for costs. I can only dismiss both these motions with costs.

Solicitors: *Newman, Stretton, and Hilliard; Snell, Son, and Greenip; Harper and Battcock.*

Friday, July 25.

(Before PEARSON, J.)

LUMB v. BEAUMONT. (a)

*Practice—Inspection of premises before trial—Experiment before trial—Breaking up defendant's soil—Interlocutory application—R. S. C. 1883, Order L., r. 3.*

*The old rule is now obsolete, that (as laid down in Ennor v. Barwell, 1 De G. F. & J. 529) "it is not according to the practice of the court to make, upon interlocutory application before the hearing, an order authorising the plaintiff to break the soil of the defendant's property for the purpose of inspection."*

*Order made, under Order L., r. 3, that, without prejudice to other rights, a certain plaintiff should be at liberty, on notice given, to enter upon defendant's premises for the purpose of experimenting as to certain drainage connections, and, for that purpose, to dig up the surface so far as might be necessary, plaintiff undertaking to do no unnecessary harm and to replace the surface so soon as his investigation was completed, as quickly as possible, and at his own expense.*

The principal facts relating to this action and the nature of the relief claimed are stated in 49 L. T. Rep. N. S. 772.

The plaintiff now moved, under Order L., r. 3, for leave to enter on the defendants' premises and to inspect the drain leading from the defendants' house to the plaintiff's drain, and to dig down to that drain and to follow its course from the defendants' cellar to the plaintiff's drain.

It appeared that, upon the plaintiff exploring in his own land, he had lately discovered a pipe connected with his drain and running towards the defendants' house, and he desired to trace this pipe to its origin.

Levett for the plaintiff.—This is exactly the sort of case contemplated in Order L., r. 3. (b)

J. Beaumont for the defendants.—The old rule, stated in *Ennor v. Barwell* (1 De G. F. & J. 529),

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

(b) Order L., r. 3: It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the inspection of any property or thing, being the subject of such cause or matter, as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

that "it is not according to the practice of the court to make, upon interlocutory application before the hearing, an order authorising the plaintiff to break the defendant's soil for the purposes of inspection," is still in force. He also referred to

*Bennitt v. Whitehouse*, 12 Beav. 159.

PEARSON, J.—It appears to me that *Ennor v. Barwell* has nothing to do with the construction of the present Rules of Court, which give a very convenient power of inspection before the trial of the action, so that at the trial the court may have the proper materials before it. [His Lordship proceeded to dictate an order that, "without prejudice to the rights of any other person or authority, the plaintiff should be at liberty, on giving forty-eight hours' notice to the defendants, to enter on that part of the street the soil of which belonged to the defendants for the purpose of experimenting in order to discover whether the pipe which joined the plaintiff's drain proceeded directly from the defendants' house, and, for that purpose, to dig up the street so far as might be necessary, the plaintiff undertaking to do no unnecessary harm and to replace the street so soon as his investigation was completed, as quickly as possible, and at his own expense."]

Solicitors for plaintiff, *Bower, Cotton, and Bower*, for *Jubb, Booth, and Helliwell*, Halifax.

Solicitors for defendants, *Van Sandau, Cumming, and Armitage*, for *Mills and Bibby*, Huddersfield.

## QUEEN'S BENCH DIVISION.

Monday, Dec. 10, 1883.

(Before DAX and SMITH, JJ.)

REG. v. THE JUDGE OF THE CITY OF LONDON COURT. (a)

*County Courts—Admiralty jurisdiction of—"Carriage of goods in any ship"—Passenger's luggage on board—Action by passenger against shipowner for loss of—Jurisdiction of County Court to try action—County Courts Admiralty Jurisdiction Acts 1868 and 1869—31 & 32 Vict. c. 71, s. 3, sub-sect. 8—32 & 33 Vict. c. 51, s. 2.*

*The personal luggage of a passenger on board ship, and which is carried with him as a privilege incidental to the contract to convey the passenger himself, is not "goods" within sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), by which County Courts, having Admiralty jurisdiction, are empowered to try claims "arising out of any agreement made in relation to the carriage of goods in any ship;" and there is therefore no jurisdiction in a County Court under that Act to try any action by a passenger against a shipowner for the loss of such luggage.*

This was a rule, calling upon the learned judge of the City of London Court and the defendant in an action brought by the plaintiff in that court, to show cause why the judge should not proceed to hear and determine the said action. The facts of the case were as follows:—

The plaintiff was a passenger on board a ship belonging to the defendant on a voyage from Hamburg to London, and his personal luggage, which on his embarkation on board had been stowed away

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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in the ship's hold, had been lost in the course of the voyage. He sued the defendant, the shipowner, in the City of London Court, to recover its value in damages, his action being brought under the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), s. 2. The learned judge of the court was of opinion that under that Act he had no jurisdiction to try the action, inasmuch as, in his opinion, the term "goods" in that Act applied not to a passenger's personal luggage, but only to "goods" carried on board a ship as merchandise or for profit; and he accordingly declined to hear the action, which he dismissed with costs, whereupon the rule above mentioned was obtained on behalf of the plaintiff.

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), by sect. 2, enables Her Majesty, on the representation of the Lord Chancellor, by an Order in Council, to appoint certain County Courts to have Admiralty jurisdiction as therein specified and enacted, with a proviso that no judge of a County Court, except the judge of the London Court, shall have jurisdiction in the city of London.

### Sect. 3 :

Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes) :

(8.) As to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed 300*l*.

By 32 & 33 Vict. c. 51 (the County Courts Admiralty Jurisdiction Amendment Act 1869), s. 2 :

Any County Court appointed, or to be appointed, to have Admiralty jurisdiction, shall have jurisdiction and all powers and authorities relating thereto to try and determine the following causes :

(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*.

G. Barnes, for the defendant, the shipowner, now showed cause against the rule.—The ruling of the learned judge of the City of London Court, that the term "goods" in the amended County Courts Admiralty Jurisdiction Act of 1869 applied only to "goods" carried as "merchandise or for profit," and in no way related or could be extended to such articles as the ordinary luggage of a passenger on board the ship, was right. The authorities in the way of text-books clearly support that view; for instance, in Marshall on Marine Insurance, 4th ed., part 1, chap. 7, p. 257, it is said that "a policy on goods means only such goods *merely* as are merchantable, i.e., cargo put on board for the purposes of commerce;" and to the same effect is Lowndes on Marine Insurance, par. 91, p. 48. Even assuming a contract to carry a passenger and his luggage, that would not be a contract to carry his luggage as "goods." There is no precise authority upon this Act; but the above text-books and the following cases throw a light upon the meaning of the term "goods" in such a case as this, where an Admiralty jurisdiction is conferred :

*Brown v. Stapylton*, 4 Bing. 119; 5 L. J. 121, C. P. ;  
and the judgment of Best, C.J. ;  
*Hill v. Patten*, 8 East, 373, per Lord Ellenborough,  
C.J. ;

1 Park on Insurance, 7th ed., p. 26, (citing *Ross v. Thwaites*) ;

*Cohen v. The South-Eastern Railway Company* (in the Court of Appeal), 35 L. T. Rep. N. S. 213; 2 Ex. Div. 253; 46 L. J. 417, Q. B. and Ex. ;

*Cahill v. London and North-Western Railway Company*, 4 L. T. Rep. N. S. 246; 10 C. B. N. S. 154; 30 L. J. 289, C. P.

It is clear that "goods" in the section means something very different from ordinary "luggage," which is not the subject of general average or salvage.

E. Pollock, for the plaintiff, *contra*, in support of the rule.—A reference to the prior Act of 1868 (31 & 32 Vict. c. 71) will throw some light on the meaning of the word "goods" in the subsequent Act of 1869 (32 & 33 Vict. c. 51). By the former Act of 1868, s. 3, Admiralty jurisdiction is given to the County Courts in claims for damages to "cargo," but in the subsequent amending Act of 1869 the term "goods" is used in contradistinction to the word "cargo," and it is submitted that the Legislature, by so changing the word and substituting "goods" for "cargo," clearly meant something different; and, so far from the word "goods" in the later Act meaning the same thing as "cargo" in the earlier Act, as the learned County Court judge held was the case, I contend, on the other hand, that the very reverse is the true and proper construction of sect. 2 of the Act of 1869, and that "luggage," such as that in the present case, was meant by the Legislature to be included in the term "goods." He cited

*Cohen v. The South-Eastern Railway Company* (*ubi sup.*) ;

*The Cargo ex Argos*, 27 L. T. Rep. N. S. 64; 28 Ib. 77, 745; L. Rep. 4 Adm. & Ecc. 9; Ib. 5 P. C. 134; 41 L. J. 89, Adm.; 42 Ib. 1 and 49, Adm. ;

*The Alina* (*Brown v. The Alina*), 42 L. T. Rep. N. S. 507; L. Rep. 2 Ex. Div. 227.

"Goods," under the Railways and Canal Traffic Act 1854, includes passengers' luggage, and, unless there is manifest absurdity in so doing, the court will so hold in the present case, and make the rule absolute.

DAY, J.—I am of opinion that the decision of the learned judge of the City of London Court is quite right. The cases which have been cited by Mr. Pollock, though very ingeniously put before us by him, do not, I think, help us much in coming to a decision in this case, in which, I think, the Act of Parliament (32 & 33 Vict. c. 51, s. 2, sub-sect. 1) on which the question turns must be construed by itself. For myself, I have little doubt as to the way in which we ought to construe it. The first part of sub-sect. 1, by which jurisdiction is given to the County Court "as to any claim arising out of any agreement made in relation to the use or hire of any ship," refers clearly, as it seems to me, to claims arising out of or under charter-parties. Then comes the next paragraph of the sub-section, "or in relation to the carriage of any goods in any ship," which refers, I think, as clearly to questions and claims on bills of lading. But it is urged by the plaintiff's counsel, and we are asked by him to say, that the words "in relation to the carriage of any goods in any ship" relate to a claim like the present respecting the claim of the plaintiff for the loss of his personal luggage, and that the agreement to carry a passenger and his luggage is, so far as the luggage is concerned, a contract

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to carry "goods." That, in my opinion, is not so. The contract or agreement here was not made for or with reference to the carriage of "goods" or luggage, but for the carriage of the plaintiff himself as a passenger, and it is only incidental to that contract that the passenger's luggage (his ordinary personal luggage) is carried with him. Such luggage is not and cannot be deemed to be "goods" in the sense or within the meaning of that word in the above sub-section. The ruling of the County Court judge being quite right, this rule must be discharged.

SMITH, J.—I am entirely of the same opinion, and cannot at all agree with the view taken of the section in question by Mr. Pollock. The two statutes that have been referred to deal, so far as concerns the present case, with three matters. The first of them, the Act of 1868 (31 & 32 Vict. c. 71), by sect. 2, sub-sect. 3, relates to claims made for damage to "cargo." In the subsequent Act of 1869 (32 & 33 Vict. c. 51), by sect. 2, sub-sect. 1, two claims are dealt with, namely, first, a "claim arising out of any agreement made in relation to the use or hire of any ship," which, as my brother Day has already said, relates to questions upon charter-parties; and secondly, to a claim "in relation to the carriage of goods in any ship," which I also agree with my brother Day in thinking relates to bills of lading. Now, Mr. Pollock has argued that the "claim in relation to the carriage of goods" mentioned in this section must mean or include the plaintiff's luggage, and that the agreement to carry the passenger is an agreement to carry his luggage, which is included in the term "goods." Now, no doubt in the sense that a contract to carry a passenger gives that passenger the incidental right or privilege to carry or take his personal luggage with him, the contract is a contract to carry the luggage, but in no sense is it a contract to carry "goods" within the meaning of the sub-section by which a passenger's luggage was never intended or contemplated. The Act was dealing with "merchandise" in the ordinary and well-known sense of the term.

*Rule discharged.*

Solicitors for the plaintiff, *R. Greening.*

Solicitors for the defendant, *Stokes, Saunders, and Stokes.*

*Dec. 17, 19, 20, 1883, and Feb. 9, 1884.*

(Before Lord COLERIDGE, C.J. and STEPHEN, J.)

THE ATTORNEY-GENERAL v. BIRKBECK AND CO. AND THE CRAVEN BANK LIMITED. (a)

*Banker — Right of, to issue bank notes — Bank Charter Act 1844 (7 & 8 Vict. c. 32), ss. 11, 12, 28 — Banker lawfully issuing notes at date of Act — Subsequent transfer of his business with reservation of right of issue — "Ceasing to carry on business of a banker" — Discontinuing the issue of bank notes — Meaning of these terms in sect. 12 — Information for issuing notes in contravention of the Act.*

By sect. 11 of the Bank Charter Act 1844 (7 & 8 Vict. c. 32) the issue of notes by bankers is prohibited, except that any banker who was, on the 6th May 1844, carrying on the business of a banker, and was then lawfully issuing his own notes, may continue to issue them under the con-

ditions thereafter mentioned. By sect. 12 it is provided that, on any such banker ceasing to carry on the business of a banker or discontinuing the issue of bank notes, it shall not be lawful for him thereafter to issue any such notes; and by the interpretation clause (sect. 28) the term "banker" extends and applies to all corporations, partnerships, and persons "carrying on the business of bankers, whether by the issue of bank notes or otherwise," except the Bank of England.

In 1880 a banking firm, then lawfully issuing their own notes within sect. 11, transferred their business as "a going concern" to a banking company limited, reserving to themselves their right to issue their own notes, but including in the sale such benefit of the issue as was agreed to be given to the company. The firm were to continue to issue their notes in the same form as heretofore, but through the company's officers only (which officers they might nominate), and to make through them the required statutory returns; and the company were to allow the firm interest at 2 per cent. on the amount of all notes in circulation. For the purposes of issue only the firm might continue to use their accustomed name, but were not to assign their rights; and for the like purpose new partners might, with the company's consent, be admitted; and without the like consent the firm were not to carry on business within a specified district, except so far as related to the issue of notes under the agreement. Upon their being restrained from issuing notes and no equal right of issue being given to the company, they were to pay any compensation received by them to the company, and upon the latter acquiring the right of issue, the firm's right of issue was thereupon to cease.

Upon the company's taking over the business under the above agreement on the 1st July 1880, and since which time they have carried it on, the amount of notes then in circulation was taken as part of and deducted from the purchase money paid by them, and the notes in hand were treated as cash lent by them to the firm, and outstanding notes were, on presentation, cashed and re-issued by the company. Returns of the notes in circulation were made daily to the company's head office, and twice a year the company paid to the firm 2 per cent. interest on the amount so ascertained. Except as under the agreement, the firm since July 1880 has ceased to carry on business.

An information having been filed against the firm and the company under sect. 47 of the Stamp Act of 1870 (33 & 34 Vict. c. 97), to recover penalties from them for having contravened the provisions of the Bank Charter Act of 1844 (7 & 8 Vict. c. 32) by the issue of bank notes, it was

Held by the Queen's Bench Division (Lord Coleridge, C.J. and Stephen, J.), that the company having been established in 1880 were not within the exception in sect. 11 of the Bank Charter Act of 1844, and that, as the effect of the agreement of July 1880 was to transfer to the company the business of the firm, including the right of issuing bank notes, the firm had thereby "ceased to carry on the business of a banker, whether by the issue of notes or otherwise," within the meaning of sects. 12 and 28 of the Act, and so were not protected by the exception in sect. 11, and therefore the issue of notes, whether under the agreement or otherwise, was unlawful, and all the defendants were liable.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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THIS was an information on behalf of the Crown against the defendants Birkbeck, Robinson, and Co., an old-established banking firm, which at the date of and previously to the Bank Charter Act of 1884 (7 & 8 Vict. c. 32) were lawfully issuing their own bank notes, and were therefore, by sect. 11 of the Act, empowered to continue so to do, under certain specified conditions; and also against the other defendants, the Craven Bank Limited, to whom, in July 1880, the defendants Birkbeck and Co. had sold and transferred their business, with a reservation to themselves of their right to issue bank-notes. The information was filed against all the above-mentioned defendants to recover penalties from them under sect. 47 of the Stamp Act 1870 (33 & 34 Vict. c. 97), for having, subsequently to the above-said sale and transfer in July 1880, issued bank notes in contravention of the provisions of the Bank Charter Act of 1844, and it prayed declarations that the defendants had issued bank notes in contravention of the said Act and the revenue laws, and had thereby become liable, under sub-sect. 1 of sect. 47 of the Stamp Act 1870, to a penalty of 50*l.* in respect of every note so issued (a); that the firm were not entitled to a licence under 9 Geo. 4, c. 23, and that bank notes, within the meaning of the Bank Charter Act 1844, s. 28, could not, whether under the agreement for sale and transfer, or otherwise, be issued by or on behalf of the defendants, or any of them; and praying also an injunction restraining such issue, and also seeking further and other relief as therein mentioned.

The facts of the case and the arguments on both sides are sufficiently set forth in the head-note and the judgment of the court.

Sir *H. James*, Q.C. (A.G.) and Sir *F. Herschell*, Q.C. (S.G.) (with whom were *R. S. Wright* and *Danckwerts*), appeared and argued for the Crown.

*E. E. Webster*, Q.C. and *Pollard* (with them was *H. E. Stansfeld*), for the defendants, *contra*.

*Curr. adv. vult.*

*Feb. 9.*—The considered written judgment of the court (Lord Coleridge, C.J. and Stephen, J.) was now read as follows by

LORD COLERIDGE, C.J.—This was an information for penalties under the Stamp Act of 1870 (33 & 34 Vict. c. 97), s. 47, filed against the defendants under the following circumstances: The firm of Birkbeck and Co., otherwise known as the Craven Bank, carried on the business of bankers in Yorkshire for a great many years previous to 1880, and from the year 1791 they issued notes, which subsequently to 1884 were for 5*l.* only. In 1880 the defendants, who then represented the firm, transferred their banking business to a limited liability company called the Craven Bank Limited. This was effected by a written agreement, of which the following provisions appear to us material to the decision of the present case. By article 1 the vendors agreed to sell and the company to purchase and take over "the whole of the said business of the Craven Bank Company and of Birkbeck, Robinson, and Co. as a going concern, and the goodwill thereof, except

and always reserving to the vendors their right to issue their own bank notes, but including in the said sale and purchase such benefit of the said issue as is hereby agreed to be given to the company." By article 7 it was agreed as follows: "If circumstances permit, the vendors shall, for a period not exceeding five years and may for a longer period, continue to issue their own notes in the same form as heretofore, but through the officers of the company only, and the vendors for that purpose shall from time to time nominate such clerks or officers of the company as they, the vendors, shall think fit, and shall make the returns required by statute through such clerks or officers. The company shall allow the vendors interest at the rate of 2 per centum per annum on the amount of all notes from time to time in circulation. The accounts between the vendors and the company in respect of the issue shall be stated and a balance struck on the 30th day of June and the 31st day of December in every year, and the amount found due shall be thereupon paid after deducting therefrom all the expenses of the issue. For the purposes of the issue only the vendors may continue to use the names of the said firms, or such name as has been hitherto accustomed, but the rights of the vendors shall not be assigned, but shall pass only to the surviving or continuing partners or partner. Provided always that a new partner or new partners shall from time to time be admitted on like terms for the purpose of continuing the issue of notes, but not without the consent of the company." Article 10 provided as follows: "The vendors shall not nor shall any of them at any time hereafter as long as the company carry on business, unless with the consent of the company, carry on in the county of York or the county of Lancaster the business of banking, except so far as relates to the issue of their notes under this agreement." Finally, article 11 is as follows: "If at any time hereafter the vendors shall be restrained from issuing their notes and no equal right of issue shall at the same time be given or allowed to the company, any composition or compensation which shall be made to the vendors or their successors in exercising their right to issue in respect of such right shall be paid over by them to the company, but, if at the time of such restraint an equal right of issue shall be given or allowed to the company, then any such composition or compensation as aforesaid shall belong to the vendors or their successors as aforesaid absolutely. If at any time hereafter the company shall acquire the right to issue their own notes, the right hereby reserved to the vendors of issuing their own notes shall thereupon cease and be determined." Under this agreement the company took over the business as from the 1st July 1880, and have carried on the business since that time. The facts with regard to the issue of notes of the firm were as follows: When the business was taken over a considerable number of notes, about 60,000*l.*, were in circulation, and the vendors received from the company 60,000*l.* less than they would otherwise have been entitled to. In other words, 60,000*l.* in circulation were treated as a liability of the firm which the company were to meet. On the other hand, the notes in hand at the various branches of the firm were treated as so much cash lent by the firm to the company. As the outstanding notes were presented

(a) The Stamp Act 1870 (33 & 34 Vict. c. 97) enacts: Sect. 47 (1). If any banker, not being duly licensed or otherwise authorised to issue unstamped bank notes, issues or causes, or permits to be issued bank notes not being duly stamped, he shall forfeit the sum of 50*l.*

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for payment they were cashed by the company, and, on the other hand, they were issued by the company to persons who had to receive cash from them, and who chose to take it in that form. Daily returns were made to the head office of the company showing how many of the firm's notes they had in stock at the closing of the bank, and this showed how many were in circulation. Twice a year the firm were paid 2 per cent. interest on the amount in circulation thus ascertained. The notes in stock were regarded as being received by the company for the firm and re-lent by the firm to the company as soon as they were received by the company for the firm. Several affidavits were filed and a good deal of argument was put forward as to the manner in which the books were kept, and the inferences to be drawn from them. It was sworn by certain accountants from different Government offices that the books showed that the company, and not the firm, carried on the business of a bank of issue for their own profit, and that no separate accounts were kept of the issue business and the other business of the bank. It was sworn, in substance, on behalf of the defendants, that the books, when properly examined, showed the course of business which has just been described, and it was argued that it followed that the firm still carried on their business of a bank of issue through the company, who acted solely as their agents. The controversy as to the books appears to us immaterial. The substance of the transaction appears on the agreement and on statements of fact admitted to be correct. The way in which it was recorded in the books really throws no light upon it. It is consistent with either of the views suggested to us as to the transaction itself. The legality of the arrangement made, and of the course pursued in virtue of it, depends mainly upon the construction of 7 & 8 Vict. c. 32, ss. 11 and 12 (the Bank Charter Act of 1844). Sect. 11 prohibits the issue of notes by bankers, with the following exceptions: "Any banker who was on the 6th May 1844 carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes under the authority of a licence to that effect," may "continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise." It is admitted that the defendants (other than the Craven Bank Limited) are within this exception. The question is whether they are within a limitation imposed upon it by sect. 12. This section provides that "if any banker who, after the passing of this Act, shall be entitled to issue bank notes shall . . . cease to carry on the business of a banker, or shall discontinue the issue of bank notes . . . it shall not be lawful for such banker at any time thereafter to issue any such notes." By the interpretation clause (sect. 28), it is enacted that the term "banker" shall extend and apply to all corporations, societies, partnerships, and persons and every individual person carrying on the business of bankers, whether by the issue of bank notes or otherwise, except only the Governor and Company of the Bank of England." Upon these enactments, it was contended that, in the circumstances already detailed, all the defendants had issued bank notes in contravention of sect. 11, the Craven Bank Limited having been established in 1880 were not within the exception, and that the

Birkbecks were not protected by the exception in sect. 11, because they had ceased to carry on the business of bankers within the meaning of sect. 12. To this it was replied that the Birkbecks had never ceased to carry on the business of bankers, that under the agreement with the company they continued to carry on the business of a bank of issue, and that the company issued their notes as their agents, and not otherwise. We are of opinion that the contention of the Crown is correct, and for the following reasons: We think that the effect of the agreement between the company and the firm of Birkbeck and Co. substantially and really was to transfer the business of the firm to the company, including in the transfer the right, which before the transfer the firm no doubt possessed, of issuing bank notes, and that the object of the provisions in the agreement which we have quoted was to evade the provisions of the Bank Charter Act, and to keep alive the power to issue notes which, according to those provisions, would have ceased as soon as the firm was merged in the company. We do not mean to cast any imputation on the parties by this statement. There are many cases, and this may be one of them, in which legal obligations are the measure of moral obligations. The question before us is simply whether the parties have succeeded in keeping outside of the prohibition of the Act. We think they have not. The first question is, by whom are these notes issued? That they are, in fact, issued by the Craven Bank Limited is admitted. The contention on the part of the defendants is, that they are issued by the Craven Bank Limited only as agents for Birkbecks. The word "issued" is not, so far as we know, defined in any of the Acts which relate to this subject, but it is obviously not equivalent to "pass" or "circulate," for if it were everyone who made use of these notes would violate the Act. Its meaning may be inferred from the language of several of the earlier Acts. Thus, in 39 & 40 Geo. 3, c. 28, s. 15, the words used are: "It shall not be lawful for any body, politic or corporate (except the Bank of England), or for any partnership of more than six persons, to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months," &c. These words, coupled with the word "issue," are repeatedly used in the latter Acts (see 7 Geo. 4, c. 46, ss. 1, 3, 4; also 3 & 4 Will. 4, c. 98, s. 3), and they occur in the section on which this case turns—7 & 8 Vict. c. 32, s. 11. The earlier part of that Act, however, which separates the issue department from the banking department of the Bank of England throws the strongest light on the subject. Shortly, they provide that there shall be kept in the issue department of the bank a specified amount of securities, coin and bullion, not to exceed, except in certain cases, the sum of 14,000,000*l.* Bank of England notes are to be delivered out of the issue department into the banking department to such an amount as when taken with the notes then in circulation make up 14,000,000*l.* If any banker who in 1844 was issuing his own notes ceases to issue them, the bank may issue an equivalent number, in addition to the 14,000,000*l.* These provisions, taken together, show clearly what is meant by the "issue" of notes. The word means the delivery of notes to persons who are willing to receive them in exchange for value in

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gold, in bills, or otherwise, the person who delivers them being prepared to take them up when they are presented for payment. Who issues the notes in question in this sense of the words? It is admitted that the Craven Bank Limited has the custody and actual control of the notes, and that it delivers them to persons willing to receive them in exchange for bills, cheques, cash, or other valuable security. It is also admitted that it does, in fact, cash notes presented for payment. In other words, the bank issues the notes, in fact; but it is contended that it does so as the agent for the firm of Birkbeck and Co., and not otherwise, and that, therefore, it does not issue within the meaning of the Act. The principal arguments in support of this contention, used before us, were as follows:—First, it was said Birkbeck and Co., and not the Craven Bank Limited, are liable on the notes themselves as the makers of them; therefore, they (the Craven Bank Limited) do not issue, but merely circulate the notes. Whether the bank is liable on the notes themselves we need not decide; but, assuming for the sake of argument that they are not, it seems to us to be a matter of no importance, first, because the Craven Bank Limited are, as was admitted, under a contract with Birkbeck and Co. to cash the notes on presentation; secondly, because, when they give such notes against value received, they make themselves liable to the person to whom they give them if he presents in due course to Birkbeck and Co. and they dishonour them. Hence they fall within the definition of issuing just given. They give out the notes to the public, and they are bound to the makers of the notes and also to the persons to whom the notes are given to give cash for them. The prohibition of sect. 11 of the Bank Charter Act is not confined to the issue by a banker of his own notes. It forbids the “issue of any bill of exchange or promissory note or engagement for the payment of money payable to bearer on demand.” The Act, no doubt, goes on to forbid any banker “to borrow, owe, or take up any sum of money on the bills or notes of such banker payable to bearer on demand,” but it treats the two operations as distinct, and it appears to us that the first branch of the prohibition covers what is done in this case. It was argued that, upon the construction of the agreement, it must be taken that the Craven Bank Limited issued only as agents for Birkbeck and Co., and the points relied upon were as follows: The agreement, it was said, keeps alive the firm of Birkbeck and Co. for the purpose of issuing their own notes. It empowers them to keep their own clerks for that purpose. It does not bind the Craven Bank Limited to cash the notes or to keep a fund for the purpose of cashing them. The original fund for cashing the notes was provided by Birkbeck and Co. in the first instance, for they left in the hands of the Craven Bank Limited about 60,000*l.* to meet the notes in circulation when the business was taken over, which sum they would otherwise have received from the Craven Bank Limited. The effect of the subsequent transactions is the same as if Birkbeck and Co. had had a separate room and separate clerks at the bank, as if those clerks had received cash for all notes issued, and paid cash for all notes presented, and had lent the balance in hand to the bank day by day, the bank paying 2 per

cent. on the amount of notes in circulation. It was argued, on the other hand, that there is no agency at all in the matter, that the 60,000*l.* left by Birkbeck and Co. in the hands of the Craven Bank Limited, when the business was taken over, was simply a sum left to provide for one of the liabilities of Birkbeck and Co., taken over by the Craven Bank Limited, and that in all subsequent transactions the Craven Bank Limited were principals, Birkbeck and Co. having nothing to do with them. This view appears to us true. Suppose there had been but one note in circulation when the business was taken over, and that Birkbeck and Co. had received 5*l.* less than they would otherwise have received in order to cash it. Suppose, further, that that note had been cashed, and that a few days after it had been re-issued as part of the consideration for an acceptance for 100*l.* discounted with the Craven Bank Limited by A. B., the liability of Birkbeck and Co. in respect of which they left the 5*l.* in the hands of the Craven Bank Limited would have been discharged as soon as five sovereigns were paid to the holder, and the transaction would have been at an end. The discounting of A. B.'s bill for 100*l.* and the re-issue of the note as part of the value given for it would have been a transaction between A. B. and the Craven Bank Limited, to which Birkbeck and Co. would have been strangers, though they might be involved by the issue of the note in a liability to the holders, against which, however, the Craven Bank Limited had agreed to protect them. The ingenious suppositions put forward on behalf of the defendants, as to the equivalency between what was actually done and what might have been done, appear to us to be beside the point. It is conceivably possible that the firm of Birkbeck and Co. might have continued to carry on business as a bank of issue, and might in some way have made the Craven Bank Limited their agents for that purpose, and this might have had much the same effect as the present arrangement; but we do not think they have succeeded in performing this delicate operation. What they would have effected by the agreement before us, if it had been lawful, would have been a transfer, in a cumbrous way, of their right of issuing bank notes from Birkbeck and Co. to the Craven Bank Limited, in consideration of a payment of 2 per cent. on the amount of notes in circulation, and this transfer the law forbids. It is impossible for us to doubt that this is the object, and would, if the agreement were lawful, be the effect of the agreement. The agreement makes over the whole business of Birkbeck and Co. to the Craven Bank Limited, except the right to issue notes, but including such benefit of the issue as is subsequently reserved to the Craven Bank Limited. The firm are to issue their own notes for five years, and may issue them for a longer period, “but through the officers of the company only.” They may continue to use their own firm name, but only for the purposes of the issue. New partners to keep the firm alive may be introduced, “but not without the consent of the company.” Any compensation they may receive if their right of issue is taken away is to be paid to the company unless the company gets an equal right of issue, in which case the firm may retain the compensation. If the company requires a right to issue their own notes the right of the firm to do so is to cease. The



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firm is to receive from the company 2 per cent. on the amount of notes from time to time in circulation. Taken together this appears to be no more than a studiously obscure and elaborate way of saying that the firm assigns to the company the right of issuing notes in consideration of a payment of 2 per cent. on the amount in circulation. What has been done amounts to this: The firm left in the company's hands funds to meet the notes in circulation at the time of the transfer, and since that time has allowed the company to issue the notes to its customers as principals in their transactions with such customers. The very words of the agreement show that this is its true meaning. The firm reserve their right to issue notes, but sell to the company "such benefit of the said issue as is hereby reserved." If they had said, "We reserve the right, but sell you the benefit of the right," the case would have been plain. They would have made themselves at most bare trustees of the right for the benefit of the company, and when the latter part of the agreement is examined it is quite clear that this is what has actually been done. The firm of Birkbeck and Co. have deprived themselves of all possible benefit which could accrue to them from the exercise of their right in consideration of 2 per cent. on the amount of notes in circulation. For what is the benefit of the right? It was suggested to us that its benefit was that it served as an introduction to business. People who come to the bank to change notes would, it was said, come for other purposes. We cannot accept this statement. It is perfectly plain that the benefit to a banker of the right to issue notes (and it can be a benefit to no one else) is that it operates *pro tanto* as an increase to its capital. So long as they are in good credit the power to issue notes to the extent of 70,000*l.* is equivalent, for many purposes, to the Craven Bank Limited to the possession of 70,000*l.* which they can employ in their business, and it is for this that they agree to pay 2 per cent. to Birkbeck and Co. What benefit is left to Birkbeck and Co. beyond the 2 per cent? Absolutely nothing, except, indeed, the bare possibility of being allowed in a highly improbable contingency to retain a compensation to which their right is extremely questionable, to say the least. They must not issue their notes through any other bank. They must not use their firm name, except for the purpose of authorising that issue. If they get any compensation for the loss of their right the bank is to have it, except in a highly improbable contingency. If the bank gets the right to issue its own notes, they are to discontinue their issue, obviously in order to avoid all competition. The liability of the firm to the holders of the notes remains, but that is no advantage to them, but the reverse. The result is that, in consideration of the payment mentioned, the bank obtain the whole benefit of the privilege of issuing their notes and the sole power of issuing them. This, we think, is in substance and in truth a transfer of the privilege, and the effect of the Bank Charter Act is to prohibit such a transfer, as it forbids any bankers, who were not carrying on the business of a banker in 1884 and then lawfully issuing their own bank notes, to issue notes, and if our view is correct the issue of these notes by the Craven Bank Limited falls within this prin-

ciple. This is enough to entitle the Crown to judgment, but there is another point in the case which is disposed of by the same reasoning, and which applies more particularly to the defendants other than the Craven Bank Limited. Sect. 12 prohibits any banker who being entitled to issue bank notes "shall cease to carry on the business of a banker" from issuing thereafter such notes. The Crown contended that on the making of the agreement of 1880 the defendants (other than the Craven Bank Limited, ceased to carry on the business of bankers and became shareholders or directors of the Craven Bank Limited. To this it was replied that the effect of the agreement was that they continued to carry on business as bankers of a bank of issue, and that by the interpretation clause the word "bankers" applied to every person "carrying on the business of banking, whether by the issue of bank notes or otherwise." It is not impossible that this expression may mean "carrying on business as a banker, whether he issues notes or not," and it may have been thought necessary, because in several of the earlier statutes, from the days of Queen Anne down to 3 & 4 Will. 4, c. 98, the word "bank" and the expression "exclusive privilege of banking" is used to mean a bank of issue as distinguished from a bank of deposit; but however this may be, it appears to us that the contention of the Crown is well founded. The effect of the agreement of 1880 appears to us, for the reasons already given, to have been to transfer the business of Birkbeck and Co. to the Craven Bank Limited, and to bind Birkbeck and Co. not to carry on the business of banking, except so far as was necessary to enable them to carry out what was in reality a transfer of their right to issue notes to the Craven Bank Limited. After the date of that agreement it appears that the business of a bank of issue was carried on by the Craven Bank Limited, and not by the other defendants, though the other defendants no doubt continued to authorise the issue of their notes by the Craven Bank Limited, and to receive payment for their consent to and participation in such issue. For all these reasons we think there must be judgment for the Crown.

*Judgment for the Crown.*

Solicitors for the Crown, *Hare and Co.*, agents for the Solicitor to the Treasury.

Solicitors for the defendants, *Freshfields and Williams.*

Thursday, July 3.

(Before MATHEW and DAY, JJ.)

REG. on the prosecution of HOOLEY v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE. (a)

*Practice—Mandamus—Return of unconditional compliance—Plea to—Rules of Supreme Court 1883, Order LIII., r. 9; Order LXVIII., r. 1; Order LXXII., r. 2.*

*Where a return is made to a writ of mandamus of unconditional compliance therewith, the prosecutor can still plead to the return, notwithstanding the provisions of Order LIII., r. 9, as the former practice is kept alive by Order LXVIII., r. 1, and Order LXXII., r. 2.*

(a) Reported by W. P. EVERSLY, Esq., Barrister at Law.



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This was a motion to strike out or set aside a plea to a return to a writ of *mandamus*.

A writ of *mandamus* was issued to the defendants commanding them within a reasonable time to hold a further adjournment of the adjourned general annual licensing meeting for the division of Pirehill North, and to cause notice to be given of the time and place for holding such further adjournment, and at such further adjournment to proceed to hear and determine an application by Samuel John Hooley, for the renewal of a licence or certificate to hold excise licences to sell by retail beer, cider, or wine, to be consumed on the premises.

The defendants in their return to the writ of *mandamus* stated that they did within a reasonable time after service of the writ hold a further adjournment of the adjourned annual general licensing meeting, after due notice given, and did in due form of law proceed to hear and determine the application for the renewal of the said licence, and did hear and determine the matter of the said application.

To this return the prosecutor pleaded that the defendants did not in due form of law hear and determine the application, and that they had illegally refused to renew the licence or certificate. The plea further went on to state the circumstances connected with the hearing and refusal of the application both at the annual general licensing meeting and the adjournment thereof, and also at the further adjourned meeting held in pursuance of the writ of *mandamus*, and the prosecutor therein alleged that, under the circumstances so stated, "the defendants did not in due form of law proceed to hear and determine, and did not hear and determine the matter of the application pursuant to the statute in that behalf, and in obedience to the writ of *mandamus*."

The defendants thereupon moved that the plea to the return to the *mandamus* be struck out or set aside upon the grounds that no pleading was allowed by law to the return (being a return of unconditional compliance), and that it was irregular and embarrassing.

Order LIII., r. 9:

Where any return is made to a writ of *mandamus*, other than an unconditional compliance therewith, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action; and, subject to these rules, this pleading, and all subsequent proceedings, including pleadings, trial, judgment, and execution, shall proceed, and may be had and taken as if in an action.

*H. D. Greene* for the defendants.—Before the statute of the 9 Anne, c. 25, when a return was made to a writ of *mandamus* which was false, the prosecutor had a remedy open to him by bringing an action for a false return. Then two statutes were passed (9 Anne, c. 25, s. 1, and 1 Will. 4, c. 21, s. 3) which allowed pleas to a return to a writ of *mandamus*. In 1883, by the Statute Law Revision and Civil Procedure Act (46 & 47 Vict. c. 49), these two statutes were repealed upon this point, and in their place was put rule 9 of Order LIII. The effect of that repeal is to leave the law as it was before the statute of Anne, except in so far as it is affected by Order LIII., r. 9. That rule allows pleas to a return in all cases

except where the return is that of unconditional compliance. Here the justices have made a return of obedience, and so there is no provision allowing the prosecutor to plead to it. His remedy is to bring an action for a false return, or he might, in the first instance, have appealed to quarter sessions against the refusal of the justices to renew the licence. This plea ought, therefore, to be struck out as not warranted by any statute or rule of court. Again, the plea is embarrassing, because alleged facts are stated in it which are inconsistent with the finding of the justices. The justices are the sole judges of the facts, and if this plea is allowed to stand the justices will have to fight over these allegations which it is not the province of the jury to determine. No question of law can be raised upon this plea.

*Jelf*, Q.C. (*Rose* with him) for the prosecutor.—As to the last point, that this plea is embarrassing, the facts are stated there to enable the defendants to know what case they are to meet, and to traverse any facts they please, and to raise any question of law upon it. The plea sets out the facts of the case, which facts did not justify the defendants in refusing the licence, and show that the defendants did not *bonâ fide* hear and determine in accordance with the writ of *mandamus*. [*MATHEW*, J.—Speaking for myself, I should not have thought that this pleading could be treated as embarrassing. There is, first, a traverse; and then a statement of the grounds upon which that traverse is intended to be maintained. I cannot see that it is so embarrassing that we ought to strike it out.] Then, as to the first objection, this is one of some difficulty. However, Order LXVIII., r. 1, says that, "subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters. . . . Proceedings on the Crown side of the Queen's Bench Division." This rule saves the existing practice, namely, the practice under the statutes of 9 Anne, c. 25, and 1 Will. 4, c. 21, as the rules do not anywhere expressly provide for this particular case. [*MATHEW*, J.—Order LXXII., r. 2, may further assist you. It enacts that, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." No provision has been made for pleading to a return of unconditional compliance, and therefore does not the then existing practice—that is, the practice under the statutes of Anne and Will. 4—apply?] It is submitted that it does apply. The rules came into operation on the 24th Oct. 1883, and at that date the "existing procedure and practice" was the procedure and practice under those statutes. Hence, as there is no express provision in the rules dealing with this particular case, the old practice still remains in force, and this plea is good.

*Greene* replied.

*MATHEW*, J.—I am clearly of opinion that this application must be refused. Mr. Greene relies, in the first instance, on an objection which he makes under Order LIII., r. 9. He says that there has been here a return of obedience to this writ of *mandamus*, and that the effect of Order LIII., r. 9, is to terminate the proceedings and to prohibit any plea to that return. He says

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that that was the meaning, and that was the intent of the rule. Why any such provision as that should have been introduced into the rule it is impossible to conjecture, and Mr. Greene has not been able to supply any motive for the extraordinary change in the practice and procedure which he alleges has been made, though no doubt the terms of the rule would appear to omit the case of a plea to a return of obedience. The argument that he puts forward is that there is expressly omitted from the provisions of the rule the case of a return of unconditional compliance to a writ of *mandamus*, and that there are consequently no means now of pleading to such a return. Under the old procedure it could have been done, because there were two statutes that provided for it, namely, the statute of 9 Anne, c. 25, s. 1, and the statute of 1 Will. 4, c. 21, s. 3. Those statutes, however, have been repealed, and nothing has been put in their place with respect to a return of unconditional compliance, the rule in question omitting, whether by oversight or not, to provide for such a case as this, and so it is said that the plea that has been put in is unwarranted by any statute or rule of court, and must be struck out. Upon turning, however, to a subsequent order, I think that words are to be found there that will save us from terminating the action in the peremptory manner suggested. It is Order LXVIII. r. 1, applying to cases on the Crown side of the Queen's Bench Division, and by that rule it is provided that "subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters (*inter alia*): Proceedings on the Crown side of the Queen's Bench Division." It seems to me that that rule saves the proceeding in question, because nowhere else is there contained in the rules any express provision as to what shall be done in the particular case now before us, namely, the case where the return is a return of unconditional compliance to the writ of *mandamus*. That being so, this plea is allowable, and the then existing procedure is applicable, and the then existing procedure applicable was that regulated by the Common Law Procedure Act 1854, which has also been repealed as to this by the 46 & 47 Vict. c. 49. Upon that ground this application must fail. Upon the other ground I think that, for the reasons I have given in the course of the argument, there is no embarrassment here. A plea is either good or bad. If bad, it can be met by what is equivalent to a demurrer; if good, it will have to be proved. This plea is merely an argumentative denial that the return is true, an issue which must have gone to the jury under the old practice. This application, therefore, must be refused.

DAY, J.—I concur, and I only wish to add that the practice of pleading to a return to a writ of *mandamus* is a practice which had originated, no doubt, under the statutes of Anne and Will. 4, but which had become a well-known and well-established practice and procedure, and was well known and well established on the 24th Oct. 1883. It is quite true that upon that day the statutes of Anne and Will. 4 had been repealed; that is, they were repealed by the statute which took effect on that day, but I do not think that it necessarily follows that the well-known and well-established practice and procedure which origi-

nated under them were thereby put an end to. (a) On the contrary, I think, with my brother Mathew, that they are preserved by those words to be found in the rules which preserve the existing practice and procedure. I also agree that the existing procedure applicable is that under the Common Law Procedure Act 1854. I also agree with my brother Mathew as to the second objection taken by Mr. Greene, and I think that this application should be refused.

*Motion dismissed.*

Solicitors for the prosecutor, *Robinson, Preston, and Stow*, for *Hollinshead and Moody*, Tunstall.

Solicitors for the defendants, *Thomas White and Sons*, for *Hand, Blakiston, and Everett*, Stafford.

Wednesday, April 2.

(Before Lord COLERIDGE, C.J., WILLIAMS and CAVE, JJ.)

REG. v. PHILLIMORE AND OTHERS (Justices) AND PILLING. (b)

*Practice—Refusal of justices to hear case—Rule to show cause—Mandamus—11 & 12 Vict. c. 44, s. 5.*

By the 5th section of 11 & 12 Vict. c. 44, it is enacted that, "whereas it would conduce to the advancement of justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justices enabled and directed to perform it without risk of any action or other proceeding being brought or had against them; therefore in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done."

An information having been laid against P. under the 51st section of the Highway Act 1864 (27 & 28 Vict. c. 101) for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bona fide*, and thereupon refused to hear the case on the ground of want of jurisdiction.

The complainant having applied under the 5th section of 11 & 12 Vict. c. 44, for a rule for the justices to show cause why they should not hear and determine the case:

Held, that the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties.

Reg. v. Percy (*L. Rep.* 9 Q. B. 64) overruled.

(a) As to the effect upon an existing practice of the repeal of a statute under which that practice originated, by the Civil Procedure Acts Repeal Act 1879, containing words identical with those in the Statute Law Revision and Civil Procedure Act 1883, see the judgment of Watkin Williams, J. in *The London Scottish Permanent Benefit Society v. Chorley* (50 L. T. Rep. N. S. 265).  
(b) Reported by J. SMITH, Esq., Barrister-at-Law.

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DAUBUZ AND OTHERS v. LAVINGTON.

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THIS was a rule calling upon justices and one Pilling to show cause why they should not hear and determine a certain information which had been laid against Pilling under the 51st section of the Highway Act 1864 (27 & 28 Vict. c. 101) for encroaching upon a highway.

On the hearing of the information, it appeared on evidence that Pilling had inclosed certain pieces of land by the side of a highway, which, previous to the inclosing, were separated from land admitted to belong to him by a fence, but were not separated from the highway. It was contended on the part of Pilling that the land belonged to him, and had never been dedicated to the public.

The justices upon the evidence given decided that the claim set up by Pilling was a *bonâ fide* claim of right, and thereupon refused to hear the case further upon the ground of want of jurisdiction.

A rule *nisi* was then obtained under the 5th section of 11 & 12 Vict. c. 44, calling upon the justices and Pilling to show cause why they (the justices) should not hear and determine the matter, and this was the rule which now came on for argument.

The 5th section of 11 & 12 Vict. c. 44, is:

And whereas it would conduce to the advancement of justice, and render more effectual and certain the performance of the duties of justices, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him; be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and, if after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required, and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

*Pitt-Lewis*, for Pilling, showed cause against the rule.—This section is applicable only in cases where the justices need protection. In *Reg. v. Percy* (L. Rep. 9 Q. B. 64) *Blackburn*, J. lays this down in terms. "The generality," he says, "of the words 'where justices shall refuse to do any act relating to the duties of their office' is controlled by the recital of the section, and it is only where the justices need protection that the enactment applies;" and *Quain*, J. says, "The last clause in the section confirms that view." In this case it cannot be said that the justices need protection, and therefore the section does not apply, and the court will not grant a rule.

*Bullen* in support of the rule.—The decision in *Reg. v. Percy* was at variance with that of *Wightman*, J. in *Reg. v. Aston* (1 L. M. & P. 491), which was apparently not brought to the knowledge of the court which decided *Reg. v. Percy*. *Reg. v. Aston* was the case of a rule under this section calling upon justices to show cause why they should not take *Aston's* recognisances in a penal

sum on condition that he prosecuted with effect an appeal against a conviction made against him by them, and *Wightman*, J. there held that the remedy under this section is not simply for the benefit of justices, nor confined to cases in which their jurisdiction is doubtful, but extends to all cases in which they refuse to do an act relating to the duties of their office. "I will not," he said, "say what the object of the statute generally is, but that section substitutes a rule in lieu of *mandamus*, in order to prevent expense, 'in all cases, where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office.' These words seem large enough to embrace the present matter." The view so taken by *Wightman*, J. is the correct view of the object of the section, which is clearly applicable to the present case.

*Lord COLERIDGE*, C.J.—We are not prepared to lay down any exclusive rule as to what class of cases come within the operation of this section, and what are rather the subject of *mandamus*, these two methods being, of course, in many cases, co-ordinate. But we are prepared to say that we do not think that the case of *Reg. v. Percy* was rightly decided, in so far as it held that this section only applies to cases in which the justices need protection. We think that this view narrows the statute too much, and does not rightly interpret its meaning.

*WILLIAMS* and *CAVE*, JJ. concurred.

*Williams*, J. then left the court, and, the facts having been discussed,

*Lord COLERIDGE*, C.J. and *CAVE*, J. held that, on the authority of *Williams v. Adams* (5 L. T. Rep. N. S. 790; 31 L. J. 109, M. C.) and other cases, the justices had jurisdiction to decide, and ought to have decided, whether the land in question was highway or not, and thereupon made the rule absolute, with costs against the defendant *Pilling*.

*Rule absolute.*

Solicitors for the applicant, *Pickett and Mytton*.  
Solicitors for the defendant, *Stocken and Jupp*.

Friday, April 4.

(Before *Lord COLERIDGE*, C.J. and *CAVE*, J.)

DAUBUZ AND OTHERS v. LAVINGTON. (a)

*Practice—Order III., r. 6 (F)—Specially indorsed writ—Action for the recovery of land by a landlord against a tenant whose term has been duly determined by notice to quit—Action by mortgagee under attornment clause.*

*Order III., r. 6, provides that . . . (F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim.*

*A deed of mortgage contained a clause by which the mortgagees, who were therein stated to be in possession of the lands thereby mortgaged, according to the true intent and meaning of the Bills of Sale Act 1878, demised the said lands to the mortgagor, and the mortgagor attorned tenant thereof*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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to the mortgagees at a yearly rent equal to the interest payable under the mortgage, subject to a proviso that the mortgagees might at any time after a time therein stated enter on the lands and thereby, or in any other way, determine the tenancy without giving any previous notice to quit. Subsequent to the time so stated, the interest on the mortgage being in arrear, the mortgagees served on the mortgagor a notice to quit forthwith. The mortgagor refusing to do so, the mortgagees brought an action against him for the recovery of land, specially indorsing their writ under Order III., r. 6 (F), and applied in due course for liberty to sign final judgment under Order XIV., r. 1.

*Held*, that the action was within the true intent and meaning of Order III., r. 6 (F), and that, there being no defence on the merits, the mortgagees were entitled to sign judgment under Order XIV., r. 1.

This was an appeal from a decision of Field, J. at chambers, giving the plaintiffs liberty, under Order XIV., r. 1, to enter final judgment in an action for the recovery of land.

The action was brought by the plaintiffs, as mortgagees, against the defendant, their mortgagor, the indorsement on the writ being as follows:

The plaintiffs' claim is for possession of the freehold land and hereditaments known as the Twineham Grange Estate, containing together 161a. 2r. 39p., or thereabouts, with the capital messuage, stables, cottages, barns, out-houses, and appurtenances, situate in the parish of Twineham, in the county of Sussex, which land and premises are on the tithe commutation map for the said parish numbered as follows, &c. The above-described land and hereditaments were demised by the plaintiffs to the defendant by indenture of the 19th Dec. 1881, at the rent there mentioned, subject to a proviso that the plaintiffs might at any time after the 25th Dec. 1881, enter into and upon the said lands and hereditaments or any part thereof, and thereby, or in any other way they might think fit, determine the tenancy thereby created without giving to the defendant any previous notice to quit. The said tenancy of the defendant was duly determined by notice to quit and entry on the said lands and hereditaments on the 8th Feb. 1884.

The indenture of the 19th Dec. 1881 was a mortgage deed containing an attornment clause in the following form:

Lastly, the said mortgagees being in possession according to the true intent and meaning of the Bills of Sale Act 1878, do hereby demise unto the said mortgagor the lands, hereditaments, and premises hereinbefore expressed to be hereby granted, and the said mortgagor doth hereby attorn tenant thereof to the said mortgagees at the rent of 360l. per annum, being a fair and reasonable rent within the meaning of the said Act, to be paid in advance half-yearly, on the 24th day of June, and on the 25th day of Dec. in every year, the first of such payments to be made on or before the execution of these presents, and the next on the said 24th day of June, and so on thenceforth; provided nevertheless, that the said mortgagees and the survivors and survivor of them, and the heirs of such survivor, their or his assigns, may at any time after the said 25th Dec. 1881, enter into and upon the said lands and hereditaments or any part thereof, and thereby, or in any other way they or he may think fit, determine the tenancy hereby created without giving to the mortgagor any previous notice to quit; and, further, that nothing hereinbefore contained shall constitute the said mortgagees mortgagees in possession for any other purpose than the making of the above determinable demise, or subject them to any liability to account or other liability incident to the position of mortgagees in possession.

The amount of the rent reserved under this clause was the same as the amount of interest

payable in respect of the mortgage, and, this interest being in arrear, the mortgagees served upon the mortgagor a notice to quit "forthwith," and subsequently brought against him the present action, and, alleging the writ therein indorsed as above mentioned to be a specially indorsed writ within the meaning of Order III., r. 6 (F), applied to a master under Order XIV., r. 1, for liberty to enter final judgment in the action. The master having given the defendant leave to defend, the plaintiffs appealed to Field, J. at chambers, who reversed the decision of the master, and, holding that there was no defence upon the merits of the case, gave the plaintiffs liberty to enter judgment. (a)

From this decision the defendant appealed, and this was the appeal which now came on for hearing.

Order III., r. 6, is:

In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract); or (B) on a bond or contract under seal for payment of a liquidated amount of money; or (C) on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or (D) on a guaranty, whether under seal or

(a) The judgment of Field, J. at chambers (LAW TIMES, April 5, vol. lxxvi. p. 408) was as follows:

FIELD, J.—The best conclusion I can come to is this, that this is a case within the words of Order III., r. 6 (F). I do not mean to say that it is a matter free from doubt. With regard to the case of *Hobson v. Monk* (L. T. Jan. 26, 1884, p. 226), I have seen Mathew, J., who says that he did not intend to lay down any general rule in deciding that case. What I have to decide is, whether this is an action for the recovery of land by a landlord against a tenant whose term has expired or has been duly determined by notice to quit. The argument is, that in the present case the plaintiffs are not entitled to specially indorse their writ, and, therefore, are not entitled to this remedy under Order XIV., and I quite admit that, although there is no defence to the action, unless the case is brought within the words of sub-sect. (F), the defendant is entitled to succeed on this summons. The principal relationship between the parties here is, no doubt, that of mortgagor and mortgagee. Now, it very often happens that a mortgagee who is in possession does not get his interest. No prudent mortgagee advances his money with the immediate prospect of taking possession of the mortgaged property. As a rule, he desires to get interest for the money he has lent. He therefore prefers property which is let to tenants, and which, consequently, gives him an additional security beyond the mere power of taking possession. In the present case the mortgagee wanted to get, beyond the ordinary contract of mortgage, a substitute for the tenancy of a stranger. He therefore required that the mortgagor should put himself in the position of a tenant. Then on the 17th Feb., interest being in arrear, notice to quit is given, and, that not being complied with, this action for possession is commenced. The question now is, whether that is brought by a landlord against a tenant whose term has been duly determined by notice. I think that the fact that there exists a contract between these parties as between mortgagee and mortgagor does not prevent another contract being superadded as between landlord and tenant. The rent is to be identical with the interest, and the object of the attornment clause is, no doubt, primarily to secure payment of the interest; while, to secure possession, there is an express proviso that the mortgagee may determine the tenancy without giving any notice to quit. It seems to me that, according to the construction contended for on behalf of the defendant, no effect whatever is to be given to this contract of tenancy. I cannot myself doubt that the mortgagee is in this case a landlord and that the mortgagor is his tenant, and that the term has been duly determined by notice to quit.

Order for judgment.

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not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E) on a trust; or (F) in actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant; the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. Such special indorsement shall be to the effect of such of the forms in Appendix C., sect. iv., as shall be applicable to the case.

*Scarlett*, for the defendant, in support of the appeal.—This is not an action for the recovery of land by a landlord against a tenant whose term has expired, or has been duly determined by notice to quit, within the true meaning of Order III., r. 6 (F), and therefore this application under Order XIV., r. 1, is not well founded. The relationship between the parties is that of mortgagor and mortgagees, and not that of landlord and tenant. The real object of the attornment clause is to give the mortgagees an additional security for the payment of the interest from time to time accruing due upon the mortgage by giving them power to distrain for it, and the parties only stand to one another in the relation of landlord and tenant so far as to enable this to be done, and not to such an extent as to bring them within the meaning of this rule. The relationship in this case existed only as a legal fiction and not as a fact, which latter state of things alone the rule contemplates. It could not have been the intention of the framers of the rules to sweep away in this manner, by a side-wind, all the safeguards with which the doctrines of equity have always protected mortgagors.

*Reginald Hughes*, for the plaintiffs, was not called upon.

LORD COLERIDGE, C.J.—I am of opinion that the order of Field, J. should be affirmed. The question for our decision is whether the conditions precedent to an application under Order XIV. have been complied with in the present action, so as to entitle the plaintiff to have liberty to enter final judgment. The action before us is an action by mortgagees against their mortgagor for the possession of the mortgaged lands, and, as is usually the case, the mortgagor has been allowed to remain in possession, the mortgagees retaining the security of the land; but in this case that is not the only relation between the parties, since by the deed of mortgage the relation of landlord and tenant has been created. It has been argued that this relation cannot exist because the relation of mortgagor and mortgagee exists, but to my mind this argument has no force because I do not see why there may not be the two sets of obligations arising between two persons, as I think is the case here. The relation of landlord and tenant existing, then, has the tenancy been determined? The tenancy purports to be determined by notice to quit. It is suggested that no notice to quit is necessary, because the relation of mortgagor and mortgagee requires no such notice. That may be true, but, if it be, then either this is a tenancy properly determined by notice, or, if no notice is necessary, it has been determined by the exercise of the mortgagor's will. In many old cases the relation of mortgagor and mortgagee has been assimilated (though there is nothing, as Lord Mansfield once said, more

difficult than true assimilation) to that of landlord and tenant. Then, why should not Order XIV. apply, seeing that it is both just and convenient that it should apply? No ground against its application has been put forward, and there is no reason against it that I can see, except that the mortgagor ought to be able to put the mortgagees to the trouble of bringing their action in some longer and more expensive form instead of using the short and convenient procedure provided by these rules. I am of opinion, therefore, that the relation of landlord and tenant within the true meaning of Order III., r. 6 (F) exists, under the circumstances described in the indorsement on this writ, and the writ therefore becomes enforceable under the provisions of Order XIV.

CAVE, J.—I am of the same opinion. In this case to the relation of mortgagor and mortgagee there has been superadded the relation of landlord and tenant, and I, for my part, am entirely unable to see any reason why this should not be done, since it has been done for a long series of years as a means of giving the mortgagee a better remedy for the recovery of the interest due to him. It is not disputed that the power to distrain exists, and to my mind this itself shows that the mortgagee has the power of a landlord, and that the relation of landlord and tenant exists, the power of distress being an incident attaching to the relation of landlord and tenant. Consequently, I am clearly of opinion that the parties in the present case stand towards each other in the relation of landlord and tenant. Has, then, the tenancy expired? I agree with my Lord that either the tenancy has been determined by the notice which has been given, or, if notice to quit was unnecessary, then it has been determined by the will of the landlord. I am of opinion, therefore, that the action is within the true meaning of Order III., r. 6 (F), and that the plaintiffs are entitled to an order for final judgment under Order XIV.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Hughes, Masterman, and Rew.*

Solicitor for the defendant, *Frank Cherry.*

## QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Thursday, April 24.

(Before CAVE, J.)

Re MACKINTOSH; *Ex parte* MACKINTOSH. (a)

*Action pending in Chancery Division—Non-payment of trust money—Bankruptcy of trustee—Attachment—Jurisdiction of Bankruptcy Court to interfere.*

*M. and C. were in partnership, the separate estate of C.'s wife being held by the firm as trustees.*

*In an action, consequent upon a dissolution of partnership, by M. against C. and his wife, the case for the plaintiff failed, but, upon a counter-claim by C.'s wife, an account was ordered to be taken, and it was ordered that the amount due should be paid into court by M.*

*Upon his failure to pay, notice was given that a writ of attachment against him would be applied for, and this proceeding he, having recently presented his petition, asked the bankruptcy judge to*

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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restrain under sect. 10 (2) of the Bankruptcy Act 1883.

*Held, that the request must be refused. The bankruptcy judge has to regard the interests of the creditors, and will not interfere with the jurisdiction of another court upon the application of the debtor unless special grounds are shown.*

*Semhle, that if the trustee had come and asked that the action might be transferred, his request would have been granted.*

On the 31st Dec. 1879 the firm of Chalmers, Mackintosh, and Dudgeon, carrying on business in London and China, dissolved partnership. At the date of the dissolution Mrs. Chalmers had an account with the firm, which received the dividends of her separate property, and acted as her trustees. In consequence of disputes between the partners an action was commenced by Mackintosh against Chalmers and his wife in the Chancery Division, and was tried before Bacon, V.C.

The case against Mr. and Mrs. Chalmers failed, but an account was ordered to be taken on a counter-claim set up by Mrs. Chalmers, and the sum of 1100*l.* was found to be due to her, and on the 22nd Feb. an order was made that Mackintosh should pay that amount into court within fourteen days. Upon his failure to comply with the order, notice was given by Mrs. Chalmers that a writ of attachment would be applied for, and this proceeding Mackintosh, who had recently presented a bankruptcy petition, now sought to restrain.

*Northmore Lawrence* (J. Linklater with him) for Mackintosh.—Sect. 9 (1) of the Bankruptcy Act 1883 provides that “on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court, and on such terms as the court may impose.” And by sect. 10 (2), “The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think fair.” This was a debt provable in the bankruptcy, and I submit that the words at the end of sect. 9, “unless with the leave of the court,” &c., only qualify the words “or shall commence any action or other legal process,” and have no connection with those immediately following them. It must interfere greatly with the proceedings in bankruptcy if the debtor is locked up. The various duties which the debtor must perform with regard to the discovery and realisation of his property are described in sect. 24, and it is unprecedented to attempt to attach a person in a fiduciary position while the bankruptcy proceedings are pending:

*Cobham v. Dalton*, L. Rep. 10 Ch. App. 655;

*Lewis v. Barnett*, L. Rep. 6 Ch. Div. 252;

*Ex parte Hemmings*; *Re Chatterton*, 41 L. T. Rep. N. S. 513; 13 Ch. Div. 163.

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[CAVE, J.—Your argument is that a debtor cannot be attached for a debt provable in bankruptcy.]

*Hemming, Q.C.* (with him *Druce*), *contra*.—The words “unless,” &c., (*ubi sup.*) have a further application than that which my friend contends for. [CAVE, J.—I do not see why this application is made to me at all. I must ask Mr. Lawrence to explain why, if he is within sect. 9, he comes to me.]

*Northmore Lawrence*.—It has always been the practice. [CAVE, J.—You say they are going to lock the bankrupt up on a debt provable in the bankruptcy. Why should I help you? Under sect. 9, according to your reading of it, Bacon, V.C. cannot grant an attachment, and if he does the Court of Appeal will soon reverse the decision. If your construction of sect. 9 is right you are absolutely safe. If Mr. Hemming is right Bacon, V.C. may exercise a discretion, and he knows all the facts.] Surely that is contrary to *Cobham v. Dalton* (*ubi sup.*). [CAVE, J.—That is an authority so far; if the Vice-Chancellor commits your client, you can apply to have him discharged.] Your Lordship’s jurisdiction to restrain is admitted. [CAVE, J.—I may restrain any action, execution, or other legal process, but I must see that there is some ground for doing so, and I ought not to do it without some ground. For example, if the creditor’s property was interfered with I might interfere, but, because the debtor happens to have inculpated himself, I do not see why I should interfere.] The Act supposes that a bankrupt is a free man to help in the administration of his property. [CAVE, J.—If the Act says so, why do you want my help?] I submit that when a matter comes into bankruptcy it is for your Lordship to decide all questions. [CAVE, J.—The trustee claims nothing here; if the trustee did so I would transfer the action, but no one appears on behalf of the creditors.] I would submit that when once the bankruptcy commences, it is the duty of the court to protect the bankrupt.

CAVE, J.—I am clearly of opinion that this application must be refused. It is contended that under sect. 9 of the Bankruptcy Act 1883, the bankrupt cannot be sent to prison. If so, when the motion is brought before Bacon, V.C. he will deal with it. He is as much bound by sect. 9 as I am. If this interpretation of sect. 9 is not correct I do not see why the bankrupt should not go to prison. Certainly no facts have been brought to my notice which would justify my interference. The official receiver does not appear. I shall leave it to Bacon, V.C., and I am certain if it is contrary to sect. 9 that the learned judge will know how to act; there is certainly no one better qualified by his long experience of the Bankruptcy Act of 1869 to deal with this question. If it is not contrary to sect. 9, no facts whatever have been brought before me to induce me to interfere, and the application must be dismissed with costs.

Solicitor *Hartwood* and *Stephenson*; *Lawrence, Plews*, and *Baker*.

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MACDONALD v. THE TACQUAH GOLD MINE COMPANY.

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# Supreme Court of Judicature.

## COURT OF APPEAL.

Thursday, May 1.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

MACDONALD v. THE TACQUAH GOLD MINE COMPANY. (a)

*Practice—Attachment of debts—Debt due to judgment debtor and another jointly—R. S. C. 1875, Order XLV., r. 2.*

*A judgment creditor cannot by a garnishee order attach a debt due to the judgment debtor and another jointly in order to satisfy a judgment obtained by him against the judgment debtor alone.*

THIS was an appeal from a judgment of Baggallay, L.J. at the trial.

The plaintiff was the execution creditor of one Fitzgerald, and as such sought to attach a debt due to Fitzgerald from the defendant company under the following circumstances:—

Fitzgerald and one Horton were the lessees of the Tacquah Gold Mines, which were situated on the Gold Coast, the lease of the mines having been granted to them by a certain chief of that country. Fitzgerald and Horton sold the mines for the sum of 10,000*l.* to the defendant company, the defendants paying 2500*l.* down and the remaining sum of 7500*l.* being allowed to remain secured by mortgage of the property to the vendors. The mortgage deed, dated the 20th Feb. 1882, contained a covenant by the defendant company to pay the sum so secured to the vendors jointly. The deed also declared that the money in question belonged to them upon a joint account in equity as well as in law.

The plaintiff obtained an issue to try the following question: "Whether, on the 25th April 1883, there was a sum due, or which would accrue due to Fitzgerald in respect of his share of the balance of the purchase money remaining unpaid by the defendant company under the deed of the 20th Feb. 1882."

At the trial before Baggallay, L.J., at Maidstone, the question was argued whether the debt due from the defendant company to Fitzgerald was such a debt as could be attached. His Lordship held that there was such a debt due as could be attached, and that the sum due from the defendant company to Fitzgerald was a sum of 1688*l.* 10*s.* 10*d.*

The defendant company appealed.

*Finlay, Q.C. and Gye* for the defendants.—The covenant to pay the balance of the purchase money is a covenant to pay that balance to Fitzgerald and Horton jointly, and they are declared to be joint owners in law and equity. Such a debt cannot be attached by a judgment creditor of Fitzgerald alone. The true test is, whether the judgment debtor alone could maintain an action upon the covenant; in this case he would clearly be nonsuited in such an action. Baggallay, L.J. held himself bound by the case of *Nash v. Pease* (47 L. J. Q. B. 766), but that case was in effect overruled by *Webb v. Stenton* (49

L. T. Rep. N. S. 432; 11 Q. B. Div. 516). They also cited

*Petrie v. Bury*, 3 B. & C. 353;  
*Scott v. Godwin*, 1 Bos. & P. 67.

*Clarke, Q.C. and Morton Smith* for the plaintiff.—The issue was to ascertain the amount due to Fitzgerald. The point now taken is not open upon the words of this issue. It is true that the debt is a joint debt, due to Fitzgerald and Horton jointly, but when the share of Fitzgerald is ascertained, that share is then a debt due to him, and then is attachable. They cited

*Luke v. South Kensington Hotel Company*, 40 L. T. Rep. N. S. 638; 11 Ch. Div. 121.

BRETT, M.R.—In this case there had been certain garnishee proceedings, and in them an issue was directed. The first question we have to determine is, what is the meaning of certain words of that issue? The words used are, "whether there was a sum due or which would accrue due" in respect of Fitzgerald's share in the balance of the purchase money. Now considering that this was an issue ordered in garnishee proceedings, the only sum which could be material in those proceedings is a sum which is a debt, and therefore I think that, though perhaps the order is not very happily expressed, the word "sum" means debt. But even if the words of the order could not have been so read, I think we should have exercised our powers, and amended the order so as to make it so read, because it is clear to my mind that it was so treated at the time, and that the parties were at that time agreed as to the real meaning of the issue they were going down to try. The case of *Webb v. Stenton* (*ubi sup.*) states what the law is which is to be applied to the facts of this case. The question is whether there is a debt due or accruing due from the garnishee to the judgment debtor, and that case decides that at the time the order for the attachment is sought there must be debt existing, either a *debitum in presenti* or a *debitum in presenti solvendum in futuro*, and that the words "due or accruing due" do not include something accruing hereafter, something which may hereafter become a legal debt. I also agree with what was said by Fry, L.J. in *Webb v. Stenton* as to the word "debt" in the rule including not only a legal, but also an equitable debt. Now can the sum which is owing to Fitzgerald from the defendant company in this case be brought under either of these heads? Is it a debt either payable *in presenti*, or existing *in presenti* but *solvendum in futuro*? or is it a liquidated sum of money owing in equity to him from the defendants? In this case the defendant company was indebted in a certain fixed sum to Fitzgerald and Horton jointly; not to Fitzgerald alone or Horton alone, so that neither of them could have sued for it alone, because there is no debt due from the defendants to either of them alone. The only debt due from the company is a debt to Fitzgerald and Horton, and that is a joint debt. Therefore there is no legal debt due to Fitzgerald alone. For the same reason there is no debt due in equity to Fitzgerald alone; for no suit in equity could have been maintained by him alone without Horton being joined as a party. Therefore, applying the law as laid down in *Webb v. Stenton* (*ubi sup.*) to the facts of this case, we see that this case is not within it. For

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.



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these reasons I think that this appeal must be allowed.

BOWEN, L.J.—I am of the same opinion. It is first argued by the respondents that the point taken against them does not arise on the issue that has been ordered; but I agree in thinking that the issue does substantially raise the question, and I further agree that, even if it did not do so, our proper course would be to amend the order so as to make it do so. The question, then, is, whether this is such a debt as can be attached. That depends upon the construction of the rules relating to garnishee proceedings. By the rules there must be a debt, and where there is any indebtedness the court may order the debt, whether owing or accruing, to be attached; and the word "debt" includes both legal and equitable debts. Can it, however, be said that a sum of money due under a covenant to two persons jointly is a debt due to one of them? If not, then such a sum cannot be attached. Before the Judicature Acts such a proposition would have been quite unarguable. Have the Judicature Acts made any difference? Certainly not. How can they have done so? They have not given a man a right to bring an action by himself when it is the very essence of his right that someone else should join with him in that action. In my opinion, it is as clear now as formerly that a debt which can only be recovered against persons jointly is not a debt due or accruing due to one of them, and cannot be attached by the judgment creditors of one of them.

FRY, L.J.—I am of the same opinion. I agree that the form of the issue properly raises the question which has been argued. The rules require that someone should be indebted to the judgment debtor, and that the debt should either be due or accruing due, in order to enable the judgment creditor to attach that debt to satisfy his judgment. Can it be said that a person is indebted to the judgment debtor if he is indebted to him jointly with another person? I think not. If the language of the rules did admit of this construction, it would lead to results inconsistent with justice. It would be highly inconvenient that debts due from A. to B. and C. should be liable to be attached to answer the debts of B. alone. I quite agree that in this particular the Judicature Acts have in no way altered the rights of parties.

BRETT, M.R.—All that we will say with regard to *Nash v. Pease* (*ubi sup.*) is that, if that decision is right, it is not in point in this case.

*Appeal allowed.*

Solicitor for the plaintiff, W. M. Wilson.

Solicitors for the defendants, Newman, Stretton, and Hilliard.

Tuesday, May 13.

(Before BRETT, M.R., BOWEN and FRY, L.J.J.)

PALMER v. JOHNSON. (a)

*Vendor and purchaser—Sale by auction—Error of description in particulars of sale—Condition for compensation—Right to recover after conveyance completed.*

*The plaintiff purchased certain freehold property at a sale by auction. The particulars of sale*

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

*erroneously stated the value of the rental, in consequence of which mistake the plaintiff gave more for the property than he otherwise would have done. The conditions of sale contained a provision that if any error should be discovered in the particulars the purchaser should be entitled to compensation. The plaintiff did not find out the error until after he had paid the purchase money and had accepted the conveyance of the property. Held, that the acceptance of the conveyance did not bar the right of the plaintiff to recover compensation, and that he was entitled to receive it.*

THIS was an appeal from a judgment of A. L. Smith, J. on further consideration.

The action was brought by the purchaser of certain property against the vendor to recover damages for a misdescription of the property contained in the particulars of sale. The property in question was sold by auction, and was described in the particulars of sale as producing a net annual rental of 39*l.*, in consequence of this statement the plaintiff gave 650*l.* for the property. After the conveyance of the property to the plaintiff had been completed he discovered that the rental which had been described as a net annual rental was in reality a gross rental, and that the net rental was considerably less than 39*l.*

The conditions of sale contained (*inter alia*) the following provision:

The property is believed and shall be taken to be correctly described, but if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but compensation shall be allowed by the vendor or purchaser, as the case may require; the amount of such compensation to be settled, regard being had to the purchase money, by the auctioneer, whose decision shall be final.

In this case the auctioneer refused to adjudge. At the trial of the action the jury found that there had been no fraudulent representation, but that the plaintiff purchased the property believing that the net annual rental was 39*l.*, which was in fact the gross rental. The defendant contended that the plaintiff could not recover after having taken a conveyance of the property, as the conveyance contained no provision similar to the above provision in the conditions of sale.

Smith, J. on further consideration gave judgment for the plaintiff.

The defendant appealed.

*Lawrance, Q.C.* and *Graham* for the appellant.—The plaintiff is not now entitled to recover compensation, inasmuch as he has accepted a conveyance of the property. The deed of conveyance contains no provision as to compensation, and the provisions in the conditions of sale are now merged in the conveyance, which must contain the whole contract. *Cann v. Cann* (3 Sim. N. S. 447) and *Bos v. Helsham* (15 L. T. Rep. N. S. 481; L. Rep. 2 Ex. 72) are against this view, and the latter case cannot be distinguished from the present, and the court is therefore asked to overrule it. These cases were discussed by Malins, V.C. in *Manson v. Thacker* (38 L. T. Rep. N. S. 209; 7 Ch. Div. 620), and were doubted. The following cases were also cited:

*Besley v. Besley*, 38 L. T. Rep. N. S. 844; 9 Ch. Div. 103;

*Allen v. Richardson*, 41 L. T. Rep. N. S. 614; 13 Ch. Div. 324;

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*Hart v. Swaine*, 37 L. T. Rep. N. S. 376; 7 Ch. Div. 43;  
*Joliffe v. Baker*, 48 L. T. Rep. N. S. 966; 11 Q. B. Div. 255;  
*Turner v. Skelton*, 41 L. T. Rep. N. S. 668; 13 Ch. Div. 130;  
*Leggott v. Barrett*, 15 Ch. Div. 306.

*Buszard*, Q.C. and *Stanger*, for the plaintiffs, were not called on.

BRETT, M.R.—In this case, deliberately and I think rightly, one point and one point alone has been argued, and that point is, that the right of the plaintiff to recover damages cannot be maintained after the conveyance of the property sold has been completed. The point that the auctioneer has not settled the amount of compensation, as he was to do according to the terms of the conditions of sale, is not taken, and therefore I express no opinion upon it. Therefore the question is this—whether, where the particulars of a sale by auction of real property contain a misstatement of fact, and where they also contain an express contract in the form of the contract in these particulars of sale,—whether, where these two things exist, the purchaser can recover compensation in respect of the misstatement on the completion of the conveyance. It must be borne in mind that this is not a case in which it is sought to set aside the conveyance on the ground of fraudulent misstatement, it is not a case in which after the completion of the conveyance any action is brought upon the ground of fraud; and further, it is not a case of some mistaken assertion being contained in the conditions of sale, whilst those conditions do not contain any express contract as to the mode of dealing with that mistaken assertion; but it is a case of express misstatement with an express contract made between the parties as to how that misstatement is to be dealt with. The contract, therefore, is in effect the same as the contract in the case of *Cann v. Cann* (*ubi sup.*) and in *Bos v. Helsham* (*ubi sup.*), and every point taken in this case was clearly and obviously open in both those cases. To my mind it is impossible for us to decide this case in favour of the defendant without clearly overruling both the cases of *Cann v. Cann* and *Bos v. Helsham*. Now such a transaction as this is of daily occurrence. Nothing can be more common than the sale of real property by auction, and when we find a decision like that in *Cann v. Cann*, which was come to fifty-four years ago, and like that in *Bos v. Helsham*, which was come to eighteen years ago, and when we find that these cases were not challenged at the time, and have since gone forth as a deliberate and judicial statement of the law, by what rule are we to be guided when it is suggested that such cases are to be overruled? It has always been the legal practice to say that where the matter which is affected by the decision is of common and daily occurrence, and must constantly have been carried out upon the assumption that the decision in question is good law, yet if the decision has lasted and has been acted on for some time, a court of error will not reverse that decision, even though it should be of opinion that it would not have come to the same conclusion. For this reason I do not think it is open to us now to overrule the cases of *Cann v. Cann* and *Bos v. Helsham*. It is true that two cases have been cited to us in which one judge differed from the views expressed in those cases; but,

according to the comity of the courts of this country, courts of co-ordinate jurisdiction do not overrule co-ordinate courts, and I think that rule must be applied to the case before Malins, V.C., and with great respect to his memory I do not think he was justified in differing from similar cases decided in a court of co-ordinate jurisdiction with his own; and that view was expressed by the late Master of the Rolls, who was also of opinion that the learned Vice-Chancellor ought to have followed the current of authority. To speak my own mind, uninfluenced by authority, I cannot doubt that strong arguments may be used against the view upheld by *Cann v. Cann* and *Bos v. Helsham*; but it is not because we can see that strong arguments may be used against the decision that we are to say that we should not then have decided in the same manner. The judgments in the cases I have referred to seem strong and fairly conclusive, and I am far from saying that if I had had to decide those cases at that time I should have ventured to differ from the conclusion which was then arrived at. On the contrary, I think I should have agreed with those conclusions; but I wish to be understood to rest my decision in this case on this ground, that we cannot now overrule cases which, in a matter of daily occurrence, have laid down a rule of law which has been acted upon as a good rule of law through a long series of years. Several other cases were cited to us, but I do not think I need deal with any of them, except to say that I do not agree with those cases to which we have been referred which were before Malins, V.C., and to say further, as to the case of *Joliffe v. Baker* (*ubi sup.*), that if the judgment of Williams, J. in that case is in conflict with the cases of *Cann v. Cann* and *Bos v. Helsham*, I do not agree with it; and I prefer the judgment of Smith, J. in the present case. *Hart v. Swaine* (*ubi sup.*) was much pressed upon us, but I do not think that has anything to do with the point; that was a case of fraud, and Fry, L.J., sitting as a jury, found that there was fraud, and set aside the deed in consequence, but there is no question of that sort here. As to the case of *Leggott v. Barrett* (*ubi sup.*), which was used as an authority for the proposition that the contracts contained in these conditions of sale had been merged in the deed of conveyance. I see nothing wrong in that case; and I think I said nothing there which I repent of now, but the case is not applicable to the present case. Smith, J., in his judgment in the court below in this case, is quite right, in my opinion, when he points out what was the sole point of the decision in *Leggott v. Barrett*. For these reasons, I think that the judgment of Smith, J. was right, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The question is, what is the true agreement made between these parties? and it is a question of construction to a considerable extent. It is said that it is involved in the nature of this transaction that it was the intention of the parties that the formal deed of conveyance should displace the conditions of sale; but I think that cannot be so, because nothing is easier to conceive than a clause inserted in these conditions which would manifestly have vitality after the completion of the conveyance, and therefore we must interpret these conditions of sale. Now, I confess that, if the question were quite untouched by authority,

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I should have felt that there was much to be said for the view for which Mr. Lawrence contended; but I do not think that even on this question of construction we are left free to consider the main arguments that may be advanced upon it, because we find that, rightly or wrongly, a judicial construction has already been placed upon such a contract as this, which judicial construction must have constantly been acted upon in the daily occurrence of these sales by auction contracts during the many years through which those judgments have stood. The state of authority seems to have been this: that the point was apparently open, but apparently it was only open on account of the view taken by one learned judge—Malins, V.C., and which view I do not think, looking at the other authorities in co-ordinate courts, he was justified in taking. I agree with what the Master of the Rolls has said about the case of *Joliffe v. Baker* (*ubi sup.*), and, as it seems to me that we cannot properly consider this point, as it is in truth concluded by authority, I think this appeal must be dismissed.

FRY, L.J.—I am of the same opinion. The question is really one of construction. Does the condition in the conditions of sale provide for payment of compensation at any time, or only before the completion of the conveyance? Now, I think that much might be said upon both sides of the question, and no one can be insensible of some of the inconveniences which arise from the view contended for by the respondents, but that view has been commonly acted upon in these transactions for a long series of years. *Cann v. Cann* (*ubi sup.*) decided the point in favour of that view as long ago as 1830, and there was no authority varying from that until, I think, the year 1876; meanwhile *Cann v. Cann* had been upheld in the case of *Bos v. Helsham* (*ubi sup.*). I entirely agree with the opinion expressed by the other members of this court, that under these circumstances it is not desirable to interfere with the state of the law, upon the ground that in every-day transactions of this sort much must have been done upon the footing that the law is as then laid down. Then the only remaining question is whether this contract has been varied by the conveyance. I think that is not so. I can find in this conveyance nothing in any way approaching an expressed intention to vary. The only other point I wish to mention is this, that in *Besley v. Besley* (*ubi sup.*) and *Joliffe v. Baker* (*ubi sup.*) there was no such express contract as there is in this case, and that point must always be remembered when those cases are cited as authority upon this point.

Appeal dismissed.

Solicitors for the plaintiff, Swann and Co., for Elborne, Nottingham.

Solicitors for the defendant, Lee, Ockerby, and Eckerington, for Bright, Nottingham.

Friday, May 16.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

MORGAN v. THE LONDON GENERAL OMNIBUS COMPANY. (a)

*Employers' Liability Act 1880* (43 & 44 Vict. c. 42), s. 8—*Employers and Workmen Act 1875* (38 & 39 Vict. c. 90), s. 10—*Omnibus conductor*—*Workman*—*Person engaged in manual labour*.

An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of the *Employers and Workmen Act 1875*, s. 10.

THIS was an appeal from a judgment of the Divisional Court, consisting of Day and Smith, JJ., reported 50 L. T. Rep. N. S. 687.

The action was brought by the plaintiff in the Shoreditch County Court under the *Employers' Liability Act 1880* (43 & 44 Vict. c. 42) to recover damages from the defendants in respect of injuries sustained by him in consequence of a defect in one of the defendant company's omnibuses.

The plaintiff was employed by the defendants as an omnibus conductor, and was paid daily wages at the rate of 4s. per day.

At the trial of the action in the County Court the learned County Court judge, nonsuited the plaintiff upon the ground that he was not a person to whom the *Employers and Workmen Act 1875* (38 & 39 Vict. c. 90) applied.

The Queen's Bench Division (Day and Smith, JJ.) affirmed the decision of the County Court judge.

The plaintiff appealed.

The material sections of the Acts referred to are as follows:

43 & 44 Vict. c. 42, s. 8:

For the purposes of this Act, unless the context otherwise requires, the expression "workman" means a railway servant, and any person to whom the *Employers and Workmen Act 1875* applies.

38 & 39 Vict. c. 90, s. 10:

The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means a person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract . . . be express or implied.

Leonard for the plaintiff.—The plaintiff is within the words of the 10th section of the *Employers and Workmen Act 1875*. He is a labourer; at any rate he is a journeyman, being hired and paid by the day. But, whether this is so or not, he is engaged in manual labour. The section is meant to include all servants except domestic and menial servants, and the words "engaged in manual labour" are used to express all classes of workmen not before enumerated in the particular words of the section. The point has been decided in the plaintiff's favour in a similar tramway case in Scotland:

*Wilson v. The Glasgow Tramways and Omnibus Company*, *Sees. Cas. 4th series*, vol. 5, p. 981.

He referred to

*Grainger v. Aynsley*, 43 L. T. Rep. N. S. 608; 6 Q. B. Div. 182;

*Shaffers v. The General Steam Navigation Company*, 48 L. T. Rep. N. S. 228; 10 Q. B. Div. 356.

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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Sir *Hardinge Giffard*, Q.C., *Cock*, and *Beresford*, for the defendants, were not called on to argue.

BRETT, M.R.—In construing such an Act of Parliament as the one now under consideration, the court is in this difficulty, that it has to bring to bear the knowledge that it has of certain employments in order to see whether they come within the words of the Act. We have to apply the words of this Act of Parliament to the case of an omnibus conductor, and, in order to do so, we have to use that general knowledge which everyone possesses of the nature of the employment of an omnibus conductor. Now, the Act is passed to give to "workmen" relief which they could not have at common law; and the Legislature is not content to use the word "workmen" alone, but proceeds to define that word in an interpretation clause. That interpretation clause is as follows: [His Lordship read the 10th section of the Act of 1875.] Now it is obvious, by the insertion of the word "otherwise," that the draftsman understood that all the persons mentioned before were persons engaged in manual labour. And so they are, for all I know; they are persons who, in the ordinary use of the English language, are spoken of as working people engaged in manual labour. A "labourer" is a man who digs and does other work of that kind; a "servant in husbandry" is familiar to every one; a "journeyman" is a man working with and for a master. Every one is familiar with the term "journeyman carpenter," for instance. An "artificer" and a "handicraftsman" are skilled workmen. A "miner" needs no explanation; he certainly works with his hands in the sense of being engaged in manual labour. Then the section goes on, "or otherwise engaged in manual labour;" that is to say, engaged in manual labour in the same sense as these persons who have just been enumerated, though they cannot properly be called by any of these names. Therefore the question is, whether an omnibus conductor comes within the meaning of these words "engaged in manual labour," read by the light of what I have just said. As I said before, we must bring our general knowledge to bear, and it seems to me to be plain that the work of an omnibus conductor is not manual labour in this sense. His real and substantial business is to invite people to get into the omnibus, to let them out again, and to collect and keep their fares. No one, using the English language in its ordinary sense, would say that a man so employed was engaged in manual labour. Now, it was argued that the case of *Wilson v. The Glasgow Tramways Company* (*ubi sup.*) was an authority directly in point, and was in opposition to the view I have expressed. I am not going to try to distinguish that case. I think that, if we were bound by that case, our decision here would have to be the other way; but we are not bound by it, and, if we differ from it, we must act according to our own views. I therefore venture to differ from that case, and I am of opinion that the County Court judge and the Divisional Court were right, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The question we have to decide is, whether an omnibus conductor is within the 10th section of the Act of 1875. I agree that the words ought to be con-

strued in the ordinary sense that they bear in the English language; that is a well-known rule, unless something in the context or subject-matter shows that it should be otherwise. Here a statute speaks of certain persons whom it calls "workmen," but "workmen" are defined in an interpretation clause, and it is to that interpretation clause we have to look in order to discover who are meant by "workmen." That interpretation clause is as follows: [His Lordship read the section.] An omnibus conductor cannot in any sense at all be called a labourer. The words "otherwise engaged in manual labour" are the words relied upon by the plaintiff, but I think it is plain that they can only mean those persons who are substantially engaged in labour performed by the hands. Is an omnibus conductor such a person? It seems to me that as soon as one asks oneself the question one finds that a negative answer rises to the lips. As to the case of *Wilson v. The Glasgow Tramways Company* (*ubi sup.*), either the facts are distinguishable from the present case, or if not, I cannot understand how that decision can be consistent with the language employed in the section. I think that the decisions below were right, and that this appeal must be dismissed.

FRY, L.J.—I am entirely of the same opinion. I fail to see that any words used in the 10th section of the Act of 1875 include an omnibus conductor. As to the Scotch case, I notice that one of the three judges, Lord Gifford, expressly avoided touching on the question, and said that it was a difficult question which he would not then decide.

*Appeal dismissed.*

Solicitors for the plaintiff, *Mackreth, Bramicell, and White*.

Solicitors for the defendants, *Harries, Wilkinson, and Raikes*.

July 24 and 25.

(Before BRETT, M.R., BOWEN and FRY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE DUNELM. (a)

ON APPEAL FROM BUTT, J.

*Collision—Lights—Steam trawler—Look-out—Regulations for Preventing Collisions at Sea 1863, art. 9—Regulations for Preventing Collisions at Sea 1880, art. 10.*

*A steam trawler with her nets down and attached thereto is "stationary" within the meaning of art. 9 of the Regulations for Preventing Collisions at Sea 1863, although she has way on her through the water, provided such way is not more than is necessary to keep her under command, and in such circumstances she is bound only to carry the white light required by that article; but, if she exceeds that speed, she is bound by art. 3 of the Regulations for Preventing Collisions at Sea to carry the lights of a steamship under way.*

*A steam trawler, whilst fishing, was only carrying a white light when she ought to have been carrying the lights for a steamship under way. A steamship having a bad look-out, but with an officer on deck and in charge, was approaching the trawler, but did not see her until within a*

(a) Reported by J. P. ASPINALL and F. W. HAIKEN, Esqrs., Barristers-at-Law.

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distance of from a quarter to half a mile, and then did not alter her course until too late to avoid a collision.

Held, that, as the officer in charge might have acted sooner if he had seen a side light, and that, as it was not proved that the absence of the side lights could not by any possibility have contributed to the collision, the steam trawler was to blame for a breach of the regulations.

The judgment of the court below having been confirmed, but for reasons other than those given by the judge below, and the Court of Appeal differing from those reasons, ordered each party to pay his own costs.

THIS was an appeal from a judgment of Butt, J. in a damage action *in rem* to recover compensation for damage sustained by the paddle-wheel steam trawler *Achievement*, of thirty-six tons net, in a collision between that vessel and the screw steamship *Dunelm*, of 826 tons gross, at about 11.30 p.m. on March 25, 1884, in the North Sea, about seven miles east of Seaham Harbour. The defendants counter-claimed.

At the time of collision the wind was easterly, a light breeze, the weather fine and clear, and the tide about half flood of the force of two knots.

The *Achievement*, which was on a fishing voyage, had her trawling gear on the ground, and according to her evidence was dragging it with the tide over the ground at about four and a half knots an hour. She was exhibiting a white light in a globular lamp at her masthead, and was heading about south.

The *Dunelm*, which was on a voyage from Rochester to Sunderland, was heading N.W. by N.  $\frac{1}{2}$  N., and making about eight knots, when those on board her observed the white light of the *Achievement* about half a point on the starboard bow, and from about a quarter to half a mile distant. The white light was watched, and after a short time was made out to be crossing the bows of the *Dunelm* from starboard to port, and the helm of the *Dunelm* was put hard-a-port, but although the engines were immediately afterwards stopped and reversed, the vessels came into collision, the port side of the *Achievement* striking the stem of the *Dunelm*.

According to the evidence of two of the crew of the *Dunelm*, called on behalf of the plaintiffs, there was no look-out on board the *Dunelm*. It however appeared that the officer in charge of the *Dunelm* was on the bridge. During the course of the hearing it was admitted that the *Dunelm* was to blame.

The Regulations for Preventing Collisions at Sea and the Order in Council upon which the argument turned are as follows:

Regulations for Preventing Collisions at Sea 1863, art. 9:

Fishing vessels and open boats when at anchor, or attached to their nets and stationary, shall exhibit a bright white light.

Regulations for Preventing Collisions at Sea 1880, art. 10, deals with the lights to be carried by open fishing boats, and other open boats, and by fishing vessels, and is divided into paragraphs a, b, c, d, e, f, and g.

(d) A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried,

have ready at hand the coloured lights as provided in article 7, or a lantern with a red and green glass as described in paragraph (a) of this article.

Order in Council dated March 24, 1880:

Whereas by the Merchant Shipping Act Amendment Act 1862 . . . Now, therefore, Her Majesty by virtue of the powers vested in her by the said recited Act, and by and with the advice of her Privy Council, is pleased to direct that the operation of the said recited article, numbered 10 of the new regulations (the regulations of 1880) contained in the first schedule of the said Order in Council of the 14th day of August 1879, shall be suspended until the 1st day of September 1881, and that in lieu thereof and in substitution thereof, the said recited article numbered 9 of the regulations appended to the said Order in Council of the 9th day of January 1863 shall continue and remain in force until the 1st day of September 1881.

By a succession of Orders in Council art. 9 of the Regulations for Preventing Collisions at Sea 1863 had been continued in force, and was in force at the time of the collision.

July 2.—The action came on for hearing before Butt, J., assisted by Trinity Masters.

Dr. Phillimore (with him Bucknill) for the plaintiffs, the owners of the *Achievement*.—The one white light carried by the trawler was in accordance with the Regulations for Preventing Collisions at Sea. By Order in Council, the lights prescribed by art. 10 of the regulations of 1880 were suspended, and in their place was substituted the one white light required by art. 9 of the regulations of 1863. Even assuming the trawler not to have been stationary in fact, she was stationary within the meaning of the word as used in the article, and she has therefore complied with the regulations:

*The Edith*, L. Rep. Ir. 10 Eq. 345;

*The Robert and Ann v. The Lloyds*, Holt's Rule of the Road, p. 57;

*The Englishman*, 3 Asp. Mar. Law Cas. 506; 37 L. T. Rep. N. S. 412; 3 P. Div. 18.

Assuming there to have been a breach of the regulations by the *Achievement*, and assuming it to have been her duty to carry side lights, it cannot be said that this breach could by any possibility have contributed to the collision. It has been proved that not only was there a bad look-out on the *Dunelm*, but that there was no look-out. If so, the question of lights on the trawler becomes immaterial, and their absence or presence could in no way conduce to the collision:

*The Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 478; 32 L. T. Rep. N. S. 129; L. Rep. 4 A. & E. 417;

*The Englishman* (*ubi sup.*).

Hall, Q.C. and W. R. Kennedy for the defendants.—The Order in Council of the 24th March 1880 suspends art. 10 of the regulations of 1880, but only substitutes art. 9 of the regulations of 1863 in cases covered by the terms of that article. Thus art. 9 provides that fishing vessels when attached to their nets and stationary shall carry the one bright light. But the *Achievement* was not stationary. She admittedly was making some two and half knots through the water, and should therefore have exhibited side lights. She, therefore, has infringed the regulations, and in such a way that may possibly have conduced to the collision. For, assuming there to have been a bad look-out on the steamer, yet there was an officer on the bridge, and had the side lights been exhibited, it is impossible to say that he might not have seen them.

BUTT, J.—This is a case in which a point of some nicety has arisen on the interpretation of one or more of the Regulations for Preventing Collisions at Sea. I have come to the conclusion, acting on the advice of the Elder Brethren of the Trinity House, that both these vessels must be held to blame. That the steamer is to blame there can be no doubt, and indeed Mr. Hall has conceded it to be so. I would therefore only advert to the fact that, though the steam trawler had a good white light exhibited, which ought to have been visible at two or three miles, it was never seen by those on board the steamer until, according to their own statement, they were within a distance of from a quarter to half a mile, and that even then they do nothing, although they are in doubt as to the meaning of the white light, whereas I think they ought certainly to have stopped and reversed their engines. Had they done so they never would have sunk this vessel, the *Achievement*. That settles the matter as to the steamer. Now with regard to the steam trawler, the question as to the application of the Regulations for Preventing Collisions at Sea arises. She was carrying a good globular light at the masthead, according to the evidence some 30 feet above the deck. She was heading about south, with her trawl down, and was making, by her own admission, about two and a half knots through the water, and about four and a half over the ground. I am advised by the Trinity Masters that trawlers prefer to go at even a greater rate of speed over the ground, and that as a fact they must have some good headway on them. However, taking the speed to have been two and a half knots through the water, what follows? In the year 1880 the Regulations for Preventing Collisions at Sea, which with some exceptions are now in force, were promulgated, and had art. 10 of those regulations not been suspended by Order in Council, there would have been no difficulty in determining this case, had it ever arisen, which I very much doubt if the article had remained in force. Now art. 10, sub-sect. (d) of the Regulations provided that "A trawler at work shall carry on one of her masts two lights in a vertical line one over the other not less than three feet apart, the upper light red and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried, have ready at hand the coloured lights, as provided in art. 7, or a lantern with a red and green glass, as described in paragraph (a) of this article." By a series of Orders in Council that article has been suspended, and remains so suspended up to the present time. The first of these Orders in Council, dated the 24th March 1880, I will advert to immediately. It is agreed by the counsel on both sides that there are subsequent Orders in Council in the same terms as the first, and therefore I will confine myself to dealing with the first. By it the operation of art. 10 of the present Regulations for Preventing Collisions was suspended, and in lieu thereof, and in substitution therefor, the 9th article of the Regulations for Preventing Collisions at Sea was to continue and remain in force for a certain period. Now, then, what is the effect of that Order in Council? Dr. Phillimore, on behalf of the plaintiffs, the owners of the steam trawler, has contended that it substituted for the light provided by sub-section (d)

of art. 10 of the new regulations the one bright light mentioned in art. 9 of the old regulations, which bright light was undoubtedly carried by the *Achievement*. Certainly, that is an argument which is deserving of very serious consideration, and to which I have given all the weight I think I ought to give, though I have not allowed that argument to prevail with me. The conclusion to which I have come is, that the Order in Council does not substitute the one bright light mentioned in art. 9 of the old regulations for the lights prescribed by sub-sect. (d), art. 10, of the new regulations. The view I take of the matter is this: I think the proper view of the Order in Council is, that art. 9 of the old regulations is, by the Order in Council, substituted for art. 10 of the new regulations in so far, and in so far only, as art. 9 applies to any particular case, and that where art. 9 cannot be applied, art. 10 is suspended, and nothing is substituted for it. If that is the right view of the matter, then I think that in this case art. 3 of the new regulations comes into operation. Is this trawler to blame for not carrying side lights? I think it is impossible to say that she was stationary. She was not stationary as a matter of fact, and in my opinion not stationary within the meaning of the word as used in the regulations. She had four and a half knots on her over the ground, and, what is more important, two and a half knots through the water. The Elder Brethren, whose opinion I have taken on this point, think she cannot be considered as stationary. But further, when one looks at the second paragraph of art. 9 of the old regulations, it appears to me to apply, and to have been intended to apply, only to vessels which are practically stationary. The light required is the light prescribed for vessels at anchor, and I think the article is only applicable to vessels at anchor, or, at the utmost, to vessels drifting without way through the water. If that be the right construction, what follows? It follows that the *Achievement* was not carrying the proper lights. Whether that conducted to the collision is a matter which I have not to determine. The question is, might not the absence of the side lights have contributed to the collision? Now, what are the facts? I have already said that there was a bad look-out on board the steamer. There was, however, an officer on the bridge, but he also was keeping a bad look-out, because he did not see the *Achievement's* light until a distance of from a quarter to half a mile. If the trawler had been carrying the side lights, which I have held she ought to have carried, that officer would, in all probability, having regard to the relative position of these two vessels, have seen the red light as soon as he saw the white light. Seeing a red light in such a position, ordinarily an officer would at once give the order to port, which, in this case, is not done till later. He does not then do that, but waits until he can make out the meaning of the single white light. It is therefore probable that, had he seen a red light, he would have ported earlier and in sufficient time to have avoided a collision. In conclusion, it appears to me that, having regard to all the circumstances of this case, not only is it possible, but probable, that this collision might have been avoided if a red light had been visible, and I therefore hold both these vessels to blame.

From this judgment the plaintiffs appealed.

Dr. Phillimore (with him Bucknill), for the plaintiffs, in support of the appeal.—Under the circumstances of this case the *Achievement* was bound by the provisions of art. 9 of the Regulations for Preventing Collisions at Sea 1863. She acted in accordance with that article by exhibiting a white light, and therefore should not be held to blame for this collision. If, however, art. 9 does not cover the case of a trawler, then she is bound by the common law only to exhibit such a light as shall warn other vessels in sufficient time of her presence. If so, the white light carried would answer that purpose. It is, however, submitted that art. 9 does cover trawlers, because it is unreasonable to suppose that the Legislature, when specifically enacting with regard to fishing vessels, should have so enacted as to exclude trawling, one of the principal modes of fishing, from the operation of the article. It is submitted that art. 9 is to be construed by reference to art. 10 of the Regulations for Preventing Collisions at Sea 1880:

*Attorney-General v. Lamplough*, 38 L. T. Rep. N. S. 87; 8 Ex. Div. 227.

Art. 10 in terms deals with "a trawler at work," when therefore art. 9 was substituted for art. 10, it is to be assumed that art. 9 was meant to cover the case of a trawler at work. According to art. 9 fishing vessels when "attached to their nets and stationary" are to carry a bright light. Inasmuch as a trawler cannot work without some way on her, the word "stationary" should be construed to mean stationary so far as is consistent with the carrying on the work of trawling. It is a matter of common knowledge that trawlers, when fishing, go with the tide. It is therefore necessary that trawlers must have way over the ground. It is also obvious that trawlers, incumbered with their nets, must be under some command, and in order to be so it is necessary that they should have some way through the water, in order to give themselves steerage way and otherwise to enable them to manœuvre. Having regard to the fact that this must have been within the knowledge of those who framed this article, it is to be presumed that in using the word "stationary" they could not have meant a total absence of motion, the effect of which would be to prevent trawl fishing altogether. According to Dr. Lushington and the Irish Court of Appeal the word is to be defined as meaning such way through the water as will give the trawler steerage way:

*The Robert and Ann v. The Lloyds*, Holt's Rule of the Road, p. 57;  
*The Edith*, L. Rep. Ir. 10 Eq. 345.

If so, it is submitted that two knots does not exceed this limit. It is also submitted that the fishing vessels referred to in art. 9 belong to three distinct categories, viz., vessels at anchor, vessels attached to their nets, and vessels stationary. If so, the *Achievement* being attached to her nets, it becomes unnecessary to consider whether she was also stationary, and there has been a proper compliance with the article. Even assuming there to have been a breach of the regulations, it could not possibly have conducted to the collision, seeing that it has been proved that there was a bad look-out on board the steamer.

*Hall, Q.C. and W. R. Kennedy*, for the respondents, *contra*.—Having regard to the fact that

art. 9 prescribes a white light for vessels attached to their nets and stationary, and that vessels at anchor are directed to carry a white light, it is to be assumed that vessels when "stationary" are meant to be in much the same position as vessels at anchor. A vessel when attached to her nets and stationary would both be incumbered with her nets, and also out of command, hence she is to carry that light which will indicate to other vessels that she is to be looked upon as equivalent to a vessel at anchor, and incapable of manœuvring to keep out of their way. It is therefore submitted that stationary means, if not absence of motion over the ground, nothing more than motion with the tide. To give it any wider definition, is to do violence to its meaning. Even assuming it to cover some slight way through the water, the two knots in the present case are excessive. The argument that art. 9 covers three distinct conditions of fishing vessels is negated by the language of the article the first conjunction being "or," and the second "and," which shows that the words "attached to their nets and stationary" are to be read together. With regard to the breach of the regulations not possibly conducing to the collision, it is submitted that it is not sufficient to prove merely that there was a bad look-out.

BRETT, M.R.—In this case there was a collision between the steamer *Dunelm* and the steam trawler *Achievement*, and it is exceedingly clear, and is not otherwise contested, that the steamer was in the wrong. The only question is, whether the *Achievement* was also to blame. At the time of the collision this steam trawler was in the act of fishing with her trawl net, and had her trawl net down, and being in that position she had a globular white light on her mast, and she had not any red or green side lights. The first question is, whether, being in that state as to her lights, she committed a breach of any rule that was imperative upon her. Another question is, under what rule, if any, would she be? This collision took place after the Order in Council promulgating the regulations of 1880, in which regulations when originally published, there was an art. 10 which dealt with trawlers. But by a subsequent Order in Council this art. 10 was suspended, and art. 9 of the regulations of 1863 was substituted in lieu of art. 10. Hence Dr. Phillimore argued that we ought to construe art. 9 by what was in art. 10. That is contrary, to my mind, to the proper rules of construction. We have to construe art. 9 as if we had to construe it the day after it was enacted. What I mean is this, that we are to take out of the regulations art. 10, and read into it, as if it were there, the old art. 9. Therefore, the code of regulations under which this vessel was at the time of the collision, was the Order in Council promulgating the regulations of 1880, as if that Order in Council had been published with all the articles in it except art. 10, art. 9 being in its place. That being so, was this steam trawler within art. 9? I mean, is she the sort of vessel that could be within art. 9? There is also the question whether, under the circumstances, she ought to have acted under art. 9 or under art. 3, which latter article would be applicable to her as a steamer under way. Prior to the Order in Council substituting art. 9 for art. 10 fishing of different kinds was well



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known. There was fishing with drift nets, fishing without nets at all, and fishing with trawls. The vessels with drift nets, trawl nets, &c., were all vessels attached to their nets. Therefore we must assume that those who had to legislate on this matter knew the way in which the fishing trade was carried on. They knew, therefore, that these vessels fished with their nets attached to them, and so when they use the words "attached to their nets" it seems to me obvious that they meant to include vessels attached to trawling nets just as much as to any other nets. They make no distinction between the nets. Therefore I think it perfectly clear that trawlers, which at the date of the Order in Council were principally sailing vessels, were meant to come within the rule. But it is not under all circumstances that a fishing vessel is allowed to carry the light prescribed by that rule. A fishing vessel can only carry the white light when at anchor or attached to her nets and stationary. If she is not under those particular circumstances, she is an ordinary sea-going vessel, and, if under way, she must carry the red and green side lights; and, if at anchor, the prescribed white light. With regard to a steamer, which was the case here, there is nothing in art. 9 to exclude her if she is a fishing vessel and is attached to her nets and stationary. If she was within that category, then she must show the white light required by that article. Therefore the matter is reduced to this: Was this steam trawler, at the time when the collision took place, a vessel within the limits of art. 9, so that it was her duty to show a white light, or was she outside that article? If she was not within the article, it follows, as a matter of course, that she was a steamer under way, and ought to have carried the red and green and masthead lights. Therefore, in this particular case, the question is, whether the trawler was a steamer under way, or whether she was a fishing vessel attached to her nets and stationary. That leads me to the construction of art. 9. It certainly is a difficult one to construe. My view of an Act of Parliament—and these regulations are equivalent to an Act of Parliament—which is applicable to a large trade or business is, that it is to be construed, if possible, not according to the strictest and nicest interpretation, but that it is to be construed in a reasonable way with regard to the trade or business with which the Act is dealing. It seems to me impossible to suppose, and it would be wrong to assert, that those who have to legislate with regard to a large trade or business should be supposed to have so legislated as to prevent that trade or business from being carried on, unless one is forced to come to such a conclusion by the language used; and then that could only be by the most extraordinary inadvertence of those who legislate. With regard to this article, it is first of all enacted as to fishing vessels at anchor—that is, when they are not fishing—that they are to carry a white light. Then there is an enactment as to fishing vessels "attached to their nets and stationary." For a vessel to be "at anchor," it is not necessary that there should be an anchor down. For instance, a vessel made fast to moorings has no anchor down, and yet nobody would say that she was not at anchor. So again with fishing boats which are brought up by dropping overboard an exceedingly heavy piece of stone. They are "at anchor," though

not attached to an anchor. Therefore the difference between being at anchor and attached to their nets and stationary means that they are not exactly in the same state. To my mind the words "attached to their nets and stationary" are meant to be applicable at a time when the vessels are fishing; because, as every one knows, vessels when fishing are attached to their nets. They are not then under way; that is, they do not enjoy the same liberty of movement as they would when under way. They are then much more like a vessel at anchor than like a vessel under way. They have not the same command over themselves. Should it become necessary for them to go forward they could not easily do so on account of the weight of their nets, especially so in the case of trawlers. Assuming them to be steamers, if they backed, they would back into their own nets, and their screw or paddles would become hopelessly entangled in them. Therefore they are in an extremely helpless state. So if a sailing vessel were round to avoid some obstruction she would be into her own nets. If she tacked considerably she would also do damage. Therefore these vessels when attached to their nets are much more like vessels at anchor than they are like vessels under way, and it was for that reason, no doubt, that provisions were enacted with regard to them whilst they were fishing, which would distinguish them from vessels under way. Again, with regard to vessels approaching them, if they, while thus crippled, were to carry the same lights that a vessel does when she is under way and in full command of herself, they would mislead other vessels, which would suppose that the fishing vessel was under way and would act accordingly. If another vessel wanted to go astern of a fishing vessel she would have a right to steer on the assumption that the fishing vessel was going forward. But the fishing vessel would be practically stationary, and hence the other vessel would go a great deal too close to her and would probably cut her nets. There are positions in which a fishing vessel, if she is within the rule for vessels under way, would be bound to give way to other vessels, although in her crippled state she could not do what the rule stated ought to be done. That to my mind shows that this article was meant to apply to fishing vessels when fishing. What then is the meaning of the word "stationary?" It has been argued that it must mean mathematically stationary. It seems to me that that cannot be so in a tideway unless the vessel is anchored. A vessel must go with the tide unless she is so managed that with her head turned to tide she exactly counteracts the tide—a thing almost impossible to do for five consecutive minutes. Therefore that cannot be the meaning. Then it was suggested that it means that the vessel must not have any way through the water. But it is told us by our assessors that the mode of fishing in the case of drift nets and trawlers is for the vessels to go with the tide and not against it. If that be true, and the vessel has no way through the water, she cannot steer at all. There may be no harm in a vessel not having command of herself in a perfectly calm sea, but assume there is some sea on, and vessels do fish in what is not exactly a calm sea, she would, under those circumstances, be in manifest danger. How is a vessel then to fish? She cannot be aimlessly wandering about from

one side to the other, into her nets and then out of them, and all the time with no command over herself. It makes the thing impracticable. If it was meant that she was to have no way through the water, the Legislature might just as well have said at once that she must not fish at all. What, then, is the use of the white light if by the hypothesis the vessel cannot fish at all? Therefore it seems to me clear that the word "stationary" cannot mean mathematically stationary, that is, going by the land and not by the tide; neither can it mean that the vessel is to have no way on her through the water. I agree that it is a strong word, and the Legislature must have meant to hold the case very strongly indeed. If a vessel is more in the condition of being a vessel under way than at anchor, then she would mislead other vessels if she showed a light which is intended to show that she is a vessel at anchor. The result, therefore, is, that we must so construe this word "stationary" as to mean that the vessel is not in fact stationary, though at the same time I think that we are bound to give the fullest effect to so strong a word as "stationary." It must mean that the vessel is to have some way through the water. How far can one go so as to make trawling practicable in allowing the vessel to have way through the water, and yet at the same time to give the fullest possible effect to the word "stationary?" Upon the best consideration that we can give to it, I think what we must say is this, that she must not be going faster than is necessary to keep herself under command while attached to her nets. It will follow from that, that it will not be sufficient for fishermen to say, "We were only going so fast as to enable us to fish with the best advantage and effect," because it may be that a fishing vessel may desire to go faster than I have fixed as the limit, for the purpose of coming to the fish faster and so catching more fish in a given time. Trawl fishing is usually slow because the net is on the ground, and if the vessel goes too fast the net would get torn. But suppose the weather to be such that a vessel cannot fish without going faster than is necessary to keep her under command. It is very possible that there may be weather which is so strong that if vessels fish they must go faster than is necessary to keep them under way. That would be more so in the case of a sailing vessel than in the case of a steamer; but if it is so, they must, according to what I have laid down, neither fish at all, or if they do, they must in the case of a sailing vessel show the red and green lights, and in the case of a steamer show the red, green, and masthead lights. Whether in any particular case a vessel is going faster than is necessary to keep herself under command is a matter of evidence and almost invariably a question for the assessors, although it is perfectly clear that if a trawler was going nine knots through the water we would not want the assessors to tell us that that was excessive. The evidence in this case I take to be, that the trawler with her trawl on the ground was going at two knots an hour through the water, which with the two-knot tide would give her four knots over the ground. The test, to my mind, is not the speed over the ground, but through the water, and in this case the trawler's speed through the water was two knots. We have therefore asked our assessors this question: "Was the *Achievement*, assuming she was going two knots an hour

through the water, going faster than was necessary to enable her to keep herself under command whilst attached to her nets?" They say that she was. She therefore was not within art. 9, and was within art. 3. Instead, therefore, of having only a white light, she ought under the circumstances to have carried the red, green, and masthead lights. Hence she is to blame, unless another proposition which was put forward can be maintained, which was, that although she had infringed the regulations, yet, under the circumstances, it was not possible that the infringement could have conduced to the accident. It is sufficient for me to say that in this case it is impossible to accept such an argument, because the officer in command of the steamer, only seeing the trawler's white light, would be induced to act differently from what he would have done had the trawler carried the lights which would have shown that she was a steamer under way, and if the absence of those lights might have induced the officer to act differently, then the infringement of the regulations cannot be excused. This is not like the case to which the proposition was referred when it was enunciated, namely, that where one vessel was on the starboard side of the other, and that other vessel has got a green light but not a red light, it is useless to charge her with a breach of the rules for not exhibiting a red light, because, if she had had twenty lights on the port side, no one on the approaching vessel could have seen them, and therefore its absence could make no difference. But this is not anything like that case. The strict interpretation that we have had to put upon this rule will make it very difficult for trawlers, at any given moment, to know what they are to do, because, if they are within art. 9, they do wrong to carry the red and green lights, and if they are outside art. 9, then they do wrong in carrying the white light only. Therefore persons in charge of trawlers will have to do what sailors often have to do, they will have to solve a most difficult problem, and be always asking themselves: "Am I going faster than I ought with only a white light. If so, I must put up my red and green lights. If I am not, I must put up the single white light and immediately take down the side lights." That is the difficulty, but it is one which we cannot help. We have tried to define as fairly as possible the meaning of this Act of Parliament. A larger definition, to my mind, would have been on the whole more desirable, but I do not see any way to construe the word "stationary" in any larger sense than we have done. Therefore I think that, while not agreeing with the reasons of the judgment of the court below, we must come to the same conclusion and dismiss this appeal. How the costs of this appeal are to be borne will have to be considered. The question arises, whether the case comes within the rule that, where both parties are to blame, each party pays his own costs; or whether, the appeal being dismissed, the appellants should pay the costs.

BOWEN, L.J.—I am of the same opinion. I agree entirely with the reasons given by the Master of the Rolls for his exposition of the regulations, and I only add a few words because this is, to my mind, a most important matter. In the first place, I should wish most emphatically to call the attention of the Board of Trade to the necessity of dealing in some efficient way

with trawl fishing. For myself, I have neither the necessary experience nor the desire to formulate an opinion as to whether or not the white bright light should be legalised for trawlers under all circumstances. If it is that a conflict of opinion rages upon the subject, I do not wish to express any opinion other than this, that some clear and definite line ought to be taken with regard to trawlers, because at the moment the existing legislation is nothing better than a trap for trawlers. I agree with the Master of the Rolls in saying that we should have been glad to have laid down some express guidance for trawlers if we could have done so without doing violence to the meaning of the word "stationary," so that those in charge of trawlers might know what lights to carry, without having to exercise a difficult judgment at each particular moment as to the exact pace at which they are moving through the water. I therefore trust that the Board of Trade will not leave trawlers any longer in their present position. As regards the construction we are putting upon art. 9, it seems to me to come to this: Steam and sailing trawlers, within art. 9, are only intended to carry a white light if they come within the rather difficult definition of either being at anchor or attached to their nets and stationary. What is the meaning of "attached to their nets and stationary?" The nets must be supposed to be out, or else the vessels would not be attached to their nets. The words "and stationary" must therefore mean something additional. I agree with the Master of the Rolls, when he says that we must construe the article from a business point of view, just as one would construe an Act of Parliament with reference to a matter of science, art, or law. It is the subject-matter which gives the colour to the words used in an Act of Parliament. The first thing to be observed of this article is that the fishing vessels which are dealt with are fishing vessels at anchor; that is to say, vessels which are attached to the land, and do not move with the water. Then there is the other class of vessels which are dealt with, which are vessels moving with the water. They are vessels which rest upon the water as distinct from resting on the land. I do not think the word "stationary" is exactly antithetical to "under way," but think it means substantially keeping the same spot or station, and only moving about so much as is consistent with fishing. This leads me directly to the test given by the Master of the Rolls. The vessel must have a certain motion with the tide if she is going with the tide, and moreover she must have a certain motion through the water for the purpose of keeping herself under command, and for the necessary purpose of managing her nets. But that is all. If she is doing more than that she is locomotive, and not stationary. No doubt it is a difficult question of fact to say whether a vessel is really stationary according to this popular and seafaring term, but I think it cannot be doubted that a vessel travelling two knots through the water is not stationary. In conclusion, I cannot help thinking that the exposition of the law by the Master of the Rolls is the same exposition, though couched in different language, as that of the Court of Appeal of Ireland in the case of *The Edith* (*ubi sup.*), and that it is not at all inconsistent with what has been laid down by Dr. Lushington

in the case of *The Robert and Ann v. The Lloyds* (*ubi sup.*).

Fry, L.J.—I concur in the judgments pronounced by my learned brethren. The question turns upon the meaning to be given to a few words in art. 9 of the old Regulations for Preventing Collisions. The words are "fishing vessels and other boats, when at anchor, or attached to their nets and stationary, shall exhibit a bright white light." What is the meaning of the word "stationary?" Dr. Phillimore asks us to read "and," which precedes the word "stationary," as "or," so as to hold that the article applied either to fishing boats at anchor, or attached to their nets, or stationary. But it is obvious that such a construction would do violence to the language of the article, and would be inconsistent with its intention. It appears to me that two conditions must be satisfied by the meaning to be given to the word "stationary." In the first place, it must describe a common condition of fishing vessels. We cannot suppose that Her Majesty in Council was legislating with regard to an extraordinary and uncommon condition of fishing vessels, and requiring an extraordinary condition of lights. In the next place it must express some condition, some state of fishing vessels incidental to them when their nets are down, and therefore we must find some condition, some common state of fishing vessels when they are attached to their nets and stationary. That appears to me to be the principle upon which the word should be construed, and one which our construction satisfies. No doubt the most rigorous meaning of the word "stationary" is a negation of any motion of the vessel with regard to the ground; but there is a condition, a common and well-known condition of fishing vessels, in which they are attached to their nets, and making some way over the ground. With regard to the other parts of the case I entirely agree with my learned brethren, and I do not consider that it is necessary for me to add any more.

Brett, M.R.—As to the costs of this appeal, we think that, the reasons for the judgment below being in our view incorrect, we ought, under the circumstances, to order each party to bear their own costs.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Ingledeu, Ince, and Co.*

Solicitors for the defendants, *Thomas Cooper and Co.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

June 30 and July 1.

(Before KAY, J.)

Re HEATON'S TRADE MARK. (a)

Trade mark—Registration—Common mark—User—Fraud—Foreign proprietor—Laches.

In 1718 G.'s firm, who were manufacturers of iron at *Lövsta*, in Sweden, registered in Sweden, as their trade mark, the letter L inclosed in a ring or hoop, commonly known as the "hoop L."

In 1878 they registered in England, under the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

*Trade Marks Registration Act 1875, the hoop L mark alone, and also in combination with the word "Leufsta." Since 1835 they had exported iron of the highest quality to England for the manufacture of a particular kind of steel known as "blister steel." The hoop L mark was stamped upon the iron in combination either with the name of their English consignee, or with the word "Leufsta," or with both. They registered these in Sweden as bye-stamps in addition to their original hoop L mark.*

*H.'s firm, who were English iron and steel and edge tool manufacturers, had for fifty years past used the hoop L mark, in combination with the name of their firm, as their trade mark upon blister steel manufactured by them from inferior brands of Swedish iron. For this purpose it was necessary to cut off the Swedish mark, as the bars of iron when converted into steel retained upon their surface, unless intentionally obliterated, any marks which might be stamped upon them. A similar practice was adopted by thirty other English firms of iron and steel manufacturers, but this practice did not come to G.'s knowledge until 1881.*

*H. applied, under the Trade Marks Registration Act 1875, to register the hoop L mark in combination with the words "Brades Co., Warranted."*

*Held, that the application must be refused with costs, upon the ground that, whatever might have been the practice as to the user, it was one which had its inception in fraud, and was calculated to deceive, and therefore, though apparently established by time and usage, could not receive the sanction of the court.*

GEORGE HEATON and George Caleb Adkins carried on the business of iron, steel, and edge tool manufacturers, at the Brades Works, near Oldbury, Stafford, and also at Birmingham, under the style of William Hunt and Sons, and as the Brades Company.

In Feb. 1882 they made an application, No. 27,698, under the Trade Marks Registration Act 1875 (which was published in the *Trade Marks Journal* of the 21st June 1882), to register as a trade mark applicable to iron and steel the letter L inclosed in a ring or hoop—thus (L)—(commonly known as the "hoop L") in combination with the words "Brades Co., Warranted."

The application was opposed by Baron Louis de Geer, the owner of certain ironworks at Leufsta, in Dannemora, Sweden, who claimed the exclusive right to the trade mark.

For more than fifty years the applicants and their predecessors had used the hoop L in connection with their trade name as a trade mark, and a similar practice was adopted by thirty other firms of iron and steel manufacturers. This use was almost entirely confined to Swedish iron, which was peculiarly adapted for the manufacture of steel of the highest quality, known as "blister steel," and so called because its surface was covered with blisters. The bars of iron when converted into steel retained their shape, and, unless intentionally obliterated, any marks which were upon the iron before the conversion.

By the law of Sweden it was necessary that every bar of iron which left the country should bear a registered mark upon it.

The evidence stated that Swedish iron varied considerably in quality. The best brands came

from the region of Dannemora, and of these brands the manufacture of the Baron de Geer had acquired the highest reputation.

It was the practice of the applicants to purchase the lower qualities of Swedish iron for conversion into blister steel, and before conversion to cut off the distinctive marks of these lower qualities, and substitute their own mark, coupled with their own name, which appeared upon the steel. This practice was a common one in the trade. It did not appear that the applicants, or the thirty other firms, purchased the Baron de Geer's iron to any considerable extent, but it was admitted on both sides that no one who purchased the Baron de Geer's iron for the manufacture of blister steel ever removed his mark, as no manufactured steel commanded so high a price in the market as that bearing the Baron de Geer's stamp upon it. The hoop L mark had been registered in England in connection with other words and devices, by two English iron manufacturers, viz., Henry Hall and Bradley and Sons, and had remained on the register for five years without objection, but it did not appear whether the mark had been used by these firms, either exclusively, or at all, upon Swedish iron.

Under these circumstances the contention of the applicants was that the hoop L had become a common mark, but they were willing not to use their own mark, either upon the Baron de Geer's iron or upon any iron that came from Dannemora.

It was admitted that the hoop L mark originally belonged exclusively to the firm represented by the Baron de Geer, it having been registered in Sweden in 1718.

Since 1835 the Baron de Geer's firm had, except for a short period, been in the habit of exporting the whole of their iron to a single English purchaser or firm of purchasers whom they changed from time to time. They added the name of the purchaser for the time being to their hoop L mark upon all the iron which they exported, and registered such name in Sweden as a bye-stamp in addition to such mark. This went on till 1864. In that year the then proprietor, with a view to export his iron to several English purchasers, not desiring to have their several names on the register, registered in Sweden the word Leufsta as a bye-stamp; but in 1867 he again reverted to his former practice and sold the whole of the output to W. Jessop and Sons, and his iron was then marked "Hoop L Leufsta, W. Jessop and Sons."

In 1879 the Baron de Geer, who had then succeeded to the ironworks, entered into a contract with Thomas Firth and Sons, Sheffield, to consign to them for sale all his iron manufactured at the Leufsta works. Firth and Sons became the sole importers in England, but their name was not stamped upon the iron, and since that time the Baron de Geer's iron had been marked Hoop L Leufsta simply.

Previously, in 1878, the Baron de Geer had, without opposition, registered in England, under the Trade Marks Registration Act 1875, his two trademarks Hoop L and Hoop L Leufsta for Swedish Dannemora bar iron. Towards the end of 1881 he learnt from Firth and Sons for the first time that English firms had been using his hoop L mark. The Baron's firm had not used the hoop L mark except in combination with words since 1835.

The details of the evidence, which was by affidavit, appear in the judgment.

*Graham Hastings, Q.C. and John Cutler* for the applicants.—As the Baron de Geer has not obtained the leave of the court to register his trade marks, he comes within rule 19 of the Rules under the Trade Marks Registration Acts 1875-7, which provides that where a trade mark has been already registered, a trade mark that is identical, or so nearly resembling as to be calculated to deceive, cannot be registered without the leave of the court. This is not an application to strike the trade mark off the register, but we submit that we are entitled to deal with it on the same footing. The opposition to our application can only rest on the fact that the Baron de Geer was properly or lawfully on the register, and was exclusively entitled to the trade mark. The two points to be decided are, first, as to the user of the trade mark for fifty years; and, secondly, whether it was or was not a common mark. We say that the hoop L mark has become a common mark:

*Re Hyde and Co.'s Trade Mark*, 38 L. T. Rep. N. S. 777; 7 Ch. Div. 724;

*Re J. B. Palmer's Application* (No. 1), 46 L. T. Rep. N. S. 787; 21 Ch. Div. 47.

It is a term of approbation, like "A 1." The Baron de Geer's defence is, that it is not a common mark, and that those who have hitherto been using it have used it by fraud. But even if that be so, if it has become a common mark, it is immaterial whether it was acquired by fraud and piracy or not. That is no answer to our claim to register, nor would it prevent the mark being removed if it was a common mark, though the common use began in fraud. We deny, however, that there was any fraud at all. Everyone in the trade understands that the hoop L mark alone indicates iron coming from the Leufsta works, or steel made from that iron. In any case, the onus lies on the Baron de Geer to prove fraud. These are not the proper proceedings to try the question of fraud. The Baron de Geer has not used the hoop L mark, except in combination with words, since 1835. He has, therefore, abandoned his exclusive right to that mark alone:

*Re J. B. Palmer's Trade Mark* (No. 2), 50 L. T. Rep. N. S. 30; 24 Ch. Div. 504.

On both these points *Lea v. Millar* (Sebastian's Dig. of Trade Mark Cases, p. 305) is in our favour. The applicants are entitled to register this common trade mark in connection with their trade name, disclaiming the exclusive right to the common mark:

*Re Horeburgh*, 50 L. T. Rep. N. S. 23;

*Re Kuhn and Co.*, 50 L. T. Rep. N. S. 25; 53 L. J. 238, Ch.

Foreign user alone does not give a right to registration:

*Re Munch's Application*, 50 L. T. Rep. N. S. 12;

*Re Rivière's Trade Mark*, 49 L. T. Rep. N. S. 506; 26 Ch. Div. 48.

There may be more than one registration of an old mark for the same goods:

*Re Powell*; *Re Pratt*, Sebastian's Dig. of Trade Mark Cases, p. 357.

When the Baron de Geer registered his trade marks in 1878 there were already upon the register two trade marks with the hoop L forming part, and he is barred by laches in allowing the

parties to remain on the register for five years without taking proceedings against them. They referred also to the Trade Marks Registration Act 1875, s. 6.

*Rigby, Q.C. and Sebastian* for the Baron de Geer.—We do not deny that there had been a sort of user, but it is a remarkable fact that not one of the firms that used the mark came forward to register the mark for blister steel until 1882. [KAY, J.—It is alleged there are two on the register.] Those that were registered were for an entirely different class of goods, and not for blister steel at all, and the parties may have used the Baron de Geer's mark innocently. The attempt made by the applicants to get their names on the register is not surprising, because it would protect them against the consequence of doing a wrong action, for it has been admitted by the applicants that inferior Swedish iron has been used, the brand cut off, and then restamped with the hoop L mark. That undoubtedly is calculated to represent it as the Baron de Geer's iron instead of inferior iron. No usage can justify the removal of a lower brand and the substitution of a higher. That is a continuing fraud. It is a representation that the applicants' iron is the Baron de Geer's iron, for the hoop L mark has no specific meaning except with reference to his own. Moreover, the use is confined to Swedish iron. [KAY, J.—Your case is, that you should be able to stop this use by injunction.] We think that we should be so entitled to retain such use, but an act originally fraudulent cannot possibly become innocent from the nature of it. Every time the use has been made it has been a dishonest use, and therefore never can become a right action. The Registration Acts are not intended to confer a right upon a wrongdoer. A mark is only made *publici juris* by long use when there is no evidence of a fraudulent origin, and when the use complained of has ceased to deceive:

*Rodgers v. Rodgers*, 31 L. T. Rep. N. S. 285;

*Ford v. Foster*, 27 L. T. Rep. N. S. 219; L. Rep. 7 Ch. App. 611.

In *Re Kuhn and Co.* (*ubi sup.*) there was no evidence as to the origin of the user. Until 1881 the Baron de Geer had no knowledge of any English user. He might obtain an injunction if necessary, as there is no need to prove actual deception:

*Sykes v. Sykes*, 3 B. & C. 541; 5 D. & B. 292;

*Johnston and Co. v. Orr-Ewing and Co.*, 46 L. T. Rep. N. S. 216; 7 App. Cas. 219.

A foreigner may protect his rights everywhere:

*The Collins Company v. Brown*, 30 L. T. Rep. O. S. 62; 3 K. & G. 423;

*Taylor v. Carpenter* (1), Sebastian's Digest of Trade Mark Cases, p. 39.

The "three-mark rule" applies only to an innocent user:

*Re Jelley, Son, and Jones*, 46 L. T. Rep. N. S. 381.

Under the circumstances the applicants are not entitled to register the hoop L in such a way as to pass off their goods for those of the Baron de Geer. They have no right to come to the court for registration, and their application should be refused. If they do use the mark they must use it at their own risk, and not with the sanction of any authority.

*Hastings* in reply.—The Statute of Limitations enables a person to acquire a right by means of a

wrong. The origin of the user is immaterial, except as to costs:

*Re Kuhn and Co. (ubi sup.).*

The English user must have been known to the consignees of the Baron de Geer, and he must be taken to have been informed by them. The word "Leufsta" was registered for the purpose of distinguishing iron exported by the Baron de Geer from other iron stamped with the hoop L mark. The existence of fraud is not established; it rests upon information and belief only:

*Gilbert v. Endean*, 9 Ch. Div. 259.

In *Johnston and Co. v. Orr-Ewing and Co. (ubi sup.)* no other "two elephant" mark was shown to exist in the trade. There was no intention on the part of the applicants to defraud the Baron or anyone else. The hoop L was mark never placed upon English or inferior iron. The mark has become *publici juris*. The evidence shows that at least thirty firms have for years used this mark on good Swedish iron in connection with their own names. The applicants, however, are prepared to give an undertaking not to use the hoop L mark upon any iron coming from the Leufsta works, or from the mines of Dannemora.

KAY, J.—This case comes before the court upon an application to register a trade mark, which is opposed by the Baron de Geer, and of course the matter is referred to the court. The question is, on all the facts of the case, whether the applicants are entitled to have the trade mark, which they claim, put upon the register. Now, their case is this. I read it from their affidavits: "It is, and has been for over fifty years last past, the practice of us and our predecessors to openly and publicly manufacture for sale and sell, both at our works at the Brades and our warehouse in Birmingham, blister steel with the brand or trade mark," of a circle with the letter L printed in the middle of it (which has been called "hoop L")

—thus (L)—and the words following "Brades Co., Warranted," "which we are now seeking to register (and which is hereafter referred to as our trade mark), affixed thereto or impressed thereon." Then they prove a price list of their firm more than forty years old containing an entry of this "hoop L Blister Steel, Brades Co., Warranted," "hoop L Blister Steel, Brades Co.," and one other "hoop L Blister Steel, Sykes." That evidence is supported by evidence that thirty other firms in England have used this hoop L mark in connection with their names upon Swedish iron. This is the evidence of sixteen witnesses, most of whom are people engaged in the steel and iron trade in this country; and it is admitted that the use, both by the applicants and by those thirty other firms, has been chiefly upon Swedish iron and not upon English iron. There has been some trifling evidence of the use of it to a very small extent upon Norwegian iron, and there is some suggestion of its having been used once upon Russian iron, but the use of it chiefly is upon Swedish iron. That makes a case which it is impossible not to see the strength and force of. I have been referred by the opponents to an authority of *Rodgers v. Rodgers*, the report of which is in the LAW TIMES (31 L. T. Rep. N. S. 285)—I do not know that it is reported elsewhere—and to the language of Mellish, L.J. in that case. I should observe, before I read the

words, that the case was not a case of an application to put upon the register a trade mark, but a case of an application to restrain a person from using a certain trade mark. The cases have, of course, a very great deal of analogy. Mellish, L.J. says: "Now, I do not think that, as a matter of law, the mere fact that it has been used for a great number of years necessarily affords a defence. If it was really made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs having a remedy on their part"—that is, against the defendants—that being a case of an application for an injunction against the defendants. Then, later on, he says: "But, at the same time, when the defendants have done what they are now charged with doing for such a very great number of years, the court must require very clear proof both that the acts complained of have been fraudulent, and that they have had the effect of doing practical injury." Again, he says: "When it has gone on for such a number of years; and when it has to be proved that it was originally begun fraudulently, and was continued fraudulently during all those years, and that it is calculated to deceive, it appears to me that very much stronger evidence is required." I do not at all express the least dissent from that proposition. When persons come and object, in whatever form they object, to the use of a trade mark which has been used for a great number of years, it does not follow as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but, most certainly, it throws on those who object to the use the onus of proving that it was originally a fraudulent use; that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case. I also think the language of the same learned judge in *Ford v. Foster* (27 L. T. Rep. N. S. 219, 226; L. Rep. 7 Ch. App. 611, 628) may be accepted as a very good definition of what the test should be, whether a mark has, by long user, become a thing *publici juris* or not. His words are these: "Then what is the test by which a decision is to be arrived at, whether a word which was originally a trade mark has become *publici juris*? I think the test must be whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark, as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced by the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard, to some extent, it may appear on the trader, yet practically, as the right to a trade mark is simply the right to prevent the trader from being cheated by other goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone." Herein lies the strength of the applicants' case. It seems to me to be a case which it is extremely difficult to oppose. It is very difficult to get over the effect of this very long user by the applicants



CHAN. DIV.]

Re HEATON'S TRADE MARK.

[CHAN. DIV.]

themselves for fifty years. It is extremely difficult when that difficulty is increased by reason of its being shown to be, not a user by themselves alone, but a user by many other firms (and I have no doubt many of them of the highest respectability) and for long periods, and a user very similar to their own. On the other hand, the Baron's case is this: He has proved—and I will try to state the facts as fairly as possible from the result of the evidence that has been brought before me—he has proved that for a very long time indeed this hoop L mark has been the principal trade mark of his firm. He says that, according to his information and belief, it goes back to some date anterior to the year 1643. That, of course, can only be belief, but it is that sort of belief which the tradition of a firm makes, perhaps, of some little value. Then he proves this distinctly, that in the year 1718 this device of the hoop L—that and nothing else—was registered in Sweden, according to the law of that country, as a distinctive mark of iron produced at the works belonging to his ancestors in Sweden. Then, it seems, in the year 1835 the firm which he now represents sold their iron to an English purchaser, or firm of purchasers, Messrs. Sykes, of Hull, and by agreement with them they registered in Sweden, as an addition, or bye-stamp, as it is called, to the hoop L mark, the name of Messrs. Sykes. Thenceforward, for some time, the stamp impressed upon the iron manufactured by the Baron de Geer was the hoop L with the addition of the word "Sykes." That went on to about 1855. From 1855 to about 1864 Messrs. Wilkinson, of Hull, were the sole English purchasers from the Baron, and they, by a similar agreement, similarly registered their name—I am speaking always of registration in Sweden—and during that period hoop L iron was stamped "hoop L, Wilkinson." In 1864 and 1865 Messrs. Hinde and Gladstone, of London, were the sole English purchasers, and by a similar agreement they registered their name, and during those years the iron was stamped "hoop, L Hinde and Gladstone." Towards the end of the year 1864 a change was made, and the then proprietor, who was the late brother, it seems, of the Baron de Geer, "with the intention to discontinue exporting his hoop L iron to one English firm only, and being desirous that confusion should not be produced by the registration and use of different names at the same time as bye-stamps by the different English firms who should buy his said hoop L iron, adopted and registered in Sweden as a bye-stamp or additional mark for his said Leufsta iron and iron products the name 'Leufsta'" (which I understand is the name of the works where the Baron de Geer's business has been carried on, and is now carried on) "and the said additional stamp or mark Leufsta became and is the exclusive property of the proprietor of my said works as appears from the said certificate 01," which he exhibits. "On the termination of his contract with Messrs. Hinde and Gladstone, at the end of the following year, my said brother began to export his said hoop L iron to more English firms than one, and during the year 1866 he exported his said hoop L iron to several English firms, the said iron being throughout the said year 1866 stamped 'hoop L Leufsta' only, and not with the name of the said English firms." That brings us down to the year 1867, and in that

year the Baron issued this circular in England, and obviously to English purchasers and consumers: "Brightside Steel Works, Sheffield. Notice to the consumers of the genuine Swedish Dannemora Iron hoop L. I beg to announce that I have this day entered into a contract with Messrs. W. Jessop and Sons, of Sheffield, for the whole annual make of the above iron, which in future will be stamped hoop L Leufsta—W. Jessop and Sons—and to which I request the special attention of the trade. Carl Emanuel de Geer, Proprietor." It is dated from Leufsta, in Sweden, the 29th April 1867. Then there follows something about Jessop and Sons themselves in these words: "W. Jessop and Sons Limited, in referring to the above announcement, beg to inform consumers that the genuine hoop L Leufsta W. Jessop and Sons' iron can only be obtained from them, and that they are prepared to supply the trade on liberal terms. At the same time W. J. and S. wish to caution dealers in foreign iron against spurious imitations of the whole or any part of the genuine brands, as W. J. and S. are resolved in case of infringement to protect their own and the proprietor's rights in the same." The result of that is, that having the original hoop L as the sole distinctive mark and design, the Baron has, from time to time, added the names of the person to whom his output of iron was, from time to time, sold in this country; and later, in the year 1867, instead of adding the name of the English purchaser, which changed from time to time, and which of course might be more than one, so that it would be inconvenient to have the addition of several different names, he has added the name of "Leufsta," which is the name of the locality of his works, and also, in the case of W. Jessop and Sons, the name of "W. Jessop and Sons," they being the purchasers of the whole output of the iron. Now, I understand the case on the Baron's part to be this, which is admitted by the evidence, in the witness-box, of one of the applicants, Mr. Heaton, who gave his evidence very candidly and fairly: There is in Sweden a region called Dannemora, from which iron ore is produced of the purest quality of any produced in Sweden, or, it would seem from the evidence before me, in the world. This iron is manufactured in Sweden, not merely by the Baron de Geer, but by other manufacturers; and the manufacture of this iron into bars (which is done in Sweden, and, as the evidence shows, and I believe it is pretty notorious, by the aid of charcoal instead of coal) produces the very purest and best iron for the purpose of conversion into the highest quality of steel that is known in the world. Each particular manufacturer has registered, and has always had registered, his own particular brand; and of all these brands the manufacture of the Baron de Geer—whether because of his better processes, or because he happens to obtain the best ore of all, I do not know—has acquired the highest reputation, and the hoop L bar iron manufactured by the Baron de Geer is looked upon as the finest iron in the world for the purpose of being manufactured into steel for the highest qualities of work. That is quite clearly admitted by all parties. The applicants have very fairly stated what their case is. They say that they, and the other manufacturers whose evidence has been given, have, for this



long series of years, been accustomed to buy Swedish iron. There are many brands—it is said a thousand—and, of course, many of inferior quality to the Dannemora iron; but I think the evidence shows that the next in quality is something like 7½ a ton less in value than the Dannemora iron, and so it goes down to as great a difference as 12½ a ton—I am speaking of the higher qualities of Swedish iron. The Swedish iron which they buy has upon the bars a particular brand stamped. They manufacture that iron into blister steel, the process of doing which is to put it into crucibles with charcoal or some other material, in layers, between the bars, and then it is exposed to a great heat, which has the effect of converting the iron into the finest possible steel. In that conversion the heat is never raised to the melting point, but it produces this effect upon the iron, that the surface of the iron rises in blisters all over the bars, and, accordingly it is called, when manufactured, “blister steel;” but it does not at all interfere with, so as to efface or make illegible, the marks stamped upon the bar iron, as, of course the Bessemer process, and perhaps other processes of converting iron into steel, would do. Accordingly, the applicants say that whenever they manufacture the Baron de Geer's iron into steel they leave his mark upon the iron, and it appears upon the steel when manufactured; inasmuch as it would not answer their purpose to remove that mark and put any other mark upon it, because if they did they would deteriorate the price of the steel when manufactured, for no manufactured steel produces so high a price in the market as that which is made from the Baron de Geer's hoop L iron. But, they say, what they do with other and lower qualities of Swedish iron is this: they cut off the mark before they begin to convert it into blistered steel, and they put upon the bar iron instead of the original mark, which showed it to be an inferior iron to the Baron's, this mark of their own, “hoop, L Brades Co., Warranted.” Sometimes, as the evidence has shown, the name is put the other way—“Brades Co., Warranted, hoop L.” The other manufacturers, though it does not appear very clearly in their evidence, I am told at the bar, do the same thing. They never use their own marks, and hoop L for the Baron's iron; they never think of removing from the Baron's iron his mark before they turn it into blister steel, but they remove from the other and lower qualities of Swedish iron the distinctive marks of those lower qualities, and they put upon those lower qualities this mark hoop L, coupled with their own name, or with, in one instance, a crown, or something of that kind. That has been the practice of these manufacturers, and of this particular firm who are now applying for registration, as they say, for more than fifty years. Now the applicants are willing to put themselves under a condition. They are willing, in the first place, to disclaim any right to the hoop L by itself; they are willing to disclaim that as the essential part of their trade mark, and they only claim the combination of their own name and the word “warranted” with the hoop L, and, more, they are willing to undertake not to use this mark upon English iron. Indeed, Mr. Heaton said very frankly in the witness-box that he had tried it and found it did not pay, because they could not make out of the English iron steel

which would deceive anybody, although they put the mark hoop L upon it. They are willing also, as I understand Mr. Hastings in his reply, to undertake not to use their own mark upon the Baron's iron, or upon any iron which comes from the mines of Dannemora, and which is almost of the same value as the Baron's iron. I so understand it. Accordingly, what they are asking the court to do is this: Sanction by registration that practice which we have been following for the last fifty years, namely, the cutting off the name and brand from the inferior qualities of Swedish iron—not from the superior qualities; those we will not touch—and the putting on of the hoop L with our name and the word “warranted.” Of course nobody would deny that, if that were being done now for the first time, it would be the grossest and most absolute fraud that could possibly be imagined. I should have no hesitation whatever, if the case came before me as a judge and I was asked to grant an injunction, and it were proved that that was being done for the first time, in characterising it as a fraud, and stigmatising it in the strongest possible language, and granting an injunction to prevent its ever happening again. But that is not the case at all. The thing has been done for fifty years by these very applicants, and the question is now whether, having done this for fifty years, anybody can possibly be deceived by it, or whether it can possibly now have the character of a fraud. Of course I do not suppose, and I do not mean to suggest by any language I use, that the intention of the applicants is to commit a fraud, or to ask the court to sanction a fraud. Is the question the same as if I had now before me an application to grant an injunction? If I had before me an application to restrain this use by these present applicants of the mark hoop L, I must require, according to the language I have read of Mellish, L.J., in the case of *Rodgers v. Rodgers (ubi sup.)*, very clear evidence that persons are now deceived by that use. The applicants, however, say (I hope they will not take exception to the language in which I put their argument) that this has been done so often that it has lost its power to defraud; that it has become so common a fraud among all manufacturers that it is impossible anyone should be deceived by it now; and, therefore, they say not that the court cannot grant an injunction, but that the court must put its own seal upon this transaction and add to it its approval by allowing the mark to be registered. I absolutely decline to do so. This was in its origin a gross fraud. I am not satisfied now, nor would any amount of evidence satisfy me, that this transaction, which I assume to be done in all innocence, is not calculated to deceive. To ask a court of justice to sanction by its *flat* this act, which is properly characterised as a continuing misrepresentation, and an attempt to make out that this iron of an inferior quality is the iron which is well known now in the market as the best iron produced, seems to me absolutely out of the question. The question is not the same as whether the court can grant an injunction or not, as to which I say nothing because that matter is not before me; but I most distinctly say, in my opinion, it is the duty of the court to testify in the strongest manner its disapprobation of this kind of proceeding, however long it may have been sanctioned by custom. I say that I am not satisfied that this would not, if continued, be

eminently calculated to deceive. I think it would be. It seems to me there may be many purchasers of this blister steel and of iron, who, knowing the reputation which the hoop L mark has obtained and has had for so long a time, even for centuries, might well be deceived by seeing upon blister steel, made admittedly from Swedish iron, this hoop L mark coupled with a name. The name which the Baron has from time to time added to the mark itself upon his own iron has from time to time been changed. What is to prevent a purchaser of the blister steel supposing that the changed name was the name of the consignee of the Baron's iron? Nothing that I can make out at all, and besides that, I have before me on this trade mark, of which it is sought to obtain the registration, the word "warranted." What does the word "warranted" mean? "Warranted," what? "Warranted," that the iron was manufactured into steel by the Brades Company? Clearly nothing of the kind. It means—if the word has any meaning at all—"Warranted to be made from the hoop L iron," a falsehood which certainly gains nothing in respectability from being continually repeated. That again is a reason why, if any other kind of trade mark with the hoop L as part of it could be registered, this is not the one that should be. I have no hesitation in saying that this is an application which ought not to be granted, and I refuse it with costs.

Solicitors: Beale, Marigold, Beale, and Groves; Henry Aughton Maude, agent for Broomhead, Wightman, and Moore, Sheffield.

July 3 and 24.

(Before KAY, J.)

HALL v. HALE. (a)

*Agreement to grant a lease—Specific performance—Decree for—Refusal to obey order of court—Defendant declared a trustee—Appointment of person to execute lease—Trustee Act 1850 (13 & 14 Vict. c. 60), s. 30.*

*A decree was made for specific performance of an agreement to grant a new lease of certain premises, and the defendant was ordered to execute such new lease to the plaintiff.*

*The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her.*

*Held, that there having been a decree for specific performance, the court had jurisdiction, under sect. 30 of the Trustee Act 1850, to appoint a person to execute the lease in place of the defendant, and the motion was directed to be amended accordingly.*

*The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff.*

*In this action a decree was made for the specific performance of an agreement to grant a new lease of certain premises, and the defendant was thereby ordered to execute such new lease to the plaintiff.*

*The defendant having refused to obey the order,*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

a motion was made on behalf of the plaintiff for leave to issue a writ of attachment against her.

*Seddon*, in support of the motion, cited

*Grace v. Baynton*, W. N. 1877, p. 79; 25 W. R. 506; *Seton on Decrees*, 4th edit. p. 1329, note; *Lewin on Trusts*, 7th edit. p. 881, note.

The defendant did not appear.

KAY, J. held that, there having been a decree for specific performance, the court had jurisdiction, under sect. 30 of the Trustee Act 1850, to appoint a person to execute the lease in place of the defendant, and directed the notice of motion to be amended accordingly.

*July 24.*—The motion having been amended so as to ask that the defendant might be declared a trustee of the premises in question, within the meaning of the Trustee Act 1850, and for the appointment of a person to execute the lease thereof to the plaintiff in place of the defendant,

KAY, J. made the order.

Solicitors for the plaintiff, *Robinson and Dees*.

July 7 and 11.

(Before KAY, J.)

HUGHES v. COLES. (a)

*Annuity charged upon land—"Rent"—Trust to pay the same—Arrears—Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), ss. 1, 10—3 & 4 Will. 4, c. 27, s. 1.*

*By a deed, dated in 1833, certain real estate was conveyed to trustees upon trust to pay an annuity to A., his heirs and assigns for ever.*

*A claim for this annuity was first made in June 1884. The right to receive the annuity accrued more than twenty years before such claim, but nothing had ever been paid in respect thereof. The question was, as to the effect of the Real Property Limitation Act 1874 upon the payments which had become due.*

*Held, that no payment of the annuity which became due before the claim was made could be recovered, because, as to any such sum, the remedy was only the same as if there were no trust, in which case it would be irrecoverable.*

An action was brought for partition of certain real estate. Judgment was given in 1882, and it was ordered that accounts should be taken, inquiries made as to the persons entitled, and a sale of the property made. The property had been sold, and the proceeds of sale had been paid into court.

The chief clerk in his certificate showed who were entitled, and stated that one moiety of the property was, under the provisions of a deed, dated the 15th Sept. 1833, subject, after the death of Mary Coles, to a trust for payment of a perpetual annuity of £l. to John Morgan.

Mary Coles died in 1851.

This was the further consideration for the distribution of the fund in court.

A summons had been taken out by beneficiaries to vary the certificate, as the claim to be paid the annuity was first made on the 8th June 1884. Nothing had ever been paid in respect thereof. The claim was made for the annuity and arrears for six years previous to the 8th June 1884.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

CHAN. DIV.] REG. v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBHING. [Q.B. DIV.]

*Maidlow*, for the applicants, contended that the whole of the annuity and the arrears was barred by the 10th section of the Real Property Limitation Act 1874, as it would have been if there had been no express trust to secure it.

*Graham Hastings*, Q.C. and *C. Parke* for other parties in the same interest.

*Upjohn*, for the annuitant, argued that under sect. 8 of the Act of 1874 the "present right to receive" the sum of money did not occur until it became payable, and that the annuitant was certainly entitled to be paid six years' arrears. He referred to

*Edwards v. Warden*, 30 L. T. Rep. N. S. 540; L. Rep. 9 Ch. App. 495.

*Townsend* for other parties. *Cur. adv. vult.*

July 11.—The following written judgment was delivered by

KAY, J.—By a deed, dated the 15th Sept. 1833, certain real estate was conveyed to trustees upon trust to pay an annuity to one Morgan, his heirs and assigns for ever. The right to receive this annuity first accrued more than twenty years ago but nothing has ever been paid in respect thereof. The question is as to the effect, in that state of things, of the recent Statute of Limitations, (37 & 38 Vict. c. 57), the 10th section of which provides that: "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." It is obvious that the terms of that section do not destroy the right to recover any future payments of the annuity. "Any sum of money" may apply to each instalment of the annuity as it becomes due, as was said in *Edwards v. Warden* (30 L. T. Rep. N. S. 540, 544; L. Rep. 9 Ch. App. 495, 505). So that the right to recover any one payment of the annuity is the same under that section as if there were no trust; but the right to recover the future payments has not yet arisen at all, and consequently the section does not apply to such future payments. This was admitted in the argument, and the real question is, what is the effect of this section upon the payments which had become due before the present application was made. By the 9th section this Act is to be construed together with 3 & 4 Will. 4, c. 27. The interpretation clause in that statute, sect. 1, provides that the word "rent" shall extend to all annuities charged upon, or payable out of, any land. Sect. 42 provides that no arrears of rent shall be recovered but within six years; and if the annuity be, as it is admitted, an existing charge, six years' arrears would be recoverable under that section. But by sect. 1 of the later Act no proceeding to recover any rent, that is, any annuity charged upon land, can be taken after twelve years from the time when the right first accrued. Therefore, if there were not any trust, those twelve years having elapsed, none of the past instalments of this annuity could now be recovered. That is precisely what the 10th section says must now happen; and

accordingly it seems to me that the result is that no payment of this annuity which became due before this application was made can now be recovered, because, as to any such sum, the remedy is only the same as if there were not any trust, in which case it would be irrecoverable.

Solicitors: *Samuel Price and Son*; *F. Venn and Co.*; *Stones, Morris, and Stone*; *Henry J. Adkin*.

## QUEEN'S BENCH DIVISION.

March 7, 8, and 14.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

REG. on the prosecution of JOHN ABBOTT v. THE COMMISSIONERS OF SEWERS FOR THE LEVELS OF FOBHING. (a)

*Sewers, commission of—Liability to repair a wall—Damage caused by extraordinary tide—Evidence of liability—Presentments—3 & 4 Will. 4, c. 22, ss. 13, 46.*

The prosecutor was the owner of certain lands in the county of Essex, on the shore of the river Thames, known as Curry Marsh Farm, and within the jurisdiction of the Commissioners of Sewers for the Levels of Fobbing. All the land lies below the level of the river at high water, and is protected from inundation at every flood tide by sea walls constructed for that purpose.

The sea walls were ancient, and the date of their construction was not known, and the wall in front of Curry Marsh Farm, belonging to the prosecutor, formed part of the southern boundary of the levels.

On the 18th Jan. 1881 there occurred an extraordinary storm and high tide, and the sea wall fronting Curry Marsh Farm, and almost all the sea walls on the banks of the Thames in that neighbourhood, were breached by the water from the river, which flowed through and over the walls of the level generally, and submerged a large portion of the lands.

Previously to the 18th Jan. 1881 the sea wall fronting Curry Marsh Farm was in a good state of repair, and sufficient to resist the flow of ordinary tides.

Immediately after the 18th Jan. 1881 the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor to repair the wall, which he did, and on the 15th Feb. 1881, at a general court of sewers, the commissioners ordered the prosecutor to do certain further repairs to the sea wall, and which were rendered necessary by the extraordinary tide of the 18th Jan. 1881. This order, which was based on a presentment made many years previously, was complied with by the prosecutor.

The prosecutor then obtained a writ of mandamus directed to the commissioners, commanding them to reimburse the expenses incurred by him in repairing the damage done to the sea wall fronting Curry Marsh Farm by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the commissioners, and to make rates and do all such acts as might be necessary for such reimbursement.

The prosecutor contended that he was not liable to repair damage caused to the wall by extraordinary weather or tides; and, on the other

(a) Reported by H. D. BONSET, Esq., Barrister-at-Law.

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hand, the commissioners contended that his liability extended to all repairs, whether rendered necessary by ordinary or extraordinary weather or tides, and they endeavoured to prove this liability by certain presentments of juries and other documents found among the papers and books of the commissioners.

*Held*, that the burden of proof was on the commissioners to establish the extent of the prosecutor's liability, and that they had failed to prove that he was liable to make good all damage however caused; that the prosecutor was only liable to make good damage which could in some way be traced to his or his predecessors' negligence; and that the damage to the wall mentioned in the case was not such as he was bound to repair.

*Held*, also, that the prosecutor was entitled to a mandamus to be reimbursed the expense of repairing the wall under the direction of the marsh bailiff, but not the expense of repairing the wall under the orders of the commissioners, because those orders were equivalent to a verdict after trial of a presentment, and, until they were reversed on appeal or quashed by the court on certiorari, the prosecutor was bound by them, and therefore he was not entitled to a mandamus to reimburse him the expense he had incurred in obeying them.

On the 9th June 1882 the prosecutor, John Abbott, obtained a rule for a mandamus directed to the Commissioners of Sewers within certain parishes in the county of Essex, commanding them to reimburse the said John Abbott the expenses incurred by him in repairing the damage done to the sea wall fronting Curry Marsh Farm by the storm of the 18th Jan. 1881, and all expenses incurred in complying with the orders of the said commissioners made on or about the 15th Feb. 1881 and the 9th March 1882, and to make and levy such rates and do all such acts as might be necessary for such reimbursement, and it was further ordered by consent of counsel on both sides that a special case should be stated on the mandamus. At the same time it was agreed between the parties that an application by the prosecutor to bring up the orders of the 15th Feb. 1881 and 9th March 1882 by certiorari, in order that they might be quashed as being invalid, should stand over until after the argument of the special case.

#### SPECIAL CASE.

1. The said John Abbott (hereinafter called the prosecutor) is the owner of certain freehold lands and hereditaments in the parish of Stanford-le-Hope, in the county of Essex, comprising about 122a. 1r. 13p., and known as Curry Marsh Farm. The said land and hereditaments are situate on the Essex shore of the river Thames in Sea Reach, and form part of the levels within the limits of the parishes of Fobbing, Corringham, Stanford-le-Hope, Mucking, Laindon, Dunton, Little Warley, and Pange, and they are within the jurisdiction of the said Commissioners of Sewers, who are appointed by Her Majesty's Commission of Sewers, issued for the limits of the said parishes on the 19th Nov. 1860, under the Great Seal of Great Britain, pursuant to the statute relating to sewers.

2. Similar commissions have from time to time been issued for a considerable number of years past to the commissioners for the same district.

The records of the commissioners begin from the year 1729. It is not known when the first commission for the district was issued. The commission of the 19th Nov. 1860 has continued in force to the present time, under the provisions of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), s. 14.

3. The said levels are bounded on the south by the river Thames. All the lands within the said levels, comprising in extent about 3442 acres, lie below the level of the river at high water, and are protected from inundation at every flood tide by sea walls constructed for that purpose. Of the 3442 acres, 2592a. 2r. 12p. are protected by the sea wall along the length of the southern boundary of the levels of which the Curry Marsh wall forms part. Some part of the said lands is owned by persons who have no frontage to the river, and have no sea walls on or abutting on their own land, but are protected by the sea walls on or fronting the lands of the others. The sea walls are ancient, and the date when they were first constructed is not known.

4. The evidence as to the liability of owners of land alongside the river to repair the sea walls fronting their respective lands will be found set out in paragraphs 33 to 52 of this special case.

5. One of the said sea walls fronts Curry Marsh Farm. The owners of that farm who preceded the prosecutor from time to time repaired the said wall. The prosecutor bought under a condition of sale, which will be found set out in the appendix thereto. (a) There is no evidence that repairs were ever done to the said wall otherwise than by or at the expense of the owners of Curry Marsh Farm.

6. At a court held by the commissioners on the 18th Aug. 1880 their then marsh bailiff reported that all former orders of the commissioners had been complied with, and at a court held on the 26th Jan. 1881 he stated that he had on the 14th Jan. 1881 inspected the sea walls throughout the level, and that they then were (except part of a sea wall not fronting Curry Marsh Farm) in a proper state to resist ordinary tides. In fact, at the time of the happening of the storm hereinafter mentioned the wall fronting Curry Marsh Farm was in good substantial repair, and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms. There was at the time of the said storm no default on the part of the prosecutor as regards the state of repair of the said sea wall, unless it was a default on his part that the wall was not, as was proved by the event, sufficient to keep out the water on the said 18th Jan. 1881.

7. On the 18th Jan. 1881 there occurred a concurrence of storm and high wind, which I find, as a fact, for the purposes of this case, was extraordinary. The sea wall fronting Curry Marsh, and almost all the sea walls on the banks of the

(a) Condition of sale: "The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to all chief and other rents, rights of way, water and other easements (if any) charged or subsisting thereon, and to such liability to repair, maintain, and cleanse the river wall, sluices, creeks, drains, and watercourses bounding or intersecting the property as the property may be subject to, or by prescription or otherwise, but the vendor shall not be required to show the nature or extent of such liability, or to furnish any other information with reference thereto."

Thames in that neighbourhood, were breached by the water from the river which flowed through and over the walls of the level generally and submerged a large portion of the lands usually protected by the walls.

8. In consequence of the damage and the destruction of part of the said sea wall fronting Curry Marsh, and of the apprehended recurrence after a short interval of unusually high tides, the marsh bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor that it was necessary that measures should be at once taken for the repair of the said sea wall. Such measures were accordingly taken by the prosecutor, and previously to the 15th Feb. 1881 he had expended on the repairing of the said wall a sum which, for the purpose of the argument of this case, is to be taken to be 3014*l.* 1*s.* 8*d.*

9. On the 26th Jan. 1881 and the 15th Feb. 1881 sessions and general courts of sewers were held by the commissioners, and a copy of so much of the record of the proceedings at the said courts as is material to this case is set out in the appendix. At the court of the 15th Feb. 1881 an order was made on the prosecutor to do certain repairs to the wall, a copy of which order is also in the appendix. (a)

10. Subsequently to the service upon him of the said order the prosecutor continued the works which he had before commenced, and by the 18th Aug. 1881 all the works required by the said order to be done had been done by him to the satisfaction of the marsh bailiff, and of the engineers of the commissioners, with the exception of a small portion at the western corner. The cost of the repairs up to this date is to be taken at 5752*l.* 10*s.* 6*d.* Work was subsequently done by the prosecutor to the portion of the western corner, and that portion was in course of com-

(a) This order was founded on the presentment made on the 1st Aug. 1861 and was as follows: "1st Aug. 1861.—At a session and general court of sewers then held for the said levels. The jurors aforesaid, upon their oath aforesaid, do further say and present, that the several persons and bodies corporate mentioned and described in the second part of each of the schedules hereunder written, or hereunder annexed, being the owners of the several lands and hereditaments set opposite to such their respective names and descriptions in the second part of each such schedule, and their ancestors and predecessors, owners of the same lands and hereditaments, have from time immemorial been used and accustomed to support, maintain and repair, and of right ought to have supported, maintained and repaired, at their respective costs and charges, the several respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the second part of the same several schedules opposite their respective names and descriptions and the said several persons and bodies corporate named and mentioned in the same part of the said several schedules respectively are now the owners of the lands and hereditaments therein set opposite to such their respective names and descriptions, and by reason of the tenure of the same lands and hereditaments respectively are now liable, and ought of right to support, maintain and repair, and keep in good and sufficient repair, at their own respective costs and charges, the several and respective quantities of walling within the limits and jurisdiction aforesaid mentioned and set forth in the said second part of the several schedules respectively opposite their respective names and descriptions, and at the respective parts and places therein also mentioned and described, so as to prevent the influx of the water from the rivers and creeks surrounding and near to the levels aforesaid (in all of which said rivers and creeks the tides, and the water of the sea do flow and reflow.)

pletion when the further slip happened as herein-after mentioned.

11. The whole of the work done and expense incurred as mentioned in paragraphs 8, 9, and 10 was rendered necessary by the extraordinary storm and high tide of the 18th Jan. 1881.

12. The prosecutor did not appeal from the order of the 15th Feb. 1881, nor did he make any protest against his liability to do the said work without reimbursement for the costs thereof.

13. In the months of January, February, and March 1882 the part of the said wall opposite the farm buildings at Curry Marsh Farm subsided for a length of about 300 yards. This part had been breached on the occasion of the storm of the 18th Jan. 1881, and had been repaired as before mentioned. The subsidence did not extend to the portion at the western corner mentioned in paragraph 10 as incomplete.

14. The nature of the subsidence, which was gradual, was as follows. In Jan. 1882 slight subsidence and cracks in the top of the wall were observed, showing that movement was going on. Proper temporary measures to prevent further mischief were had recourse to by the prosecutor, but the subsidence continued, and on the 8th March 1882 the said portion of the wall subsided altogether. In the language of the sea wallers, the wall sat down bodily, kicking out at the toe of the wall into the river the stuff of which the core of the wall was composed.

15. The immediate cause of the subsidence was the giving way of a stratum of soft mud, which, when borings were made, after litigation had arisen or was imminent between the prosecutor and the commissioners, was found to underlie the wall. But what caused the stratum to give way after supporting the wall for so many years was matter of dispute between the parties, and much scientific evidence on the subject was given before me.

In paragraphs 16 to 20 the facts were set out upon which the parties based their contentions as to the cause of the subsidence.

21. The contention on behalf of the prosecutor is, that it must be inferred that when the wall was first made it sank within the clay immediately below it into the soft mud until it came to a position of equilibrium compressing the mud from 15 feet to 9 feet, and squeezing the water out of it so as to make it sufficiently dry and firm to carry the weight of the wall, and that the water which submerged the marsh and which percolated into the ground as mentioned in paragraph 19 soaked under the wall and wetted the mud below it and gradually reconverted it from its dry into its original wet oozy condition, and so rendered it unfit to sustain the weight of the wall. He therefore contends that the subsidence resulted from the effects of the said storm.

22. The contention on the part of the commissioners is, that no water, or at any rate very little, and not sufficient in any way to account for the subsidence of the wall, soaked from the marsh into the ground, and that the subsidence did not result from the effects of the said storm, and they suggested that the nature of the foundation was, and had always been, unstable, and that the gradual changes referred to in the first part of paragraph 17, operating through a long series of years, coupled with a gradual increase in the weight of the wall in the successive repairs which

it had undergone, ultimately caused the subsidence.

23. Neither party proved their contention, nor so far as could be judged was either contention capable of proof, but was matter of conjecture or inference to be drawn from the facts and dates.

24. The existence of the mud must have always made the place a dangerous one for a wall, but no evidence was given of any circumstances from which it ought to be inferred that if the storm of the 18th Jan. 1881 had not taken place the wall as it then existed could not have continued to stand to the present day, or that the work and expenses mentioned in paragraphs 8, 9, 10, and 27 would have been necessary.

25. The nature of the soil under the wall could not till the subsidence began have been discovered without boring, nor would it be apparent to persons making an examination of the wall in the usual and proper way for the purpose of seeing if it required ordinary repairs.

26. On the 9th March 1882 the commissioners held a session and general court of sewers. The prosecutor, who had notice of the holding of the court, attended with his solicitor and submitted that the very heavy costs of the works necessitated by the storm of the 18th Jan. 1881 ought to be borne by the level, and he applied to the commissioners to make a rate for this purpose, but he did not then make any formal demand on them to do so, and they at such session made a further order upon him to repair the wall.

27. The subsidence of the wall was such as to endanger the lands of the prosecutor, the lands of other persons lying within the levels, and the public safety, and the prosecutor before attending the said court had instructed his engineer to see to the state of the wall. The repairs required to be done by the said order of the 9th March 1882, as varied by agreement as mentioned in paragraph 28, were done by the prosecutor after giving notice to the commissioners that he thereby in no way prejudiced his right to appeal against the said order, and that he proposed to claim reimbursement for the outlay. In complying or endeavouring to comply with such order he has expended a sum which is to be taken at 6972*l.* 16*s.* 10*d.*, which is in addition to the sum mentioned in paragraph 10 of this case.

28. After the order mentioned in paragraph 26, and after the nature of the soil had been investigated, and after the order for a writ of *mandamus* to issue had been made, it was agreed between the prosecutor and the commissioners, without prejudice to their respective legal positions, that it would be less difficult and less costly and more secure to build an inset curvilinear wall more inland, than to further attempt to reinstate and maintain the wall on the exact site of the portion which had subsided. And it was agreed that the prosecutor should build such inset wall, and that for the purposes of this case the cost of so doing should be treated as part of the costs of repairing the wall pursuant to the said order. The said inset wall has been so built, and the cost thereof has been 3300*l.* 6*s.* 10*d.* or thereabouts, which sum forms part of the sum of 6972*l.* 16*s.* 10*d.* mentioned in paragraph 27.

29. The sums of 3014*l.* 1*s.* 8*d.* mentioned in the 8th paragraph, 5752*l.* 10*s.* 6*d.* mentioned in the 10th paragraph, 6972*l.* 16*s.* 10*d.* and 3300*l.* 6*s.* 10*d.* mentioned in the 27th and 28th paragraphs, have

not been conclusively assessed by me, and the commissioners are to be entitled, in the event of their being held to be liable to reimburse the prosecutor all or any of the said sums, to question the amounts thereof by a reference back to me or some other person as may be directed by the court.

30. On or about the 1st April 1882 the prosecutor, by a demand in writing, bearing date the 31st March 1882, addressed to the commissioners, and to certain of them by name, required the commissioners to reimburse him for his expenditure in repairing the damage to the sea wall by the extraordinary storm and unusually high tide of the 18th Jan. 1881, and for the money expended and to be expended by him in complying with the orders of the 15th Feb. 1881 and the 9th March 1882, and to make a rate or rates for that purpose, and to take all such steps as might be necessary for charging the money so expended and to be expended rateably on the lands benefited thereby, and he requested the commissioners to summon a court for the said purpose. The commissioners held a session and special court of sewers on the 18th April 1882 for the purpose of taking into consideration the demand of the prosecutor, and at the said court the prosecutor attended by his solicitor, and made a formal demand which the commissioners refused to comply with. A copy of the record of the proceedings of the said court is set out in the appendix.

31. On the 1st May 1882 the rule *nisi* for a *mandamus*, which was afterwards made absolute on the 9th June 1882, was obtained by the prosecutor.

32. On the 1st June 1882 he gave notice of appeal to the Midsummer Quarter Sessions for the county of Essex against the order made on the 9th March 1882, which appeal has from time to time been respited pending the decision of this special case.

33. An examination of the records of the commissioners shows the following facts:

34. Between the year 1729 (being the date of the earliest record of the commissioners now forthcoming) and the year 1831 there were no presentments of grand juries finding specially any custom or prescription as to the repair of the walls, and no presentment stating in words what was the liability of the frontagers, that is to say, the persons on whose lands the sea walls abutted. The usage was for a jury to view the walls a few days before the meeting of the court of commissioners and to present at such court the repairs which they found at such view to be required, specifying, in the case of each work, a penalty in case the work should not be done. At the court such presentments were made orders of the court. The presentments were in the form of which the following is a specimen:

That A. B. do back and cope a hundred rods of their wall by Christmas next on penalty, by the rod, sixteen shillings.

The orders followed the form of the presentments.

35. The records show instances of orders on all the owners within the levels whose lands were bounded by the sea wall, and there is nothing in them to indicate any difference in the extent of the liability of the owners of the different lands so bounded as to the repair of the wall bounding their respective lands.

36. In case of emergency, the marsh bailiff was empowered to do the work, but the amount expended by him was claimed as a debt due from the owners to the commissioners, and the records show instances of the marsh bailiff recovering sums expended by him by distress from the owners who were liable to repair. In some cases it does not appear from the records whether the money expended was claimed or recovered or not, but there are no cases where it appears that it was not so claimed, or that any such claim was contested. From the small amount of the rates levied, it is apparent that no extensive repairs to the walls can have been done at the expense of the level.

37. Rates were made at the courts. They were usually made for the general purposes of the expenses of the commissioners, but sometimes for special purposes.

37 A. It is agreed between the parties that reference may be made to the records of the commissioners upon the argument for the purpose of further explaining or illustrating the matters referred to in paragraphs 33 to 37.

38. No instance appears in the records of a rate made for the special purpose of paying the expenses of repairing walls or of reimbursing any frontager for expenses incurred by him in repairing walls.

39. Except so far as the facts and documents or extracts mentioned in this special case prove or warrant an inference to the contrary, there is no evidence to show that any of the repairs ordered to be done were other than ordinary repairs, or that any extraordinary accident happened to the walls before the storm of the 18th Jan. 1881.

40. On the 31st Jan. 1791 the then existing commission expired. A petition was presented by the commissioners to the Lord Chancellor in the usual way for a warrant for a new commission. The next commission, though dated the 13th Jan. 1791, was not issued till the 15th Aug. 1791.

41. There are found in a room at the office of the clerk to the commissioners, which is and has been for very many years devoted to the custody of the books and documents of the commissioners, the following papers relating to the last-mentioned commission, the admission in evidence of which papers in the present case is objected to by the prosecutor, and which are printed in the appendix, subject to his objection. The first is the draft or copy of an affidavit in the handwriting of and purporting to have been sworn by Edward Gepp, the then clerk of the commissioners, under the expired commission on the 3rd March 1791, for the purpose of obtaining a new commission. The second, which was found with it, is a draft or copy of a petition of the commissioners, or some of them, dated the 28th June 1791. The third is a bill of costs of the said Edward Gepp against the commissioners for works done in 1791, amounting to 32*l.* 1*s.* 2*d.*, and bearing the indorsement:

10th October 1791 allowed.

R. BAKER.  
W. RUSSELL.

R. Baker and W. Russell were, on the 10th Oct. 1791, commissioners under the then existing commission.

42. At a court held by the commissioners on the 10th Oct. 1791 it was ordered that the marsh

bailiff should pay to the said Edward Gepp his bill for soliciting a new commission of sewers for the said levels, amounting to 32*l.* 1*s.* 2*d.*

43. It appears from this order and these documents that the petition for a fresh commission presented to the Lord Chancellor by the commissioners in the usual way was neglected in the Lord Chancellor's office, and a supplemental petition, supported by the affidavit of the said Edward Gepp, was presented by the commissioners, and that the said Edward Gepp was paid by the commissioners for his work and labour in respect of the said affidavit and petition and the presentation thereof.

44. Search has been made in all reasonable places for the originals of the said affidavit and supplemental petition, but they have not been found.

45. At the court held on the 10th Oct. 1791, mentioned in paragraph 42, about seventy orders for the repair of walls were made. The entry in the book relating thereto can be referred to by either party on the argument of this case.

46. At a court held on the 5th Dec. 1831 a presentment was made respecting the dangerous state of the sea wall belonging to the Oil Mill Farm, the property of Francis Kensitt, upon evidence taken in the presence of the court and jury. In this presentment the liability of the owner to repair is stated to be by ancient custom. This is the first instance in which there appears any entry upon the records of the commissioners stating in terms the liability of any owner to repair, or the existence of any custom relating thereto. An extract from the records showing the circumstances under which the presentment was made, the depositions of the witnesses, and the orders of the court, are set out in the appendix. Further extracts from the records of the commissioners relating to the same farm or parts thereof, including entries relating to damage done by unusual high wind and tide, and to a search for precedents of repairing rendered necessary by storms, will be found in the appendix.

47. Extracts from the records of courts held on the 13th July 1832 and 13th July 1833 are also printed in the appendix for the purpose of showing the statement of the customary liability contained therein.

48. The first court at which any presentment was made, held after the passing of the statute 3 & 4 Will. 4, c. 22, was held on the 26th Feb. 1836. At that court the jury made a presentment which is set out in the appendix.(a)

(a) The presentment was as follows: "26th Feb. 1836. And the jurors aforesaid, upon their oath aforesaid, further say and present, that the several persons and bodies corporate named and mentioned in the said second schedule hereunder written or hereunto annexed, and their ancestors or predecessors, being owners of the several farms and quantities of land within the levels and jurisdiction aforesaid set opposite to such their respective names and descriptions in the same schedule, have, by reason of the said farm and lands so by them respectively owned and of their being the owners thereof from time immemorial, been used and accustomed, at their own costs and charges, to support, maintain, and repair, and the said several persons and bodies corporate so named and described in the said second schedule, by reason of the said farms and lands so by them respectively owned, and of their being the owners thereof, are now liable and ought still of right to support, maintain, and repair, and keep in good and sufficient repair, at their own respective costs and charges, the several and



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49. From that date until the passing of the Land Drainage Act 1861 (24 & 25 Vict. c. 133), by which commissions of sewers were made perpetual until superseded, presentments in substantially similar form were made at the commencement of each commission. The presentment at the court held on 1st Aug. 1861 will be found in the appendix. The Robert Wharton mentioned in the extract from the schedule thereto was the predecessor in title of the prosecutor, and the lands mentioned therein are those referred to in the first paragraph of the case.

50. In March 1874 a tide occurred higher than any before then recorded (though lower than the tide of 18th Jan. 1881), and caused serious breaches in the sea walls of the level. At a court held on 27th Aug. 1874, orders were made on all the frontagers in the level (whether the walls fronting their respective lands had been damaged by the said tide or not) to raise their walls to a height one foot above the line of the said high tide. These orders were carried out, and the damage to the walls occasioned by the said tide was repaired at the expense of the owners. The orders relating to Curry Marsh are set out in the appendix. The other orders were in similar form.

51. After the storm of Jan. 1881 orders were made on all the frontagers respectively, in a form similar to that of the 15th Feb. 1881 before mentioned, to repair the damage caused to their walls by the said storm. These orders were not appealed against, and the works were done at in many cases considerable expense. It must not be assumed from this that in some cases the expense to a frontager of repairing his own wall was greater than his contribution to a general rate would have been in case the repairs had all been defrayed out of such a rate. No claim for reimbursement has as yet been made except by the prosecutor. The facts stated in this paragraph are objected to on behalf of the prosecutor as not being admissible in evidence or relevant to this case, and they are stated subject to this objection.

52. During the period to which living memory extends, so far as oral testimony is forthcoming, the walls have always been repaired by or at the expense of the owners of the land which the walls respectively front without reimbursement by the commissioners. The market value of the lands fronting the river is considerably diminished by reason of the liability to repair.

respective quantities of walling within the levels and jurisdiction aforesaid mentioned in the said schedule, and situate, standing, and being in and upon such their respective farms and lands, so as to prevent the influx of the waters from the rivers and creeks surrounding and near to the said farms and lands (in all which said rivers and creeks the tides and waters of the sea do flow and reflow); and that the several persons and bodies corporate so named and mentioned in the same schedule are now the owners of the particular farms and lands therein also mentioned and set opposite to such their respective names and descriptions, and are situate within the levels and jurisdiction aforesaid, and as such owners, and in respect of such farms and lands, are now liable, and, by reason of such immemorial custom and usage aforesaid, ought of right to repair and keep in good and sufficient repair the said walling, at their own respective costs and charges, in the proportion mentioned and set forth in the same schedule opposite to such names and descriptions respectively, and at the respective parts and places therein also mentioned and described."

53. The appendix to this special case forms part thereof.

54. The commissioners contend that: (1) The facts and documents stated and referred to in this case establish that the prosecutor was under a general liability to repair the sea wall fronting his land, and that by reason of such liability he was bound to do the repairs referred to in the case, although the necessity for such repair arose from an extraordinary storm and tide, or any other cause. (2) That the said facts and documents show that there is no liability upon the level or any other person to repair the said wall, or to reimburse the prosecutor for the whole or any part of the moneys expended by him in such repairs. (3) That the prosecutor is debarred from obtaining the relief sought for in the present proceedings by the existence of the orders of the 15th Feb. 1881 and the 9th March 1882, unless and until they or either of them be varied or reversed by the quarter sessions under the provisions of the Land Drainage Act 1861, s. 47, or otherwise set aside.

55. The prosecutor contended that: (1) Even if any liability is shown on him to do any repairs to the sea wall, such liability is at most an ordinary liability to repair by prescription, and does not extend to repairing damage caused by extraordinary floods or storms, or to reinstating such wall after such damage, but in such case the cost should be borne by the level, according to the statute of Hen. 8, as interpreted in *Keighley's case* (10 Coke, 139), and assuming the prosecutor to be liable in the first instance to pay the cost of such repair and reinstating he is entitled to be reimbursed. (2) If the subsidence in 1882 was not due to the storm of 1881 it was due to a latent defect for which he was not responsible. (3) The orders of the 15th Feb. 1881 and the 9th March 1882 are not, nor is either of them conclusive against the prosecutor, and assuming them to bind him to do the repairs in the first instance, they are not inconsistent with his right to be reimbursed.

56. The questions for the opinion of the court are: (1) Whether the cost of repairing the sea wall fronting Curry Marsh subsequent to the 18th Jan. 1881 under the circumstances hereinbefore mentioned, or any and what part thereof, ought to be borne by the prosecutor or by the level rateably. (2) Whether the prosecutor is entitled to be reimbursed by the commissioners the whole or part, and what part, of the said cost, and to have a rate or rates made for that purpose. (3) Whether, in case the prosecutor is not entitled to be reimbursed by the commissioners the whole or any part of the said cost, it is by reason of the orders of the 15th Feb. 1881 and the 9th March 1882, or either and which of them.

57. If the court shall answer either of the first two questions in favour of the prosecutor, judgment is to be entered for the prosecutor on the special case, and such order for a peremptory *mandamus*, or for a reference or otherwise as the court may direct, is to be made.

If the court shall answer the first two questions in favour of the commissioners, judgment is to be entered for the commissioners.

If the court shall answer the third question in the affirmative, the prosecutor is to be at liberty to proceed with his motion for a *certiorari*, and with his appeal to quarter sessions or with either of such proceedings.

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Charles, Q.C. (Channell with him) for the prosecutor.

Meadows White, Q.C. (Finlay, Q.C. and Kenelm Digby with him) for the defendants.

The following cases and statutes were referred to:

*Hudson v. Tabor*, 36 L. T. Rep. N. S. 492; 2 Q. B. Div. 290;  
*Reg. v. The Commissioners of Sewers for Somerset*, 8 T. R. 312;  
*Reg. v. Keighley*, 10 Coke, 139;  
*Reg. v. Commissioners of Sewers for Essex*, 1 B. & C. 477;  
*Reg. v. Leigh*, 10 Ad. & E. 398;  
*Reg. v. Warton*, 2 B. & S. 718; 31 L. J. 265, Q. B.;  
*Reg. v. Greenhow*, 1 Q. B. Div. 703;  
*The Nitro-Phosphate Company v. St. Katherine's Docks*, 37 L. T. Rep. N. S. 330; 9 Ch. Div. 503;  
*Nugent v. Smith*, 33 L. T. Rep. N. S. 731; 1 C. P. Div. 423;  
*Henly v. The Mayor of Lyme*, 5 Bing. 91; 3 B. & Ad. 77; 1 Bing. N. C. 222;  
 3 & 4 Will. 4, c. 22, ss. 13, 15, 47;  
 24 & 25 Vict. c. 133, ss. 33, 47.

May 3.—The judgment of the court (Lord Coleridge, C.J. and Cave, J.) was delivered by

LORD COLERIDGE, C.J.—The principal question in this case is, whether the prosecutor, who is the owner of certain lands within the jurisdiction of the commissioners, on which is a sea wall, is liable to repair damage done to that wall by the combined effects of a storm and high tide which occurred on the 18th Jan. 1881. The burden of proof is on the commissioners, who must establish the extent of the prosecutor's liability, and must then show that the damage they allege the prosecutor is bound to repair is damage which falls within the ambit of the liability so established. The extent of the liability of a frontager to repair a sea wall, whether arising by tenure, prescription, or custom, can only be ascertained by usage. In this case there is no living testimony as to the usage, but we have been referred to certain documents from which we have been asked to infer that the liability of the prosecutor is absolute, so as in fact to make him an insurer of the wall. These documents are presentments of juries and other papers found among the books and papers of the commissioners. The first in date is a copy or draft of an affidavit in the handwriting of and purporting to be sworn by Edward Gepp, the then clerk of the commissioners, on the 3rd March 1791, for the purpose of obtaining a new commission in the place of one which had then lately expired. It appears that the petition for a fresh commission had been neglected by the then Chancellor (Lord Thurlow), and the commissioners had presented a supplemental petition supported by the affidavit in question, which alleges that by reason of the inundation occasioned by the extraordinary high tide which happened on the preceding 2nd Feb. several breaches and other injuries had happened to the sea walls, banks, &c., and that it was absolutely necessary for the safety and preservation of the land and marsh grounds within the levels that immediate attention should be had for the reparation and amendment of the said sea walls, &c.; and that until a new commission was issued no surveys could be taken or orders made to enforce such necessary reparations and amendments. The commission was ultimately issued, and at a court held on the 10th Oct. 1791 about seventy orders for the repairs of the walls

were made. There is nothing in the nature or extent of these repairs (which are of the usual character) to lead to the conclusion that the damage so repaired was other than such as might, with ordinary prudence and foresight, have been guarded against, and we are unable to infer from the language of the clerk, anxious for the renewal of the commission under which he held his office, that the tide spoken of by him was so high that it could not reasonably have been foreseen and guarded against, or that the damage so repaired was caused without negligence on the part of the frontagers. In 1831 it appears from the report of one of the commissioners that the marsh bailiff had reported that the sea wall belonging to Oil Mill Farm was in an alarming and dangerous state from the neglect of the owner to repair pursuant to a previous presentment, and that in consequence of such neglect serious apprehensions were entertained that a breach and inundation might take place. Thereupon there was a presentment by a jury that the sea wall in question was in a ruinous and defective state and condition for want of due reparation and amendment thereof, and that such state and condition had arisen from the neglect and default of the owner of the Oil Mill Farm in repairing and amending the same as he ought to have done, and that the court ordered that the works presented to be done by the jury should be made an order and decree of the court. It appears from a record of the court of the 13th July 1833 that these works were afterwards done by the owners of Oil Mill Farm, but it is clear from the report, and from the evidence of Richard Hill Dalton given before the jury, that these repairs were rendered necessary by the neglect of the owner, and not by any extraordinary flood or accident, and consequently this presentment is no authority whatever for the existence of any such liability as that now in dispute. On the 26th Feb. 1836, after the passing of the statute 3 & 4 Will. 4, c. 22, there was a general presentment of the jury, which was much relied on by Mr. White. This presentment appears to have been made under the combined operation of sects. 13 and 46 of that Act, but it does not appear that at this time the sea wall was out of repair, and we are of opinion that that section does not warrant a presentment of the liability to repair only where the wall is not alleged to be out of repair, and that if the wall is out of repair in part it only warrants a general presentment of such part as may be out of repair. There is no power to traverse a presentment where no default is alleged, and it is obvious that a trial of a traverse of any such presentment where no default was alleged would impose an intolerable burden on the persons supposed to be affected by such presentment, as it might happen that no default would occur while they continued owners. We are also of opinion that, assuming the presentment to be good, it does not warrant the conclusion that the liability to repair extended to damage done by the act of God. In 1843 the wall upon the Oil Mill Farm was again reported to be in a very dangerous and alarming state, the same having been recently in part much reduced in height, and otherwise damaged by an unusual high wind and tide, in consequence whereof imminent danger was apprehended to the level, and at a court subsequently held it was found that the wall in question was at a part called Steep Toe

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Point in a ruinous and defective state and condition for want of due reparation and amendment thereof, and by reason of the default of the owners in not having repaired and amended the same, and it was ordered that the wall should be repaired at the expense of the owners. It appears from the clerk's bill of costs that, previous to this order being made, a question had arisen whether the proprietors of the wall were liable to repair it after a storm if it previously had been in a sufficient state to resist the tide, &c.; but, as it appeared that the wall in question was not previously in a fit state to resist ordinary occurrences, the question was not gone into, and it follows that the records of 1843 do not establish the existence of any liability such as that now contended for. The entries in the bill of costs are very strong proof that the presentment of 1836 was not in 1843 understood to have the effect now suggested. The records of the court held on the 8th June 1854 do not carry the commissioners' case any further. On the 1st Aug. 1861 another general presentment was made, which is open to the objections already taken to that of 1836, and to which, therefore, the observations previously made equally apply. On the 6th Aug. 1861 the Land Drainage Act 1861 was passed, which, by sect. 33, enacts: "That the Commissioners of Sewers, acting within their jurisdiction, may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment, subject to this proviso, that any person aggrieved by any such order made by the commissioners without the presentment of a jury may appeal therefrom in manner hereinafter mentioned." In March 1874 a tide occurred higher than any other before then recorded (though lower than the tide of the 18th Jan. 1881), and caused serious breaches in the sea walls of the level. At a court held on the 27th Aug. 1874 orders were made on all the frontagers in the level (whether the walls fronting their respective land had been damaged by the tide or not) to raise their walls to a height of 1ft. 6in. above the line of the last high tide. It is obvious that, as soon as it was shown by experience that a tide of the height of that recorded in March 1874 might occur, the danger of this recurrence was a danger that could be foreseen in the future, and might be guarded against whether it could have been seen in the past or not, and consequently that the owners of the sea walls were bound to foresee and provide against it. It is also found in the case that the damage to the walls occasioned by this tide was repaired at the expense of the owners, but we have no such evidence as to the height of the tide, or of the nature or extent of the damage done by it, as in our opinion would justify us in finding as a fact from the usage proved that the owners of this sea wall are bound to repair damage done by the act of God. Mr. White relied upon the fact that, as far as can be gathered from the records which extend back to 1729, no repairs have been done at the general expense of the level from that time to the present, and he contended that there must have been damage caused by the act of God during that period which must therefore have been repaired by the frontagers. But it seems equally clear from the records that no repairs have been done

by the frontagers of such a nature as to satisfy us that they were rendered necessary by damage arising from the act of God, and the expression being confined to events which cannot be foreseen, or which, if they could be foreseen, cannot be guarded against, points to events which are *prima facie* likely to be of very unusual occurrence, and it is quite as reasonable to conjecture that nothing of the kind has happened between 1729 and 1881 as to suppose that it has taken place and has been repaired by the frontagers without leaving any trace upon the records. Moreover, we ought not to presume anything against the prosecutor, who is virtually defending himself from an attempt to impose upon him a large and indefinite liability, and we ought to be satisfied with nothing less than would have satisfied a jury of reasonable men upon the trial of a traverse of a presentment. As for the argument attempted to be drawn from the fact that the prosecutor did not appeal against the first order made upon him, and that the other frontagers obeyed the orders made on them to repair damage caused by the same storm, we only notice it to show that we have not overlooked it. In our judgment the commissioners have failed in proving that the prosecutor is liable to make good all damage however caused, and we find as a matter of fact that the prosecutor is only liable to make good damage which can in some way or other be traced to his or his predecessors' negligence. The next question is, whether the commissioners have proved that the damage in this case arose from the prosecutor's negligence, for here, as before, the onus of proof is on the commissioners, as it would be if there had been a presentment of a jury which the prosecutor had traversed. It cannot surely be contended that the damage in this case can be traced to any such negligence. It is found as a fact that before the storm the wall was in good substantial repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms, and that on the 18th Jan. 1881 there was a concurrence of storm and high tide which was extraordinary. As to the subsidence of the wall, the cause of it is in dispute; but whether the contention of the prosecutor or that of the commissioners be adopted it is not proved that the subsidence could have been foreseen, or that if foreseen it could have been prevented, and the case expressly finds that no evidence was given of any circumstance from which it ought to be inferred that if the storm on the 18th Jan. 1881 had not taken place the wall as it then existed would not have continued to stand to the present. It is also a circumstance not without weight, that previous to the storm in question the commissioners, whose duty it is to watch over the sea wall in question, did not suggest that anything required to be done to the wall to enable it to withstand the force of tides and storms. We are, therefore, compelled to come to the conclusion that the damage to the wall mentioned in the case was not such as the prosecutor was bound to repair. There is, however, another question yet to be disposed of. It has been contended that, assuming the prosecutor was not bound to repair the damage in question, yet, as he has in fact repaired it under two orders of the commissioners, he is entitled to a *mandamus* to the commissioners to reimburse him so

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long as these orders stand. One of them is under appeal, and the other will be brought before this court on *certiorari*, and it may be that both will be upset. But the point we have now to dispose of is, whether the *mandamus* can go while these orders stand. Now, by sect. 33 of the Land Drainage Act 1861, already quoted, the commissioners, acting within their jurisdiction, may, without a presentment, make any order to execute any work which they might have made with such presentment. The commissioners did, by the orders in question, made respectively on the 15th Feb. 1881 and 9th March 1882, order the prosecutor to do certain repairs, which he has done. It was not contended by Mr. Charles, nor in our opinion could it have been successfully contended, that the commissioners, in making these orders, were acting outside their jurisdiction, for it is clear that if a jury had found as a fact that Mr. Abbot's liability was of the extensive nature contended for by the commissioners, they could, and ought, under the old system, to have made a presentment which would have warranted the orders in question. The extent of the liability of the frontager is one of the matters which would necessarily have had to be proved before a jury on the trial if the presentment had been traversed, and in *Reg. v. Leigh* (10 Ad. & Ell. 398) the Court of Queen's Bench granted a new trial, because the judge had misdirected the jury upon this very question on the trial of a presentment which had been removed into that court by *certiorari*. Mr. Charles did not contend before us that the orders were bad (not that he admitted them to be good, but that the argument on this point was reserved for this court when the orders are before it on *certiorari*), but he submitted that, notwithstanding the orders, Mr. Abbot was entitled to dispute his liability and to have this *mandamus* made absolute to reimburse him for the expenses he has incurred in obeying the orders. Under the former system the question of the liability of the frontager was put in issue by a traverse of the presentment and verdict found against the frontager it is impossible to conceive that, so long as that verdict stood, the frontager could dispute the liability so found against him. Mr. Charles's industry could not produce any authority to that effect, and it would be strange if the elaborate machinery of a presentment by a jury, a traverse of that presentment, and a finding of a jury upon such traverse, had been absolutely of no effect. Nor is it possible to understand why a frontager who had not traversed the indictment, and had thereby confessed it, should be in a better position than one who had traversed it unsuccessfully. The order of the commissioners is, by the section already quoted, to have the same effect as if it had been preceded by the necessary presentment, and an appeal to the quarter sessions is substituted for the traverse to the presentment. In our judgment, the prosecutor is bound by these orders until they have either been reversed on appeal or quashed by this court on *certiorari*. We are therefore of opinion that, although the liability of the prosecutor does not extend so far as to make him repair damage caused as this was, yet that, so long as the orders in question stand, he is not entitled to a *mandamus* to reimburse him the expenses he had incurred in obeying them. It appears, however, that the repairs

mentioned in paragraph 8 of the special case were not done under the order of the commissioners, but by the direction of the marsh bailiff, and, as to the expenses of doing these last-mentioned repairs, we hold, following *Reg. v. The Commissioners of Sewers for Somerset* (8 Term Rep. 312), that the level must be at the cost of making them good, and that the prosecutor is, to that limited extent, entitled to his *mandamus*.

Solicitors for the prosecutor, *Thomson, Son, and Brooks*.

Solicitors for the defendants, *Paterson, Snor, Bloxam, and Co.*, agents for *Gepp and Son*. Chelmsford.

Thursday, Feb. 28.

(Before DAY and SMITH, JJ.)

RHODES v. GUARDIANS OF PATELEY BRIDGE UNION. (a)

Poor law—Delay in going to trial—Proceedings prosecuted with due diligence—Poor Law Boards (Payment of Debts) Act 1859 (22 & 23 Vict. c. 49), s. 4.

An action was brought by an engineer, within the time limited by sect. 1 of the Payment of Debts Act 1859, for services rendered to the defendants, who were a rural sanitary authority acting under the Public Health Act 1875. After issue joined the plaintiff took out a summons to refer the matter to arbitration; this summons was opposed by the defendants, and was dismissed. The plaintiff then allowed two assizes at Leeds (where the action was to be tried) to pass without giving notice of trial; the defendants then took out a summons to dismiss the action for want of prosecution, after which the plaintiff gave notice of trial, for the assizes then coming on. At the trial, the learned judge, with the consent of the parties, ordered the matter to be referred to an arbitrator, who found for the plaintiff for a certain sum.

In an action for a *mandamus* to the defendants to levy a rate to satisfy the award:

Held, granting the *mandamus*, that, as the action was a proper one to be referred to arbitration, and as the plaintiff had taken out a summons to refer, which the defendants opposed, the plaintiff had not, under the circumstances, failed to prosecute the proceedings in the action "with due diligence" within the meaning of sect. 4 of the Poor Law Boards (Payment of Debts) Act 1859.

SPECIAL case stated in an action for a *mandamus* to the defendants to levy a rate for the payment of a judgment recovered by the plaintiff under the following circumstances:—

1. The plaintiff is a civil engineer carrying on business at Leeds. The defendants are the rural sanitary authority of the Pateley Bridge Union, in the county of York, constituted by and acting under the Public Health Act 1875.

2. On the 17th Nov. 1881 the plaintiff commenced an action against the defendants, claiming the sum of 252l. 2s. 1d. for professional services as engineer rendered to the defendants as such rural sanitary authority, and for work and labour done and money paid for the defendants at their request. The statement of claim was delivered on the 10th Dec. 1881, stating the place of trial at

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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Leeds. The statement of defence was delivered on the 30th Dec. 1881, and the pleadings were closed by issue being joined on the 11th Jan. 1882. After issue joined the plaintiff took out a summons to refer the matter to arbitration, which was opposed by the defendants and dismissed. The next assizes held at Leeds for the trial of civil causes was in the month of February 1882, and the last day for giving notice of trial for such assizes was the 21st Jan. 1882. The next following assizes held in Leeds for the trial of civil causes was in the month of May 1882, and the last day for giving notice of trial for such assizes was the 21st April 1882. No notice of trial was given by the plaintiff for either of those assizes. Notice of trial was given by him on the 14th July 1882 for the then next assizes to be holden at Leeds. The action came on for trial on the 25th July 1882 at the assizes held at Leeds before Cave, J., without a jury, when it was ordered by the court, with the consent of both parties, that a verdict should be entered for the plaintiff, subject to the award of William Bruce, Esq., stipendiary magistrate of Leeds.

3. The arbitrator sat to hear evidence on the 17th Aug., 27th and 28th Oct. 1882, and the 31st Jan. 1883, and by his award, dated the 20th March 1883, found in favour of the plaintiff for the sum of 112l. 19s. 9d., and directed that the defendants should pay to the plaintiff his costs of and incidental to the reference, and the costs of the award, and that the defendants should bear their own costs of the same.

4. In pursuance of the award, on the 19th April 1883, judgment was entered for the plaintiff for the sum of 112l. 19s. 9d. and costs to be taxed. On the 3rd Aug. 1883 the costs were taxed and allowed at 217l. 0s. 11d., which sum, together with the sum of 112l. 19s. 9d., amounts to the sum of 330l. 0s. 8d. due by the judgment to the plaintiff, and on the same day the plaintiff's solicitors applied for payment.

5. On the 27th Aug. 1883 an *elegit* was issued directed to the sheriff of Yorkshire, for the amount of the judgment debt, and on the 5th Sept. 1883 a return was made that there were no lands or goods belonging to the defendants within the bailiwick.

6. The defendants have no property whatsoever capable of satisfying the judgment debt, and the same remains unsatisfied.

7. On the 6th Sept. 1883 the plaintiff commenced this action against the defendants.

The question for the opinion of the court was, whether the plaintiff was entitled to a writ of or order for a *mandamus* ordering the defendants to make the necessary apportionments, if any, between the several contributory places, and to issue their precept to the overseers of each such contributory place, requiring such overseers to pay, within a reasonable time to be limited by such precept, the amount specified in such precept to the defendants as the rural sanitary authority within the provisions of the Public Health Act 1875, and further ordering the defendants, out of the moneys so paid to them, to pay to the plaintiff the amount of the said judgment debt, together with interest and the costs of the special case; or to some other and what writs or order for the purpose of enforcing payment by the defendants to the plaintiff of the sums adjudged to be due from the defendants to the plaintiff.

If the court should be of opinion that the plaintiff was entitled to a writ of or order for a *mandamus*, then such writ should issue or such order be made, and the plaintiff should be entitled to all proper remedies for enforcing the same, and all proper costs of obtaining and enforcing such remedies.

If the court should be of opinion that the plaintiff was not entitled to such writ of or order for a *mandamus*, nor to any other writ or order, the judgment to be entered for the defendants with costs.

It also appeared that, after the pleadings had been closed, the plaintiff had taken out a summons to refer the matter to arbitration, which was opposed by the defendants and dismissed on the 18th Jan. 1882, and that notice of trial was not given by the plaintiff until he had been served by the defendants in July 1882 with a summons to dismiss for want of prosecution.

Sect. 1 of the Poor Law Boards (Payment of Debts) Act 1859 (22 & 23 Vict. c. 49) provides that all debts and claims against the guardians of any union or parish shall be paid within the half-year within which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.

Sect. 4 of the same Act enacts:

If any person claiming any debt or demand shall have commenced, or shall hereafter commence, proceedings in any court of law or equity, or before any justice or other competent authority, within the time hereinbefore limited or within the time within which the Poor Law Board may grant extension, and shall, with due diligence, prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom, or against whose officer, the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by *mandamus* or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section.

*Vaughan Williams* for the plaintiff.—There has been no unnecessary delay on the part of the plaintiff. The case was a proper one to be referred to arbitration, and the plaintiff had taken out a summons for that purpose, but the defendant opposed it and compelled the plaintiff to set down the cause for trial, but when it came on for trial it was referred by the judge to an arbitrator.

*Forbes, Q.C. (A. Glen with him)* for the defendants.—This action has not been prosecuted with due diligence within the meaning of the 4th section of the Payment of Debts Act 1859. In *Baker v. Guardians of Billericay Union* (9 L. T. Rep. N. S. 486; 9 Jur. N. S. 1201; 33 L. J. 40. M. C.) it was held that this Payment of Debts Act 1859 operated as a Statute of Limitations with respect to claims made after the prescribed time. In the present case the plaintiff allowed two assizes to go past, and did not give notice of trial until more than six months after the commencement of the action, and then only after the defendants had taken out a summons to dismiss the action for want of prosecution.

*Day, J.*—In this case the plaintiff had a claim against the defendants in respect of which he began proceedings within the time limited by statute, and he finally succeeded in establishing his claim against the defendants, and obtained judg-

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ment for 330l. 0s. 8d., and I am of opinion that he is entitled to be assisted in enforcing that judgment. It has been said, and very properly said, that he is only to be paid if he has urged on his proceedings with due diligence, and it is contended that he did not prosecute his claim with such due diligence as would entitle him to succeed in the present case. I do not stop now to inquire on whom the burden of proof lies in proving the prosecution of the claim, with or without due diligence. It is sufficient now to say that I am satisfied that the plaintiff has proceeded with due diligence. It is quite true he might have given notice of trial for the winter assizes of 1882, or he might have given notice of trial for the following spring assizes, but he failed to give notice for either; he did give notice of trial for the summer assizes, but that was only after a summons had been taken out by the defendants to dismiss the action for want of prosecution. Upon these bare facts, I should have thought that the plaintiff had failed to prosecute his claim with due diligence, had the subject-matter of the action been of such a nature as to have been properly tried at assizes; it was clearly, however, a case which never could or never would have been tried at Nisi Prius, and the defendants must have known that it would have been sent to a reference the moment it was mentioned at the assizes. Having regard to the nature of this claim, the defendants acted very recklessly and wrongly in opposing the summons to refer; it would clearly have been a waste of costs to urge the plaintiff to try the action at Nisi Prius. When the summons to refer was heard, the plaintiff had only three days within which to get ready for trial at the winter assizes of 1882. He did not set down the action for trial at those assizes, and I am of opinion that there was no want of due diligence in that. On the 10th July 1882 the defendants actually take out a summons to dismiss the action for want of prosecution, and the plaintiff then says, "If you insist on going to the assizes, I must give notice of trial," and he accordingly does so. I must say, having regard to the character of this action, that it was not an action which the defendants should have insisted on having tried at Nisi Prius, and I think that the plaintiff has prosecuted the proceedings in this case to judgment or final settlement "with due diligence," within the meaning of the 4th section of the Payment of Debts Act 1859. I am of opinion, therefore, that the plaintiff is entitled to judgment on this special case.

SMITH, J.—I am of the same opinion. We have here a case in which the plaintiff is entitled to be paid the amount of his judgment for 112l. 19s. 9d. and costs. That being so, it is said he is not to have the fruits of this judgment, on the ground that he has not prosecuted his action with due diligence. Now we find that the plaintiff began his action within the proper time in Nov. 1881, and upon issue being joined he did what an ordinary person would have done in such a case, he took out a summons to refer. What did the defendants do? Relying, no doubt, on *Clow v. Harper* (38 L. T. Rep. N. S. 269; 3 Ex. Div. 198), they thought that he could successfully oppose the matter being referred to an arbitrator. What does the plaintiff then do? He sees that, if the action comes on for trial, a reference is obvious, and he tries, if possible, to avoid the expense of

taking all his witnesses and preparing for trial at the assizes, and he undoubtedly does let one assize go past. I do not think it is reasonable to say that he was bound to give notice of trial within the three days after his summons to refer failed; and again he is still holding back to avoid the expense of going to a trial at Nisi Prius, when the defendants take out a summons to dismiss the action. What does he do then? Well, he says, "if you insist on incurring all this expense, I will go to trial at the assizes," the result being that the whole matter is referred to arbitration. On that arbitration he succeeds, and issues a writ of *elegit*, to which there was a return of *nulla bona*; and now he comes here and asks for the remedy to which he is entitled, and the defendants say he is out of time. I think, taking into consideration the nature of his claim, that he has prosecuted that claim with due diligence, and that he is entitled to the *mandamus* asked for.

*Judgment for plaintiff. Mandamus granted.*

Solicitors for the plaintiff, Bolton, Robbins, and Busk.

Solicitors for the defendants, Ullithorne and Co., for Bateson and Hutchinson, Harrogate.

Tuesday, March 25.

(Before COLERIDGE, C.J. and STEPHEN, J.)

JAMES (app.) v. WYVILL (resp.). (a)

*Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 157, 159—Bye-laws—Notice of intention to erect new buildings and send plans—Conviction for erecting new buildings without notice—Question of fact.*

*Bye-laws were made for the borough of S. under the powers given by sect. 34 of the Local Government Act 1858. This Act was repealed by the Public Health Act 1875, but by sect. 326 of the latter Act, all bye-laws duly made under any of the Sanitary Acts by this Act repealed, and not inconsistent with any of the provisions of this Act, shall be deemed to be bye-laws under that Act.*

*The 27th bye-law provided that every person who intended to erect any new building should give one month's notice of such intention, and send in a plan of the works to the surveyor for the urban sanitary authority.*

*The 31st bye-law provided that, if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5l., and he shall pay a further sum not exceeding 40s. for each day such buildings shall continue or remain contrary to the said provision. The appellant contended that he was not bound to give notice or send a plan of alterations he proposed to make in his house, as the alterations merely consisted in raising the old walls a story higher, but he sent a plan, as he said, as a matter of courtesy. This plan was disapproved of, and notice of such disapproval was sent to the appellant, but he went on with the buildings. He was then summoned by the respondent, who was the surveyor for the urban sanitary authority, for neglecting to give notice and send plans as required by the bye-laws.*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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*The learned magistrate found that the structure was in fact a comfortable, good-looking dwelling-house, which previously it was not. He also found as a fact that the old building was partly pulled down to the ground floor, and that the buildings erected on the site thereof formed a new building intended for occupation, and that they were not adapted for personal occupation previously, and that they were a "new building" within sect. 159 of the Public Health Act 1875.*

*The appellant was convicted and fined 40s. and costs, and a further sum of 20s. for each day the work should continue or remain contrary to the provisions of the said bye-laws.*

*Held (affirming the conviction), that the question whether the alterations constituted a "new building" was a question of fact for the magistrate to decide, and that he had decided as a fact that they did constitute a "new building," and that the penalty of 5l. was payable in addition to the penalty of 40s. a day, though the information laid against the appellant was only for not having given the notice and plans under the 27th bye-law.*

CASE stated under 42 & 43 Vict. c. 49, by the stipendiary magistrate for the borough of Swansea:—

1. Upon the hearing at the police court at Swansea, on the 31st Jan. 1884, of a certain summons, upon an information laid on the 23rd Jan. 1884, by the respondent, who is the surveyor for the urban sanitary authority of the district of the borough of Swansea, against the said appellant under the bye-laws made by the local board of health for the district of Swansea, under the Local Government Act 1858, s. 34, that the said appellant, on the 23rd Nov. 1883, at the town of Swansea, in the said borough, had not given one month's notice to the urban sanitary authority for the borough of Swansea of his intention to erect a certain new building, situate in Dynevor-place in Swansea aforesaid, by writing delivered to the local surveyor, or left at his office, and at the same time had not left, or caused to be left, at the said office a plan and section of the whole of the ground belonging to such new building, and of the ground and cellar floor of such intended new building, drawn to a scale of not less than one inch to every eight feet, showing the position, form, and dimensions of the several parts of such buildings, and of the water-closet, privy cesspool, ashpit, well, and other appurtenances, accompanied by a description of the intended mode of drainage and means of water supply, and had not at the same time left a block plan drawn to a scale of not less than one inch to every forty-four feet, showing the position of the properties immediately adjoining, the width and level of the street in front of the intended building (such street being previously approved by the said authority), the level of the lowest floor of the intended building, and of the yard or ground belonging thereto.

2. I convicted the said appellant, and fined him 40s. and costs, and a further sum of 20s. for each and every day during which such work should continue or remain contrary to the provisions of the bye-laws.

3. It was proved before me that the premises in question were used and occupied as a public-house, known by the sign of the "Old Swan Inn,"

and were situate on the corner of Gower-street, facing south, and to Dynevor-place facing west. The inn itself fronted to and opened into Gower-street. The longer frontage, namely, to Dynevor-place, comprised the side wall of the inn itself, and beyond it a line of outbuildings running farther up that place northwards.

4. It was proved by the respondent, who is the official surveyor for the borough, that in November last he saw alterations and building in progress on the said premises belonging to the Old Swan; that an old garden wall between those premises and the houses in Dynevor-place had, in some places between, been taken down to the foundation and rebuilt, and a suite of rooms erected above it, through which and the Old Swan premises there was an internal communication, and that an old lean-to facing Gower-street had been raised and a room erected above it.

That on the 23rd Nov. the respondent wrote the appellant a letter, of which the following is a copy:

Swansea, Nov. 23rd, 1883.—Sir, I beg to inform you that no plans having yet been approved by the works committee for the alterations, &c. you are now carrying out at the Old Swan public-house, Dynevor-place, I must request that all building operations be suspended until such plans have been approved by the said committee.—Yours truly, E. H. WYVILL, Borough Surveyor.

That on the 27th Nov. he (the respondent) received a reply to that letter, of which the following is a copy:

Swansea, Nov. 27th, 1883.—Sir, In reply to your letter I beg to state that, had I thought you were entitled to a plan, I would at once have supplied it, but from past experience of the same nature, and from a careful study of the borough bye-laws, I was, and am still, under the impression that you are not entitled to a plan, because the work I am carrying on is raising the old walls a story higher. I however, as a matter of courtesy, send you the plan you desire, and as the alterations are an undoubted improvement, I trust that no unnecessary obstacles will be created.—Yours truly, T. M. JAMES.

5. That on the 5th Dec. notice was served upon the appellant from the urban sanitary authority disapproving the plan deposited by him.

6. That no notice of intention to erect the buildings was given by the appellant as required under the bye-laws.

7. That before I gave my decision I viewed the said premises, and found a great and material difference and alteration was to be, and indeed had been, made between the old buildings and the present ones.

8. There was, according to the plan, an office at the north end, a fruiterer's store where there had been stables; there was a first floor with bedrooms where there had been none, and also a sitting-room, and that the former water-closet had been taken down, and the uses of the area occupied by the old buildings extensively altered and diverted to other uses.

9. That after the plan had been disapproved, the construction had been modified, and the ground floor somewhat more resembled what it previously had been, but is still substantially and materially altered.

10. And I find that the structure is an expensive one, and is in fact a comfortable good-looking dwelling-house, which previously it was not.

I find, as a fact, that the old building was partly pulled down to the ground floor, and the buildings erected on the site thereof form a new



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building intended for occupation by men and women, and that they were not adapted for personal occupation previously, and that they now come within the definition of a new building as enacted by sect. 159 of the Public Health Act 1875.

11. By sect. 157 of the same Act power is given to make bye-laws with respect to the structure of walls, roofs, and chimneys of new buildings, and for securing stability, and the prevention of fires, and for purposes of health.

And by sect. 326 of the same Act the bye-laws duly made prior to that Act are to be deemed to be bye-laws under that statute, provided they are not inconsistent with any of its provisions.

12. The solicitor who appeared for the appellant contended that the buildings, though new in fact, were not new from a legal point of view, and were not erected in contravention of the said bye-laws, inasmuch as they were erected on the lines of the old walls and on the old foundations, and did not extend or protrude farther into the street than they did before, and headduced the case of *Shiel v. Mayor of Sunderland (ubi infra)* in support of his contention. But I held that, though the said bye-law was made prior to the passing of the Public Health Act 1875, it is to be read and interpreted by the light of the interpretation clause therein contained, and that that clause and the case of *Hobbs v. Dance (ubi infra)* warranted me in so construing the bye-law, and that, being made *pro bono publico*, I was bound to put thereon a liberal construction, in conformity with the latest statutable definition and the most recent judgment of the High Court on the same subject-matter. I therefore convicted the appellant in the penalty above mentioned.

If this honourable court should be of opinion that I was right in so holding and convicting the appellant as aforesaid, the said conviction is to stand; but, if wrong, the said conviction to be quashed.

Bye-law No. 27 provided that every person who intended to erect any new building should give one month's notice to the surveyor for the urban authority of such intention, and at the same time should leave at his office detailed plans and sections of such new building.

Bye-law No. 31 provided, amongst other things, that, if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings, &c., contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said bye-laws.

*Lavrance* for the appellant.—This is a case in which the appellant was charged with constructing a new building without complying with the provisions of the 27th bye-law. I submit that the magistrate had no power to convict in this case. The building does not infringe the bye-law in any way. By the 27th bye-law, under which this information is laid, one month's notice is required to be given to the local board by any person about to erect a building. There is nothing in this bye-law, except that the person should send a notice and plan of the proposed building. Then bye-law 31 provides penalties for the constructing of

any buildings contrary to the provisions of any of the said bye-laws; so that if a person constructs works which infringe these provisions he is liable to a penalty of 5*l.*, and a fine of 40*s.* a day; but the magistrate has here sentenced a man, who is only charged with the one offence of not having given notice, with the penalties provided for the two offences. [STEPHEN, J.—What the magistrate has done is equivalent to putting a rent of 365*l.* a year on the appellant.] Yes, and he must either pay this or pull his house down. [The learned counsel then read sect. 158 of the Public Health Act 1875.] Bye-laws made under these powers are bad, which authorise the pulling down of houses unless notice is sent in:

*Hattersley v. Burr*, 14 L. T. Rep. N. S. 565; 4 H. & C. 523;

*Hall v. Nison*, 32 L. T. Rep. N. S. 87; L. Rep. 10 Q. B. 152;

The construction of the 31st bye-law is much to the same effect. I submit there was no power nor jurisdiction in the magistrate to convict a man of two offences when the information is for but one offence. Sect. 10 of Jervis's Act (11 & 12 Vict. c. 43) provides that every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences. The conviction goes on to say, "I convicted him in a further sum of 20*s.* a day for every day during which such work should continue or remain contrary to the provisions of the said bye-laws." I submit that, according to *Shiel v. Mayor of Sunderland* (6 H. & N. 796; 30 L. J. 215, M. C.), this is not a new building; but even if this is not so, I submit that the conviction is bad, as the appellant was charged only with the one offence.

*Lumley Smith*, Q.C. and *Brynmor Jones* for the respondent.—The appellant contended that he was not bound to send in a plan, as the building was not a "new building." By sect. 159 of the Public Health Act 1875 the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building. There is nothing to show that a new building added to an old building is not a "new building" within this section. The mere fact that the building is on the old lines is not sufficient to prevent its being a "new building." The magistrate, having before him the cases of *Shiel v. Mayor of Sunderland (ubi sup.)* and *Hobbs v. Dance* (29 L. T. Rep. N. S. 687; L. Rep. 9 C. P. 30; 43 L. J. 62, C. P.; 22 W. R. 90), said that he found as a fact that the building was a "new building":

*Rez v. Gregory*, 5 B. & Ad. 555.

It is entirely a question of fact for the magistrate to decide what is or is not a "new building":

*Rez v. Fullford*, 10 L. T. Rep. N. S. 346; 10 Jur. N. S. 522; 33 L. J. 122, M. C.; 12 W. R. 715;

*Reg. v. Dayman*, 7 E. & B. 672; 26 L. J. 128, M. C.

In *Baker v. Mayor of Portsmouth* (37 L. T. Rep. N. S. 822; 3 Ex. Div. 157; 47 L. J. 223, Ex.) the Court of Appeal, held (affirming the judgment of the Exchequer Division), that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws

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relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans. In the first place, this is a new building in fact; in the second place, it is a new building within the meaning of the 159th section of the Public Health Act 1875.

COLLIERIDGE, C.J.—These are strong powers, but to carry out the objects of the Act strong powers are necessary. I agree with the opinion expressed by the judges in the Divisional Court and in the Court of Appeal in the case of *Baker v. Mayor of Portsmouth* (*ubi sup.*). When a structure is turned from an old into a new building, then the powers given by these bye-laws apply. The bye-laws themselves were made under the powers given by the 34th section of the Local Government Act 1858, and, though that Act was repealed by the Public Health Act 1875, it was provided by sect. 326 of the latter Act that all bye-laws made under any Sanitary Act repealed by that Act shall be deemed to be bye-laws under that Act. Men may build in the country as much as they like, but in towns, where considerations of health and other things have to be taken into account, there must be strong measures adopted for the purpose of compelling them to perform their statutory obligations. With regard to the facts of this particular case, the appellant was summoned for not having given one month's notice in writing to the urban sanitary authority for the borough of Swansea of his intention to erect a certain new building, and also for not having sent a plan and section of the proposed alterations as required by the bye-laws of the borough. It appeared that on the 23rd Nov. 1883 the respondent sent a letter to the appellant, stating that no plans had been sent in by the appellant; in answer to this the appellant wrote that, inasmuch as he was merely raising the old walls a story higher, he did not think that he was bound to send in a plan, but at the same time he sent in a plan, as he said, out of courtesy. This plan was disapproved of, and notice of such disapproval was served on the appellant. In spite of this disapproval, and in defiance of the local board, the appellant went on with the building, and then he is summoned by the local board for not having given a month's notice as required by the 27th bye-law. Then bye-law 31 provides that if the owner or person intending to construct any new building fail to give the required notices, or construct, or cause to be constructed, any buildings contrary to the provisions of any of the said bye-laws, he shall be liable for each offence to a penalty not exceeding 5*l.*, and he shall pay a further sum not exceeding 40*s.* for each day such buildings shall continue or remain contrary to the said provision. In the present case the appellant omitted to send plans, and he is summoned for that omission. The questions which arise in the case are, first, was this a new building? and secondly, if so, was the appellant liable to the penalties imposed by the 31st bye-law? Now the question, whether a building is a new building or not, has been decided over and over again to be a question of fact; it is a question of degree. For instance, if a building were nearly all taken away and then rebuilt, it clearly would be a new building; on the other hand, it is quite clear that by a small addition of, say, a door, the building would not thereby become a new building. Between these two extreme cases

there may be thousands of cases, and it would be impossible to give a definition in each particular case as to what is, or is not, a new building; and it must be left to the discretion of each judge to decide for himself what is a new building. So that the question is ~~and~~ must be a question of fact; there are several decisions to this effect. Now what has the magistrate found here? In paragraph 10 of the case he finds, as a question of fact, that the alterations in question constituted "a new building" within the meaning of the 159th section of the Public Health Act 1875. (a) To my mind it is clear what the magistrate intended to do. He has set out the facts of the case, which raise the question of degree, and he says that on these facts he finds "as a fact" that the building was a "new building," and that being so, then the 31st bye-law applies, and the judgment is sustainable. Mr. Lawrence has contended that this 31st bye-law is to be broken up, that if a man does build without depositing plans, he commits only one offence, and renders himself liable to only one penalty. The word "further" in the bye-law identifies the sum to be paid with the foregoing penalty, therefore the penalty of 5*l.* is to be paid in addition to the penalty of 40*s.* a day; and in the case of *Baker v. Mayor of Portsmouth* (*ubi sup.*) it was decided that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans. For these reasons I am of opinion that the judgment of the learned magistrate was right.

STEPHEN, J.—I entirely agree with my Lord's judgment, and I should only repeat what he has said if I were to deliver a separate judgment.

*Judgment for respondent. Conviction affirmed with costs.*

Solicitors for the appellants, *Smith and Lawrence.*

Solicitors for the respondent, *Sharpe, Parker, and Co.*

#### QUEEN'S BENCH DIVISION, IN BANK- RUPTCY.

Wednesday, June 11.

(Before CAVE, J.)

Re W. AND J. LUDFORD. (b)

*Special case—Sheriff's costs of execution—Poundage —"Fructuous process."*

*A writ of fieri facias being issued against the debtors on the 16th Jan., the sheriff levied execution on the 17th, and remained in possession until the 21st. The debtors filed their petition on the 20th of the same month, and the sheriff delivered possession of their goods to the official receiver.*

*Held, that the sheriff was not entitled to poundage.*

(a) Sect. 159 of the Public Health Act 1875 provides that "for the purposes of this" Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the frame work is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building.

(b) Reported by J. E. VICKENT, Esq., Barrister-at-Law.

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as there had been no sale or realisation of the property.

THIS was a special case stated for the opinion of the High Court, pursuant to sect. 97 of the Bankruptcy Act 1883, by the judge of the County Court of Warwickshire, holden at Birmingham, in the following terms:—

1. This is a special case stated for the opinion of the High Court, on the application of the official receiver, with the consent of the Sheriff of Warwickshire, in the matter of an application by the sheriff for the costs of an execution levied by him on the goods of the above-named debtor. For the purposes of this case the official receiver is to be deemed to be the appellant and the sheriff is to be deemed to be the respondent.

2. On the 16th Jan. 1884 a writ of *fiery facias* was lodged by a judgment creditor with the Sheriff of Warwickshire. By the said writ, the sheriff was directed to levy on the goods and chattels of the judgment debtors, William Ludford and John Ludford, the sum of 138*l.* 18*s.*, and 2*l.* 2*s.* 8*d.* for costs, and also interest on 138*l.* 18*s.* at 4 per cent. pro annum, from the 16th Feb. 1884 until payment.

3. On the 17th Jan. 1884 the sheriff levied on the goods and chattels of the said judgment debtors, at two separate places, namely, at Wilnecot and at Tamworth, and remained in possession till the 21st Jan. 1884. The said goods and chattels consisted of household furniture, tools, and stock-in-trade.

4. On or about the 20th Jan. 1884, the said judgment debtors filed a petition in bankruptcy in this court, and on the 21st Jan. 1884 a receiving order was made against the said judgment debtors.

5. On the said 21st Jan. 1884 notice that the receiving order had been made was served on the sheriff, and the sheriff, pursuant to sect. 46 of the Bankruptcy Act 1883, delivered up to the official receiver the goods and chattels of the said judgment debtors which he had taken in execution.

6. The sheriff claims that he is entitled under sect. 46 to the following costs of execution, namely: Levy fee, 1*l.* 1*s.*; mileage, 18*s.*; possession money (two men, six days), 3*l.*; poundage, 4*l.* 12*s.* 5*d.*

7. The official receiver, on behalf of the debtors' estate, contends that as there as been no sale or realisation, the sheriff is not entitled to poundage, but admits the validity of the remaining charges. The goods seized, after allowing to the bankrupts articles to the value of 20*l.*, as provided by sect. 44 of the Bankruptcy Act 1883, realised the sum of 72*l.* 9*s.* 11*d.*

The question for the opinion of the High Court is whether, under the circumstances stated, the sheriff is entitled to poundage. If the High Court be of opinion that the sheriff is so entitled it is ordered that the sum claimed for poundage be a charge on the goods delivered up by the sheriff to the official receiver. If the High Court be of the contrary opinion it is ordered that the application of the sheriff claiming poundage be dismissed. The costs of and incidental to this application and case shall be in the discretion of the High Court.

*Chalmers* for the official receiver.—The question is what the meaning of the words "costs of execution" is in the two sub-sections (1 and 2) of

sect. 46 of the Bankruptcy Act 1883. By sub-sect. 1 it is enacted that "where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof for the purpose of satisfying the charge." By sub-sect. 2 it is provided that "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of the sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him." I contend that the words are used in different senses in the two sub-sections, and that the first is specially applicable to cases in which there is no sale. Poundage, on the other hand, is in the nature of payment by results, and does not become due until the judgment creditor has obtained his money, and has it in his hand:

*R. v. Robinson* (1835), 2 C. M. & E. 334;  
*Miles v. Harris*, 12 C. B. N. S. 550.

*Willis*, Q.C. (with him *Macaskie*) for the sheriff.—I admit that unless a bankruptcy or something else intervenes, poundage is only payable on a fructuous process.

*Chalmers*.—In *Miles v. Harris* (*ubi sup.*) the proceedings were irregular, and it was held that on that ground poundage was not payable; *à fortiori*, therefore, it is not payable where the sheriff is stopped by the *vis major* of the law:

*Re Craycraft*, 38 L. T. Rep. N. S. 364; 8 Ch. Div. 596.

*Willis*, Q.C.—The new law means to improve the position of the sheriff in cases of this kind. Under the old law, but for *Re Craycraft* (*ubi sup.*), there would have been some difficulty in proving that the sheriff was entitled even to his expenses. The second sub-section referred to speaks of "costs of execution," and therefore if this had occurred after the sale there would have been no doubt upon the matter. The question is whether the same phrase was used in a different sense in two successive sub-sections. By 7 Will. 4, s. 55, provision is made for the bailiff. Poundage dates to 24 Eliz. s. 4. The fees under the Act of Will. 4, are for the bailiff only, and until the sheriff got poundage he got nothing at all. This section is meant to improve the position of the sheriff. [CAVE, J.—Why should he be in a better position here than where the writ is set aside for irregularity? What do you say is the scale upon which the poundage is to be ascertained?] In some cases there might be difficulty, but *Id certum est quod certum reddi potest*, and here there is no difficulty in ascertaining the sum on which the poundage is due.

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*Macaskie*.—*Miles v. Harris* (*ubi sup.*) was a misreading of the statute of Elizabeth, and is directly contrary to *Rawstorne v. Williamson* (4 Maule & Selwyn, 256). The words "costs of execution" have been explained in *Armitage v. Jessop* (2 C. P. 12), and include poundage; and in equity poundage seems to have been allowed in cases of this kind.

CAVE, J.—I am of opinion that the arguments which have been adduced on behalf of the official receiver must be allowed to prevail. The general proposition of law is undoubtedly that the sheriff is entitled to poundage when, and when only, he has got the money in his hand and has paid it over to the execution creditor. It does not matter whether he has got the money into his hand by sale or otherwise, so long as it is there; but there is no case to show that, until the sheriff is in that position, he is entitled to poundage. *Miles v. Harris* (*ubi sup.*) is the direct contradiction of that proposition, and is harmonious, and not inconsistent, with the case cited by Mr. *Macaskie*. [His Lordship then read sect. 46, sub-sect. 1, and continued:] If the notice is served before the sale and the sheriff never has the money, he is not entitled to poundage. On the other hand, under circumstances such as are described in sub-sect. 2, there is no doubt that he would be entitled to his poundage. No doubt the intention of the new Act is to improve the position of the sheriff, but this is already done by sub-sect. 2, and I see no reason to think that it was intended to make another exception in his favour under circumstances such as are described in sub-sect. 1. Moreover, there is a reason for the distinction. Where the goods are sold the poundage is easily discovered. There is no doubt, therefore, that the Legislature intended the sections to bear the interpretation which I have put upon them.

*Judgment accordingly.*

Solicitors: *The Solicitor for the Board of Trade; Taylor, Hoare, and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

May 19, 21, 22, 23, 27, 28, June 12, 14, 16, July 31, and Aug. 6.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

BOSWELL v. COAKS. (a)

*Vendor and purchaser—Sale by direction of the Court—Duty of intending purchaser to give full information—Fraud by concealing material information.*

On a purchase of property offered for sale by a court of justice, the maxims of caveat emptor and caveat vendor are not applicable as in an ordinary case of buying and selling. In such a case the person desirous of buying must either abstain from laying any information before the court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material the court should have to enable it to form a judgment on the subject under its consideration.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

If a party to an agreement to purchase property sold under the direction of the court obtain the sanction of the court by withholding information which is material, and is known to be so, such withholding amounts to fraud, and the agreement will not be allowed to stand.

*The judgment of Fry, J. (48 L. T. Rep. N. S. 929; 23 Ch. Div. 302) reversed.*

*Quære, whether the fiduciary relation of solicitor and client is got rid of by giving the solicitor leave to bid and confirming the sale.*

THIS was an appeal by the plaintiffs from a judgment of Fry, J. delivered on the 19th March 1883, dismissing with costs an action brought on the 19th Jan. 1881 by James Freeman Boswell and James Baxter, on behalf of themselves and all other the unsatisfied creditors of the late Sir Robert John Harvey, Bart., and of the firm of Harveys and Hudsons, of which he was a member, against Isaac Bugg Coaks, Charles John Bunyon, Elijah Crozier Bailey (since deceased), Frederick Elwin Watson, William Cadge, Edward Kerrison Harvey, Samuel Secker Hill (since deceased), and Thomas Muir Grant (for and on behalf of the Norwich Union Life Assurance Society).

The judgment of Fry, J. is reported 48 L. T. Rep. N. S. 929; 23 Ch. Div. 302; but the case was decided in the Court of Appeal on different grounds, and after hearing further evidence establishing many additional facts. The action was brought to set aside the purchase by the six first-named defendants of certain property forming part of the personal estate of the late Sir Robert Harvey.

The purchase sought to be set aside was completed under a contract, dated the 13th July 1872. This contract was entered into, and the purchase completed, with the sanction of the then Master of the Rolls, in the course of a suit for the administration of Sir R. Harvey's estate. The property purchased consisted of the net income arising during the life of Edward Kerrison Harvey, a brother of Sir Robert Harvey, from certain mortgages and other securities, upon which the residuary personal estate of their father, General Harvey, was invested. This life interest had been acquired some years previously by Sir R. Harvey, by purchase from his brother. At the time of the purchase sought to be set aside, the capital value of the property producing the life interest was about 300,000*l.*, and the estimated net income from the then investments exceeded 13,000*l.* Under the trusts of General Harvey's will, the investments could be varied at the discretion of the trustees, and if all the trust fund had been invested in Government securities, the clear income would have but slightly exceeded 9000*l.*

Edward Kerrison Harvey, the *cestui que vie*, had attained the age of forty-five years on the 25th Sept. 1871, and was still living, and a defendant in the present action. The purchase was made in the names of the defendants Bunyon and Coaks, on behalf of themselves and the defendants Bailey (who had died since the commencement of the action), Watson, Cadge, and Harvey. The price paid was 40,000*l.*

When the contract for the purchase of the life interest was entered into, the life of the defendant Harvey was not insurable except at a considerable advance upon the rate payable for a

healthy life. Sir Robert Harvey died by his own hand on the 19th July 1870, being then a partner in the firm of Harveys and Hudsons, bankers, at Norwich, his partners in the firm being two gentlemen of the name of Kerrison.

On the 22nd of the same month his surviving partners were adjudicated bankrupts.

The defendant Bailey was appointed trustee in the bankruptcy, and the defendant Watson became a member of the committee of inspection.

On the 29th July two suits—*Lacey v. Hill* and *Leney v. Hill*—were instituted in the Court of Chancery for the administration of Sir R. Harvey's estate. Mr. Samuel Secker Hill was the sole executor and trustee of the will of Sir R. Harvey, and was a defendant in both suits. He was also named as a defendant in this action, but died after its commencement. *Lacey v. Hill* was a suit on behalf of the separate creditors of Sir R. Harvey, and *Leney v. Hill* on behalf of creditors of the late firm of Harveys and Hudsons. On the 5th Aug. 1870 a decree was made in both suits for the administration of the estate of Sir R. Harvey.

On the 25th Jan. 1872 an order was made for the sale of the life interest.

At the date of this order Coaks was solicitor of the defendant Bailey as trustee in the bankruptcy of Harvey and Hudson, and was also the solicitor of the defendant Hill in the suits of *Lacey v. Hill* and *Leney v. Hill*; and on the same day that the suits were instituted he gave Hill an undertaking to hold him harmless in connection with proving the will of the deceased, and to indemnify him from any loss, costs, or expenses in any case arising thereupon. Coaks was also the general solicitor of the plaintiff Lacey, and had occasionally acted for the plaintiff Leney; but Messrs. Linklater and Co. were the solicitors on the record of the plaintiffs in both suits. They had, however, been introduced to the plaintiffs by Coaks, and there was an agreement between them and him under which he was to share in the profits derived by them from their position as solicitors of the plaintiffs.

On the 13th March, upon the application of Coaks, leave was given to him by the Master of the Rolls to bid at the sale of the life interest, and the conduct of the sale was given to the plaintiffs upon the undertaking of Messrs. Linklater and Co., as their solicitors, not to communicate any particulars of the sale to Coaks, and to carry out the sale in all respects independently of him. The Master of the Rolls was not informed upon this occasion of the agreement as to the costs between Messrs. Linklater and Co. and Coaks, but on the 16th March Mr. Brown, the partner in the firm of Messrs. Linklater and Co. who attended to the business of the suits, communicated the particulars of the arrangement to the Master of the Rolls, and at the same time stated that Coaks had excepted all profits arising out of the sale of the life interest from the arrangement between himself and Messrs. Linklater and Co., and the Master of the Rolls thereupon confirmed the leave previously given to Coaks to bid at the sale and the authority of Messrs. Linklater and Co. to conduct it. The day appointed for the sale of the life interest was the 2nd July 1872, and the amount of knowledge possessed to that day by Mr. Brown, as solicitor of the plaintiffs in the two suits, and by the intending purchasers as to

the state of the health of the defendant Harvey, and the probability or possibility of insuring his life, is shown by the facts immediately following. Soon after the order had been made for the sale of the life interest, Brown endeavoured to ascertain whether the life interest of the defendant Harvey could be insured. He had previously received from Coaks a letter dated the 16th Feb. 1872 addressed to Coaks by a Mr. Lowne, a clerk in the Messrs. Gurney's bank at Norwich, and who also acted occasionally as an insurance agent. This letter was as follows:

In reply to your inquiry, I beg to inform you that in the year 1860 I made, on behalf of Mr. Edward Kerrison Harvey, proposals to the Economic, the Royal Exchange, the Norwich Union, Provident Clerks, and other life insurance societies for insurances on his life, and that they declined, with one exception, namely, the Norwich Union, where the life was accepted for 1000*l.* at an increased premium, an application at the same time to increase the risk to 3000*l.* or 4000*l.* (I forget which) being declined.

In April of the same year Brown wrote to E. K. Harvey requesting an interview, to which Watson, who was the solicitor of E. K. Harvey, replied to the effect that Harvey did not feel called upon to be examined for the benefit of others.

In May Brown visited Norwich, and had interviews with Mr. Lowne, the writer of the letter just mentioned, as to the attempted insurance in 1860, and with Mr. Preston, who was the solicitor of some members of Mr. Harvey's family, and the conclusion at which the court found that he arrived was that it was quite impossible to insure the life of Harvey, unless that gentleman would consent to be examined by the medical officers of the companies in which it might be proposed to effect insurances, and to such an examination he was led to believe that Harvey would not consent.

In the meantime, Bunyon and Coaks, and the other defendants who were associated with them as intending purchasers of the life interest, obtained opinions from Norwich medical men as to the health of Harvey, with the view, as they alleged, of guiding them as to the price that they might safely offer for the life interest, and as to the probability of their being able to insure his life.

Amongst the opinions so obtained by them were those of Messrs. Johnson, Eade, and Crosse, and also of the defendant Cadge, who was a surgeon in practice in Norwich. These opinions, which were referred to in the argument as the "Norwich certificates," contained passages in the following terms. In that of Mr. Johnson, dated the 22nd June 1872:

I consider that he is likely to live to a good old age. His form is strong and well developed, and I am not acquainted with any circumstances calculated to render an insurance on his life hazardous.

In that of Mr. Crosse, dated the 21st June 1872:

His prospects of longevity are quite as good as those of healthy persons generally are for his years.

Dr. Eade's certificate, dated the 22nd June 1872, concluded as follows:

I think it possible that his life may go on increasing in strength and health, and that he may attain to a fair, or even a good age. But I am of opinion that his life can only be taken by an assurance office as of diminished and uncertain value. It is extremely difficult to estimate the proper amount at which the premiums of assurance should be increased, but I will venture to suggest that

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in case of acceptances an addition of ten years to his age might probably be fair, or that perhaps a still more equitable bargain might be made by arranging for having the premium paid by a few instalments matured at an earlier date.

The certificate of Cadge was dated the 30th Oct. 1870, nearly two years earlier, and contained the following passage :

I consider that he has no organic disease, and know that his general health and prospects have improved of late. In my opinion, his life is assurable at some increase of the ordinary rate.

In a letter addressed to Harvey, and dated the 22nd June 1872, Cadge, who was then an intending purchaser, wrote as follows :

Having an interest in the purchase of your life interest I cannot, of course, examine you medically at this time, but I think the report I made less than two years ago, when I had no thought of being interested in your life in any way, may be of use. I therefore send you a copy of it, desiring only to add that I feel confident your health and probability of long life are now as good or even better than October 1870.

These certificates were received by Coaks on the 23rd June. On the following day Harvey, who had a few days previously agreed to join the combination of the purchasers, came to London, and was examined on the 25th by Dr. Pitman, on behalf of the London and Provincial Law Life Office; Dr. Fuller, on behalf of the Law Life Office; and Dr. Beale, on behalf of the Clerical and Medical Life Office; and these three gentlemen, after examining him, gave a joint certificate, as follows :

We have this day examined Mr. Edward Kerrison Harvey, and have perused the papers submitted to us. We are of opinion that the acceptance of his life would be attended with great risk; but should the directors entertain the proposal we recommend that he be not accepted at a less addition than fifteen years to his present age, and we consider it desirable that the premiums be paid within ten years.

It was alleged by Bunyon that he called on the same day, the 25th June, at the London and Provincial Law Life Office, and was informed by Dr. Pitman that if the directors asked his opinion he should recommend them not to entertain the proposal, and that he thereupon withdrew it.

On the 27th June, in reply to a proposal to the Law Life Office that the insurance should be for a term only, Bunyon received a letter from the actuary stating that the directors would not be disposed to entertain a proposal either for life or for a term of years; and on the 28th June the actuary of the Clerical and Medical Life Office replied to the proposal of Bunyon in the following terms :

The board are willing to assure 5000*l.* for the whole term of life, without profits, on Mr. Harvey's life, at an annual premium of 12*l.* per cent., or a half-yearly premium of 6*l.* 5*s.*

The Court of Appeal found as a fact that the information so acquired by the intending purchasers as to the state of Harvey's health was not communicated to Brown previously to the day appointed for the sale of the life interest.

On the 2nd July 1872, the day so appointed, the life interest was put up for sale at the Auction Mart in London. The entire interest was first put up in one lot, and as there was no bidding for it in its entirety it was afterwards put up in lots. No higher bidding than 1500*l.* was made for any of the lots, and, this being below the reserve price, was not accepted. The reserve price for

the entirety had been fixed at 60,000*l.* Bunyon and Coakes were present at the auction, but neither of them made any bid either for the whole life interest or for any of the twentieth parts. Immediately after the attempted sale Bunyon and Coakes had an interview with Brown, in the course of which they informed him that they were in a position to lay before the court certain evidence as to the life of Harvey which would induce the court to accept a much smaller sum than was originally believed to be the value of the life interest; that they were, in fact, in possession of the joint opinion of three London medical men of eminence, whose names, however, they declined to give, as to the state of the health of Harvey, which they had obtained with the view of taking insurances for their protection as intending purchasers at the auction, and that they were prepared to make an offer for the life interest, and to furnish the evidence which they had thus obtained, if a provisional contract could be framed which would prevent such evidence, when furnished, being used for the purpose of effecting insurances upon the life of Harvey without their concurrence. They at the same time informed Brown that the offer would be made on behalf of themselves and four other gentlemen, including Harvey. Brown at once communicated that proposal to the chief clerk of the Master of the Rolls, who requested that it might be put into writing; and, accordingly, on the same day, Bunyon with the concurrence of Coaks and Cadge, who were present, wrote and handed to Brown a letter in the following terms :

50, Fleet-street, 2nd July 1872.—Dear Sir,—I am prepared to purchase the life interest mentioned in the twenty lots put up to auction to-day by Mr. Bull, and will name a price, provided that it be accepted by two actuaries to be named by you, and under the light of the evidence of three medical men of eminence or standing who have examined Mr. Harvey. If the terms are approved I shall require to have the contract optional on my part for a week, as this is a case in which it is impossible to say what a day may bring forth.—I am, &c., C. J. BUNYON. Messrs. Linklater and Co.

Upon the receipt of this, Brown prepared the draft of an agreement embodying the proposal; the draft was laid before Mr. Dart, one of the Conveyancing Counsel of the Court of Chancery, and was settled by him on the 4th July; the draft settled was on the 10th July brought under the consideration of the Master of the Rolls, and the terms of the agreement as eventually executed were approved by him on that day. The first two clauses of the agreement or draft provided that the price to be paid for the twenty lots together of the life interest should be 40,000*l.* The special features of the agreement were contained in the clauses numbered 3, 4, and 5, which were in the following terms :

3. The vendor shall be furnished, upon signing his agreement, with the written opinions of three medical men of eminence in their profession as to the insurability or unisurability of the life of Mr. Edward Kerrison Harvey in the particulars of sale mentioned, founded upon actual examination of the said E. K. Harvey, by them made in the month of June last on behalf of insurance offices of which they are respectively the medical examiners, and also a statutory declaration by the purchasers that such medical men are the only medical men who, to the knowledge or belief of the purchasers, have since the 1st day of June last been consulted on behalf of any life insurance offices upon the question of such insurability or unisurability.

4. Such opinion shall be submitted to his Lordship the



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Master of the Rolls to decide whether the said sum of 40,000*l.* is a fit and proper sum to be accepted by the vendor for the said property; and the vendor and purchaser shall, subject as aforesaid, abide by his decision—that is to say, if he shall decide that the said sum of 40,000*l.* is a fair and proper sum to be accepted by the vendor, the following clause No. 5 and the subsequent clauses shall thereupon come into operation; and if the said judge shall decide that the said sum of 40,000*l.* ought not to be accepted, then this agreement and everything hereafter contained shall absolutely cease and determine.

5. The purchasers may within four days (Sundays excluded) from notice of such decision being given to them, pay either of them to Thomas Bull, of No. 8, Bucklersbury, in the city of London, auctioneer, the sum of 4000*l.* as a deposit and in part payment of the purchase money, and upon such payment being made this contract shall become an absolute contract on the part of the vendors and purchasers respectively for the sale and purchase at the sum of 40,000*l.* of the said premises, lots 1 to 20 aforesaid, subject to the clauses hereinafter contained; and in case such deposit shall not be paid, then this contract shall absolutely cease and determine.

Whilst the draft of this agreement was being settled, a skeleton case was prepared by Bunyon, and was forwarded on the 8th July to Brown in order that it might be placed before the Master of the Rolls, and it was before him on the 10th, when he approved the agreement.

The skeleton case was to the effect following: After stating that Harvey had been examined in London by the three medical men before mentioned, it set forth in *extenso* the joint opinion signed on the 25th June, but leaving blanks for the names of the insurance offices and of medical men, and altogether omitting the qualifying words at the conclusion of the joint opinion, which suggested that the life of Harvey should not be accepted at a less addition than fifteen years, and that the premiums should be paid within ten years. The skeleton case then set forth the statement of Dr. Beale that he should recommend his directors not to entertain the proposal to insure the life of the defendant Harvey; the refusal of the Law Life Office to accept a like proposal either for life or for a term of years; and the willingness of the Clerical and Medical Life Office to grant a policy for 5000*l.* at an annual premium of 12 per cent. It also contained further certificates of Dr. Pitman and Dr. Beale given on later dates than those previously mentioned, and at least as unfavourable. The further certificate of Dr. Pitman was dated the 4th July 1872, and was in the following terms:

I have examined Mr. E. K. Harvey, of Norwich, and find that he is affected with hydrocephalus, which was probably congenital. An insurance of his life under any circumstances would be exceedingly hazardous, and I consider that the remedies to which he has recourse to relieve the pains from which he occasionally suffers are such as to add still further to the risk.

That of Dr. Beale, which was dated the 28th June 1872, was as follows:

Having examined Mr. E. K. Harvey, it seems to me that the life is a very hazardous one, considering the bad family history and the general state of the proposer's health. I think that, if taken, a very high premium should be charged.

This certificate of Dr. Beale was addressed to Mr. Cutcliffe, actuary of the Clerical and Medical Life Office, and a copy of it was forwarded by Mr. Cutcliffe to Bunyon on the 3rd July, with a letter stating that "the risk was not accepted readily on the part of any of our directors, while some desire a smaller risk at a still higher premium."

After stating that the papers (before mentioned as the Norwich certificates) were the papers referred to in the joint opinion of the three medical men, and that they took a generally favourable view of the case, the skeleton case concluded in the following terms: "Mr. Harvey has not since been examined on behalf of any life office." It was signed by the defendant, and dated the 8th July 1872.

The separate opinion given by Dr. Fuller, who also was a party to the joint opinion, and which was more favourable, was not included, though it bore the same date as that of Dr. Pitman. After alluding generally to the state of the defendant Harvey's health, it proceeded as follows:

Seeing that Mr. Harvey has learned so to manage himself as to escape headache and to enjoy better health during the last eighteen months than at any former period of his life, my impression is that a payment of 10 per cent. would prove a fair and equitable rate both to assurers and assured.

The Master of the Rolls, with the skeleton case before him, but not being aware of the omission from the statement in it of the joint opinion, approved of the draft agreement of the 10th July, and returned the skeleton case to Bunyon that the blanks might be filled up. The blanks were filled up, but the omission was not supplied, and in this partially amended form it was again placed before the Master of the Rolls on the 12th July, and he then made the following indorsement upon it:

After perusing the inclosed papers, containing the opinions respecting Mr. E. K. Harvey, I am of opinion that the contract for the sale of the life interest is a proper one to be entered into.—BOWLLY, M.R., 12<sup>th</sup> 72.

Although no formal order confirming the sale had been made, the agreement, the draft of which had been so approved by the Master of the Rolls on the 10th July, was engrossed on the 11th, and on the 13th was signed and exchanged by Lacey as vendor, and Bunyon and Coaks as purchasers.

On the 17th the purchasers, in exercise of the option conferred upon them by the fifth clause of the agreement, paid the sum of 4000*l.* to Brown to be handed over to Mr. Bull, and they insisted that the agreement of the 13th July thereupon became an absolute contract for the sale and purchase of the life interest at the sum of 40,000*l.*

On the same day the chief clerk informed Brown that it would be necessary to have a formal order sanctioning the sale, and to enable him to prepare such an order handed him the partially amended case which had been submitted to the Master of the Rolls, and had been left in his chambers on the 12th. On examining it in connection with the joint opinion Mr. Brown discovered the omission before mentioned, and informed Bunyon that the agreement would not be considered binding until the attention of the Master of the Rolls had been called to the omitted portions of the opinion. This was accordingly done, and the Master of the Rolls then desired that the opinions of two actuaries should be taken upon the completed statement.

Copies of the statement in its completed form were thereupon laid before Mr. Hendricks and Mr. Stephenson, two actuaries of established reputation, with the request that they would state how many years' purchase would be a proper price for the life interest. In answer Mr. Stephenson stated that the proper price for the life



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interest would be 4·39 years' purchase, whilst Mr. Hendricks carried his calculation two decimal points further, and gave 4·3931 as the proper number of years' purchase.

On the 23rd July Brown laid the opinion of the actuaries before the Master of the Rolls, who thereupon expressed his decision that the offer of 40,000*l.* should be accepted, and in accordance with this decision, on the 26th July 1872, an order was made confirming the agreement.

In the meantime, on the 17th July, and upon the assumption that the agreement of the 13th had become a concluded contract, Bunyon and Coaks made a statutory declaration ostensibly in pursuance of the provisions of sect. 3 of the agreement. This declaration was in substance to the effect of the case submitted to the Master of the Rolls in its completed form, which was made an exhibit to it, and it verified the originals of the joint opinion, and of the several other opinions, referred to in the case, with the exception of the Norwich certificates.

It was admitted that insurances to a large amount were effected by the purchasers on the life of E. K. Harvey in July and Aug. 1872 with various insurance offices in Scotland and England upon premiums of 10*l.* 11*s.* per cent., payable for ten years only. In the opinion of the Court of Appeal it was clear also that at the time of the auction, or at any rate before the skeleton case was laid before the Master of the Rolls on the 10th July, Bunyon and Coaks knew that, if required, they could have a policy from the Norwich Union Office for 4000*l.* at 9 per cent. The effect of the evidence with regard to these facts, and also of the further evidence given before the Court of Appeal, is sufficiently stated in the judgment.

*M. Cookson, Q.C.* and *Langworthy* for the appellants.—Apart from all question of fiduciary relation between Coaks, or the trustees, and the creditors, though we maintain such relation did exist, and that the obligation involved by it was never discharged, there is ample ground for setting aside the contract. In the dealings with the court of Coaks and Bunyon there was a *suppressio veri* which amounts to a *suggestio falsi*, but this was not sufficiently noticed in the judgment below. Material facts were omitted from the skeleton case furnished to the Master of the Rolls, and on which he acted, and the judge was not informed of the real state of the facts as to the insurability of the life. It is not the duty of a purchaser who is at arm's length from the vendor to tell the latter of any advantage in the property sold, but the transaction is dishonest if a single word is dropped tending to mislead the vendor; and the withholding of a material fact may make what is told false. In this case there has been a studied concealment with regard to the insurances, which is a sufficient ground for setting aside the contract. Lord Romilly, who was in the position of a judicial trustee of the estate, was deceived by the purchasers. The leave to bid did not absolutely terminate the fiduciary relation between Coaks and the plaintiffs. The leave was exhausted when the auction failed. They cited

*Turner v. Harvey*, Jac. 169;

*Walters v. Morgan*, 4 L. T. Rep. N. S. 758;

3 De G. F. & J. 718;

*Brownlie v. Campbell*, 5 App. Cas. 925;

*Davies v. London and Provincial Marine Insurance Company*, 38 L. T. Rep. N. S. 478; 8 Ch. Div. 469;

*Peck v. Gurney*, L. Rep. 6 E. & I. App. 377;

*Central Railway Company of Venezuela v. Fisch*, 16 L. T. Rep. N. S. 500; L. Rep. 2 E. & I. App. 99;

*Gibson v. Jeyes*, 6 Ves. 287;

*Savery v. King*, 27 L. T. Rep. O. S. 145; 5 H. of L. Cas. 665;

*Cane v. Lord Allen*, 2 Dow. 289;

*Edwards v. Meyrick*, 2 Hare, 60;

*Campbell v. Walker*, 5 Ves. 678;

*Colles v. Trecothick*, 9 Ves. 234;

*Tate v. Williamson*, 15 L. T. Rep. N. S. 549; L. Rep. 2 Ch. App. 55.

*Davey, Q.C.* and *Cozens-Hardy, Q.C.* for the defendant Coaks.—In the court below the plaintiffs alleged a case of conspiracy and collusion between Messrs. Linklater and Co. and the defendants, but failed to support it. It is impossible to establish misrepresentation now that part of the case is dropped. The information given to the court by the purchasers was accurate, and the real value of the life of Mr. Harvey was known to the gentlemen acting as the solicitors for the vendors. There was no wilful concealment of anything which the purchasers were bound to disclose, and no fraudulent misrepresentation was made. The onus lies on the appellants to prove that anyone has been misled, and they have failed to sustain it. Prior to and up to the date when liberty to bid was given the conduct of the sale was given to Messrs. Linklater and Co. as representing the plaintiffs in the action; they were made the vendors. Up to the time when the conduct of the sale was given to them, Hill, or Coaks his solicitor, had the conduct of the sale, and whatever disability attached to Hill attached to Coaks. But that disability was a disability to contract at all, because he was the trustee having the conduct of the sale; and just as Hill could not sell to himself so he could not sell to his solicitor. If Hill had sold to Coaks the *cestui que trust* would have been entitled to avoid the sale. Hill's inability applied equally to Coaks. It was not a question of more or less disclosure; it was a question of absolute inability. The effect of the inability to bid, coupled with the transfer of the conduct of the sale to other parties was, that when Hill ceased to have the conduct of the sale he ceased to be trustee for sale, and so from that moment his solicitor ceased to be under any disability to bid, because his client, Hill, was no longer trustee for sale. He had divested himself of the character of trustee for the sale, giving up every power of interference and control of any kind over the conduct of the sale, and put himself at arm's length with the purchaser. The liberty to bid at least gave him the power to bid, and put an end to his disability to bid. The appellants said that though the disability to bid was, at the auction, got rid of, yet that disability was coupled with an obligation to make a disclosure of all material facts which were known to Coaks, as the purchaser, and which affected the price paid, and that he was as much bound to advise his client as to the propriety, or otherwise, of accepting his own offer as he would have been if he had not been the purchaser. [COTTON, L.J.—I do not think the appellant's counsel carried it so far as that. But he took up a somewhat different position, namely, that possessing the liberty to

bid he was not bound to advise his client, though it still left with him the duty of communicating all facts within his knowledge which were material—that facts, not advice, should have been given.] The appellants' argument logically goes to the extent that he was bound to give the vendors advice. Coaks knew that the intending purchasers were willing to have gone as far as 45,000*l.*, but he was not bound to disclose that to the vendors. The appellants say he was bound to tell the vendors the facts which had exclusively come to his knowledge as purchaser. If he was bound to make a disclosure of one fact for the consideration of the vendors, he was bound to disclose to them every other fact. The facts of which it was urged no disclosure was made were facts which came to Coaks' knowledge after the leave to bid had been given, and when he was dealing for this estate both on behalf of himself and of the other purchasers, and was at arm's length with the vendors. The question is, did the vendors deal with Coaks at arm's length, or as a person in whom they placed confidence, and from whom they expected to receive advice and information of facts which had come to his knowledge as an intending purchaser? Not only is there no atom of proof of this, but the judge below found that neither the chief clerk nor Mr. Brown placed any confidence in Coaks as a person to whom they looked for advice and information more than was demanded by the exact terms of the contract. Every step was made a matter of discussion and dispute between the court and the purchasers. Everything was done according to the true rule of law. A trustee for sale cannot purchase at all. That disability extends to the solicitor for the sale. The moment the trustee for sale is divested of that character and put at arm's length with the vendor, so that he is no longer trustee for sale, so his solicitor is no longer solicitor for the trustee for the sale, or the parties having the conduct of the sale. From that moment the disability ceases, and the parties are free to deal together. The relation in this case never again existed. Mr. Hill never again had the conduct of the sale, and Mr. Coaks never had the conduct of the sale or any right whatever to interfere with the conduct of the sale. Coaks and Bunyon were not looked on in any other light than that of ordinary purchasers. The transfer of the conduct of the sale to other parties, and giving Coaks liberty to bid, severed the connection which up to that time disabled him from contracting—that disability imposing upon the *cestuis que trust* the right to avoid the sale, whether it would be to the advantage of the trustee or not. As there was haggling and chaffering as between vendors and purchasers, there was no such subsisting fiduciary relationship as imposed any obligation upon Coaks to make any disclosure of anything further than that which he was bound to disclose as an ordinary purchaser and according to the terms of his contract. This sale took place in 1872, while the writ was not issued till the 19th Jan. 1881. In the meantime the bargain turned out to be a good one for the purchasers. If this sale is set aside, the parties cannot be restored to their old positions. To set aside the contract would be to give the plaintiffs the benefit of that to which they are not entitled—Mr. Bunyon's skill, special knowledge, and address in effecting insurances on Mr. Harvey's life. In 1872 no

question of prudence, advisability, or expediency of the sale could enter into the calculations, and that was taken into account by the Master of the Rolls, who thought that under all the circumstances of the case, notwithstanding the opinion of the actuaries, he was making a prudent bargain for the benefit of all the parties concerned. Sale by auction having proved abortive, parties who come forward at this late date and endeavour to set aside the sale upon the case upon the pleadings are bound to make that case very clear by the strongest possible evidence. Every presumption in a case of this kind ought to be in favour of the purchasers. They cited

*Ex parte Lacey*, 6 Ves. 625;

*Ex parte Bennett*, 10 Ves. 381;

*McPherson v. Watt*, 3 App. Cas. 254.

*Rigby, Q.C.* and *H. B. Buckley* for the executors of the defendant Bailey:—No special case has been made out against the defendant Bailey.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Northmore Lawrence* for the defendant Bunyon. —The purchasers were entitled to make as good a bargain as they could. Some years afterwards, because the bargain has been shown to be a good one, it is sought to be shown that the defendants obtained the property by misconduct, fraud, and impropriety. It is impossible to put the parties into the position in which they were in 1872. They then possessed knowledge, legitimately acquired, which gave them an advantage in relation to this purchase which nobody else had. The case must be looked at, in order to deal with it fairly, having regard to what was the position of the parties in the month of Aug. 1872. If this transaction was an improper one, the circumstances existed at that time, and if the action had been brought then, the case would have had a different aspect. There was no fiduciary relationship; the position of the parties was that of ordinary vendor and purchaser, and the rights and duties of the defendants were those arising from the position of ordinary purchasers to ordinary vendors, and nothing else. The vendors had no right to expect from them or to require from them anything more than an ordinary vendor had a right to expect from an ordinary purchaser. Mixing up of the questions of misrepresentation and fraud with the question of the fiduciary relationship of the parties can only be confusing and misleading. In the court below it was suggested that, if the purchasers were not exactly in a fiduciary position, they were in a sort of midway of fiduciary relationship. They were either in a fiduciary relationship with all the obligations which that relation imposed, or they were purchasers dealing at arm's length with the vendors. The parties were in the relation of ordinary vendors and purchasers, and the purchasers had the right to make the best terms they could, and to disclose as little as they might that would be of advantage to the vendor. A proposing purchaser must not make a fraudulent misrepresentation, but he has the right to suppress everything which he knows unlikely to make a good bargain for him, and the vendor has no right to assume that he is to be supplied with all the knowledge which is in the possession of the proposing purchaser. If he wants anything he must ask for it, and the purchaser may give it or refuse to give it. Then purchasers had a right to

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make the best use of the knowledge they possessed, as they were at arm's length with the vendors. This property was of a very speculative character. All that was known by the purchasers was known by the vendors at the outset, before the insurances had been effected. The one was in as good a position as the other, subject to this (which was also known to the vendors), that the purchasers were in a position, which the vendors were not, to obtain an accurate acquaintance by medical examination of the condition of Harvey. That was the only piece of knowledge the purchasers possessed which the vendors did not possess. But the vendors knew the purchasers possessed that which they did not. Therefore, it was not a case of vendors who were dealing with purchasers who were in a better position than themselves without knowing they were in a better position. The vendors were represented by a solicitor of skill and eminence who was not empowered to act upon his own judgment or according to his own will, but every transaction in the matter was brought before the chief clerk, who saw the Master of the Rolls himself. To suggest that the intending purchasers were to take care of Mr. Brown, the chief clerk and the Master of the Rolls, and to see that they did not make a bad bargain, is ludicrous. No single thing can be pointed out in the conduct of the sale from beginning to end by Mr. Brown inconsistent with the position in which he was put by the Master of the Rolls; and it cannot be suggested that there was any fact bearing on the health of Mr. E. K. Harvey which the purchasers knew of which they did not put into the vendor's possession before the bargain was complete, and this information was such as no person other than the purchasers could have put the vendors in possession of. Mr. Coaks never stood in any fiduciary relation whatever to the plaintiffs. Messrs. Bailey and Watson were creditors and trustees for other creditors, but their fiduciary relation to the other creditors did not go beyond what passed into their possession in trust for the great body of the creditors. This did not preclude them from purchasing any part of the debtor's estate.

*Stirling* for the defendant Cadge.—In everything with which Cadge was connected he took care that his position should be known to all the parties, therefore no charge can possibly rest against him.

The Attorney-General (Sir Henry James, Q.C.) and W. P. Beale for the defendant Harvey.

Chadwyck Healey for the defendant Watson.

Whitehorne, Q.C. for the Norwich Union Life Office.

Merevether, Q.C. and Jacques for the executors of Hill.

Cookson, in reply, cited

*Brooke v. Lord Mostyn*, 11 L. T. Rep. N. S. 392; 2 De G. J. & S. 373;

*Keech v. Sandford*, 1 W. & T. L. C. 5th edit. 46;

*Ex parte James*, 8 Ves. 337;

*Holman v. Loynes*, 22 L. T. Rep. O. S. 296; 4 De G. M. & G. 270;

*Re Bloye's Trusts*, 1 Mac. & G. 488.

Davey replied on the new cases cited in *Cookson's* reply. *Cur. adv. vult.*

July 31.—BAGGALLAY, L.J. delivered the written judgment of the court, which, after

stating the value of the property and the contract, continued as follows:—The purchase has proved most advantageous to the purchasers; but it must be borne in mind that the purchase of a life interest, unless the purchaser has the means of effecting an insurance upon the life of the *cestui que vie*, must of necessity be a hazardous speculation; and the speculative character of a purchase of property of this description is much increased if the life of the *cestui que vie* is by common repute uninsurable by reason of the assumed state of his health, or of his refusal to submit to medical examination. On the other hand, if the life can be insured for the amount of the purchase money, even though at an advance upon the ordinary rate for a healthy life, the purchaser is exposed to little or no risk, provided the income purchased is more than sufficient to pay the annual premiums for insurance and the interest on the purchase money. [After stating the other facts as above stated, down to the reply of the actuary of the Clerical and Medical Office of the 28th June 1872, the judgment continued:] Thus one only of the three offices was willing to assure the life, and that only at a very high rate of premium. It has been stated on behalf of the defendants that "the Norwich certificates" were submitted to the three medical men on the 25th June, and are the papers referred to in their joint opinion as having been perused by them. This may be, and probably is, the case; but the somewhat favourable views of the state of the defendant Harvey's health expressed by the Norwich doctors do not appear to have influenced the London medical men by whom the certificates were perused. It would appear also that the defendants Bunyon and Coaks had ascertained the price at which the Norwich Union would assure the life of the defendant Harvey, but to that we shall have occasion to refer more particularly presently. As nothing has been suggested to the contrary, we assume it to be the fact that the information thus acquired by the intending purchasers as to the state of health of the defendant Harvey was not in any way, or to any extent, communicated to Mr. Brown previously to the day appointed for the sale of the life interest. [After stating the facts as to the attempted sale by auction, the negotiations for the sale to the defendants, and the order of the 26th July 1872, the judgment continued:] When the action was tried before Fry, J. the arguments were substantially confined to the fiduciary positions of the defendant Coaks as solicitor to the defendant Hill, the defendant Bailey as trustee in the bankruptcy of Harvey and Hudson, and of the defendant Watson as a member of the committee of inspection, and it was particularly insisted, on behalf of the plaintiffs, that the defendant Coaks still retained a fiduciary position, though leave had been given to him to bid at the sale by auction, of which leave he had relieved himself, and it was to these arguments that the observations of the learned judge, in giving judgment, were directed, though, as stated by him, it had been faintly suggested that, independently of the fiduciary relationship, there was sufficient in the case to set the contract aside. This latter argument has been strongly pressed upon us by Mr. Cookson, and to it we will now address ourselves. We will, however, first trace the steps by which the agreement of the 13th

July was arrived at. The negotiations having commenced, all parties were desirous that the matter should be carried through as quickly as possible. [The judgment then stated the circumstances under which the agreement was concluded and confirmed, and continued:] It is alleged by the defendant Bunyon that the skeleton case was submitted to the Master of the Rolls for the purpose of ascertaining whether it contained the information which the court would require under the third clause of the agreement. But the statements in it must have been most material in influencing the decision of the Master of the Rolls as to whether he would authorise the plaintiff to enter into a contract, and by the omission from it the of unfavourable report of the three medical men was deprived of its only mitigating qualification. In our opinion, no exception can fairly be taken to the terms of the agreement of the 13th July. We go further, and say that at the time when the Master of the Rolls expressed his decision of the 23rd July that the offer of 40,000*l.* should be accepted, the obligations imposed upon the purchasers by the terms of the agreement had apparently been performed. Every step in the proceedings to obtain the sanction of the Master of the Rolls to the purchase had been taken with the greatest regularity, with the exception of the omission from the skeleton case before referred to, and that omission had been supplied before the final decision was given. We think that, upon the materials before him, the Master of the Rolls arrived at a perfectly right conclusion. But it has been contended on behalf of the appellants that the information afforded by the case which was laid before the Master of the Rolls to enable him to decide, first, whether he ought to sanction the agreement, and, secondly, whether the price offered was sufficient, was not all that the purchasers, having regard to their own information upon the subject, were bound to afford, and that the information actually afforded by them, though not in itself untrue, was misleading and intended to mislead, inasmuch as other information within the knowledge of the purchasers, and of which they were well aware that the court was ignorant, and which, if known, would have led the court to a different opinion, was intentionally and carefully withheld. For the reasons which we are about to state we think that this contention is well founded; but it will be considered, first, what was the real effect of the information actually afforded, and to what extent it influenced the Master of the Rolls in his decision. The information actually afforded to him amounted to no more than this—that the defendant Harvey had been recently examined by the medical officers of three well-known London life insurance offices, who had also seen the Norwich certificates; that two of those offices altogether declined to insure his life; and that the third had agreed to insure it to the extent of 5000*l.* at a premium of 12 per cent. In other words, the court was led to believe that the life was only insurable at a 12 per cent. premium, and it cannot be doubted that it was intended by the defendants Bunyon and Coaks that the Master of the Rolls should so understand the representation made to him by the case. The purchasers having, as will presently be mentioned, effected other insurances upon the life of the defendant Harvey at a less rate than that effected with the

Clerical and Medical Society, a correspondence took place between Bunyon and Coaks shortly after the completion of the purchase as to the expediency of dropping the latter policy; and in reply to a letter from Bunyon, recommending that it should be dropped, Coaks, on the 11th Dec. 1872, wrote as follows: "You must bear in mind that this is a policy to which we referred in our statement of facts as having been granted at 12 guineas per cent., and which fact, no doubt, had its influence with the Master of the Rolls, and the actuaries who pronounced an opinion upon the value of the life interest." The representation so made, if it had been honestly and truthfully made, would have afforded the court sufficient means for judging whether the contract should be approved and whether the price offered was sufficient. Upon this representation there could be but one answer to the question submitted to the two actuaries. Given the amount of the premium, the tables supplied the actuaries with a ready answer to the question; and the approximate agreement between the number of years' purchase assigned by each actuary shows how simple the question was which was submitted to them. Bunyon, who is an actuary of considerable experience, in a letter which is in evidence, addressed by him to Coaks under date the 6th Dec. 1880, when the institution of these proceedings was threatened, stated that at 12 per cent. and 6 per cent. interest, the life interest valued as an annuity was worth exactly 4662 years' purchase, and that at 7 per cent. the value in years' purchase was 4393. But what practical effect had this determination of the number of years' purchase upon the acceptance by the Master of the Rolls of the purchasers' offer? If the 439 years' purchase had been applied to the then clear income taken at 13,000*l.* it would have given a sum slightly exceeding 57,000*l.* as the proper price to be paid. And this was evidently the view taken by the actuaries who, before giving their opinion as to the proper number of years' purchase, but dealing with the income of 13,000*l.*, had separately reported that 40,000*l.* was an insufficient price; but when the reports of the actuaries were brought under the consideration of the Master of the Rolls on the 23rd July, it was urged upon him by Bunyon that the 13,000*l.* might possibly, if not probably, be reduced to 9000*l.*, and it was apparently upon that basis that the decision as to accepting the offer was given, 39,500*l.* being the amount of 439 years' purchase of an annuity of 9000*l.* It may be conveniently here stated that upon the application of the plaintiffs to the late Master of the Rolls, Sir George Jessel, for leave to commence the present action, an affidavit was made by Mr. Brown in opposition to one in support of the application. Whilst that affidavit was in course of preparation Mr. Brown was in communication with Bunyon and Coaks, and in a letter upon the subject of the intended affidavit addressed to him by Coaks, and dated the 4th Dec. 1880, is a passage in the following terms: "No. 3. It is most important that it should appear in your affidavit that it was pointed out to the Master of the Rolls by Mr. Bunyon, whilst the offer was under consideration, that the trust funds were estimated to amount in value to about 300,000*l.*, and that by a change in the investment by the trustees into Government stock the income might be reduced to about 9000*l.* a year. It is

most important to show this, because it will explain why the late Master of the Rolls might adopt a medium view when considering the value under the actuaries' opinions, which he had produced to him, and which, if worked out upon 13,000*l.* a year, would have brought the value much higher than the sum the court determined to take. It is, therefore, I think, of extreme importance that this fact should appear in a separate paragraph in its proper place." The price offered by the purchasers differed so slightly from what would be the proper price upon the basis of 12 per cent. insurance on an income of 9000*l.*, that the Master of the Rolls had no alternative but to accept the price offered by the purchasers. But I must note a further instance in connection with the approval expressed by the Master of the Rolls on the 10th July. It is stated by the defendant Bunyon, in the 25th paragraph of his statement of defence, that upon that occasion he pointed out to the Master of the Rolls that the fact of the defendant Harvey having become one of the combination of the intended purchasers, gave them the advantage of being able to obtain a medical examination of Harvey for the purpose of insuring his life, which other purchasers would not be able to do, and that the Master of the Rolls thereupon said, "No man is obliged to insure his life for the benefit of others." It is doubtless true, as was alleged by the defendant Bunyon, that in addition to the impression produced upon the Master of the Rolls by the representation that the life of Harvey could only be insured at a premium of 12 per cent., the learned judge was further influenced by the statement of Bunyon, that the combination of purchasers had the advantage of being able to insure the life of Harvey, which other intending purchasers could not do. And this view has been even more strongly pressed in the arguments before us; for it has been alleged that Harvey refused to be examined for anyone except for the defendant Coaks and those associated with him, and that this refusal on his part gave him an advantage over all other buyers, and in fact made the life interest unsaleable except to themselves. Of this alleged refusal by Harvey to be examined there is no evidence whatever, except two letters written by his solicitor, the defendant Watson, to Mr. Brown. These letters were read against the respondents, and in this way became admissible for them. But neither the defendant Watson nor the defendant Harvey was called to prove this alleged refusal, although both or either of them might have been examined had it been deemed expedient to call them. Though the defendant Harvey was not bound to submit himself to medical examination, we should be unwilling, in the absence of proof, to assume that he would act so selfish and ungenerous a part as to decline to assist his deceased brother's creditors in realising their property to the best advantage by submitting himself to examination had he been requested so to do, and yet within a very short period to submit to a similar examination with a view to his own pecuniary profit. We will proceed now to consider what information, which would have assisted the court in coming to a proper decision upon the questions under consideration by him, was possessed by the purchasers but was not disclosed to the court. By the case which was submitted to the Master of the Rolls on the 10th

July the separate opinions of Drs. Beale and Pitman, two of the medical men who concurred in the joint opinion of the 25th June, were set forth; each of these separate opinions took a very unfavourable view of the state of the defendant Harvey's health, and strengthened the view that his life was only insurable at a 12 per cent. premium; but the separate opinion given by Dr. Fuller, who also was a party to the joint opinion, and which was more favourable, was not included, though it bore the same date as that of Dr. Pitman. [After stating Dr. Fuller's separate opinion, as given above, the judgment continued:] It is difficult to suggest any reason why the attention of the Master of the Rolls was not directed to this letter of Dr. Fuller other than the fear that it might weaken the effect which the opinions of Drs. Pitman and Beale were intended to produce. The opinion of Dr. Fuller was given in a letter addressed to Mr. Davies, the Secretary of the Law Life Association, and it has been urged in argument that it did not reach the hands of Bunyon before he had finished the skeleton case. If this were so he had abundant opportunity at a later period of placing it before the Master of the Rolls; but as early as the 3rd July Bunyon was expecting the opinion, for in a letter to Coaks on that day he writes: "I have seen Dr. Beale, who turns out to be a friend of mine, and who has written a certificate which I shall have through Mr. Cutcliffe; I shall get the same thing from Dr. Pitman through Mr. Hardy, and no doubt the same thing from Dr. Fuller through Mr. Davies." Again it is admitted that insurances to a large amount were effected by the purchasers on the life of Harvey in the months of July and August 1872, with various insurance offices in Scotland and England, and that these insurances were effected upon premiums of 10*l.* 11*s.* per cent., payable for ten years only. On the 25th June 1872, the same day that the joint opinion of Drs. Pitman, Beale, and Fuller was given, Bunyon opened negotiations with Mr. MacLagan, the secretary of an association of life insurance offices in Edinburgh, known as "The Under-Average Association," with a view to effecting insurances on the life of the defendant Harvey. It is unnecessary to enter into the details of these negotiations; it is sufficient to say that by a letter dated the 1st July 1872 Mr. MacLagan informed Bunyon that the association had that day resolved to recommend to the respective boards to take a sum on Harvey's life as a whole-term risk without profits by limited payments of 13*l.* 14*s.* per cent. for seven years or 10*l.* 11*s.* cent. for ten years, and that it rested with the board to say what sums they would take; that on the 5th July Bunyon wrote to Coaks that he had other acceptances from five Scotch offices for 10,000*l.*, which, with the Clerical and Medical for 5000*l.*, and 4000*l.* with the Norwich Union, would make 19,000*l.*; that on the same date Mr. MacLagan forwarded to Bunyon further acceptances from Scotch offices to the amount of 10,000*l.*; that in the aggregate insurances were effected sufficient to cover the full price agreed to be given for the life interest, and that, with the exception of the policy with the Clerical and Medical, the insurances were effected at a rate of 10*l.* 11*s.* per cent. for ten years. It is, moreover, evident from the correspondence between Sir Samuel Bignold, the secretary of the Norwich Union, and the defendants Bunyon and Coaks, that the latter,

who was a director of that office, had ascertained previously to the 2nd July that the Norwich Union would grant a policy of 4000*l.* upon even less terms than those accepted by the Scotch offices. At this time Sir S. Bignold contemplated becoming a member of the combination in the event of a purchase at the auction. Bunyon was the then actuary of the Norwich Union, and a nephew of Sir Samuel Bignold, and in a letter addressed by Sir Samuel Bignold to Bunyon, under date of 3rd July 1872, after stating that he had that morning had a note from Coaks to the effect that the life estate had not been sold at the auction on the previous day, Sir Samuel Bignold proceeded as follows: "I am glad of this issue. Our board, on the application of Coaks, had agreed to insure E. K. Harvey's life for 4000*l.* at 9 per cent., which, I suppose, will not now be required." On the same day Bunyon, in a letter to Coaks, wrote: "We had agreed that the Norwich Union should not have the life offered until after the auction, and it may be awkward if we are pressed by Brown as to the terms of the acceptances with that company." It may be, as has been urged by the defendants' counsel, that there was no actual acceptance of the proposal; but it is clear that at the time of the auction Bunyon and Coaks well knew that if required they could have a policy upon the terms mentioned. There can be no doubt that this was the "4000*l.* with the Norwich Union" referred to in the letter from the defendant Bunyon to the defendant Coaks of the 5th July. The letter of Mr. Maclagan of the 1st July would in due course of post reach Bunyon before the attempted sale by auction; and at any rate Bunyon and Coaks were well aware, before the skeleton case was laid before the Master of the Rolls on the 10th July, that the life of Harvey could be insured at the rate mentioned in Mr. Maclagan's letter of the 1st July. It was alleged on behalf of the purchasing defendants that the acceptances by the Scotch offices, upon the terms mentioned in Mr. Maclagan's letter, were communicated to the Master of the Rolls, and were taken into consideration by him before he finally approved the sale. Had such been the case there would have been a manifest impropriety in placing the case before the judge without any reference to acceptances, and therefore in a form calculated to mislead. The court would have felt justified in setting aside the sale under circumstances so special as those of the present case. But no evidence of this fact was given on the trial. It appeared, however, that upon the trial Fry, J. took a view of the case favourable to the defendants, and it has been urged before us that they had evidence which they did not then produce. We accordingly deemed it right at the close of the appellants' case to intimate to the respondents' counsel that upon the materials before us we felt that there was a case to be answered, and that they would be at liberty to adduce evidence as they might think proper. Accordingly, Mr. Brown and the defendant Bunyon were examined after Mr. Davey had finished his address for the respondent Coaks. It was apparently deemed unnecessary or inexpedient to examine Coaks, Harvey, and Watson, though there was ample opportunity of doing so. With reference to the suggested communication to the Master of the Rolls of the fact of the

Scotch acceptances no direct evidence was given by Mr. Brown; but in his examination-in-chief he stated that, in the course of a conversation with the defendant Coaks on the 17th July, he asked him how they were getting on with their insurances, telling him that he had heard from an independent source that the purchasers had got a policy from the Pelican Office at ten guineas, and that Coaks then said that the Pelican had followed the Scotch offices, and that he (Mr. Brown) gathered from Coaks that they had got some insurances from the Under-Average Association of Scotland, but that they did not go into details. This circumstantial account of the interview suggested that Mr. Brown, having become acquainted with the fact of the Scotch acceptances, might have mentioned them to the Master of the Rolls, though we have felt great difficulty in coming to the conclusion that a judge of his experience would have sanctioned such a sale if all the materials now suggested to have been before him had been actually taken into consideration. But such an inference was altogether negatived when Mr. Cookson, in cross-examination and in his reply, drew attention to statements in the before-mentioned affidavit of Mr. Brown, and to certain letters which passed between Bunyon and Coaks in Dec. 1872. In the 28th paragraph of the affidavit Mr. Brown stated as follows: "I say that I was from the 15th March 1872 well aware that the said C. J. Bunyon and I. B. Coaks were acting, not on their own behalf alone, but on behalf of themselves and several other persons interested with them in purchasing the said life interest, but I know nothing of the policies which are said to have been effected upon the life of the said Edward Kerrison Harvey." We do not impute to Mr. Brown the slightest intention to mislead the court, but we attach more weight to the very carefully prepared affidavit of the 8th Dec. 1880 than to his recollection upon the occasion of his recent examination, and we are satisfied that he was not made aware of the Scotch insurances at any time previously to the final approval by the Master of the Rolls of the proposed purchase, and this view is borne out by the correspondence between Bunyon and Coaks with reference to the Pelican policy. Bunyon, in a letter to Coaks, dated the 13th Dec. 1872, when urging the surrender of the Clerical and Medical policy, wrote: "So far from there being any representation that we could not insure except at 12 per cent., it was known by Mr. Brown that the Pelican had accepted the sum of 5000*l.*, and, if he knew that, he would have learned the rate of premium;" to which Coaks replied on the following day: "What Mr. Brown knew as to the Pelican was after the statement had gone to the Master of the Rolls." Upon a full consideration of all the circumstances of this complicated case, we can come to no other conclusion than that the opinions of Dr. Fuller, the conditional arrangement with the Norwich Union, and Scotch acceptances were intentionally and carefully kept back in order that the Master of the Rolls might remain impressed with the belief that the defendant Harvey's life could not be insured at less than a 12 per cent. premium. It has been contended on behalf of the purchasing defendants that a purchase made by them was like any other purchase; that the maxims of *Caveat emptor* and *Caveat venditor* were as appli-



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cable to this transaction as to any ordinary case of buying and selling; and that the buyers were under no obligation to disclose the advantages they possessed to the sellers. But we cannot adopt this view. It entirely leaves out of sight the duties of persons dealing with a court of justice. A person desirous of buying property which is being sold under the direction of the court must either abstain from laying any information before the court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material the court should have to enable it to form a judgment on the subject under its consideration. But what was the course pursued by the defendants Bunyon and Coaks? We name them alone, for they were the chief movers in the transaction; but the other members of the combination who availed themselves of their assistance must be equally affected by their conduct. The defendants Bunyon and Coaks knew that the life interest was being sold under the direction of the court, and that a contract for sale would have to be approved by Lord Romilly. But more than this, they had proposed, as we have before pointed out, to furnish the materials to enable Lord Romilly to form his opinion. They knew that the materials which they did furnish were incomplete and calculated to mislead, and they had further materials which, if disclosed, would have given a different complexion to the case, and could hardly have failed to lead the Master of the Rolls to decline their offer. Now, if a party to an agreement obtain the sanction of the court by withholding information which is material, and is known to him to be so, such withholding amounts to fraud, and the agreement ought not to stand. It is no answer to say that the information given to the court was true so far as it went, and that if the court desired further information or further materials, it should have asked for them. The court is neither buyer nor seller, and it is the duty of everyone laying materials before it, for the purpose of obtaining its approval of any transaction, to take care that the materials furnished to guide the court shall not be incomplete or misleading. A purchase which has received the sanction of the court will not be set aside upon slight grounds, but if the approval of the court has been obtained by misrepresentation, or by the withholding of material information through the absence of which the information furnished is misleading, the court will treat such misrepresentation or withholding as fraud, and will act accordingly. The observations of Turner, L.J., in the case to which we are about to refer, are as applicable to cases similar to the present as to that with which he was dealing. The suit of *Brooke v. Lord Mostyn* was instituted in 1853, to set aside a compromise entered into in 1843, which had been sanctioned by the court on behalf of an infant. It appeared, at the time of the inquiry whether the compromise was for the benefit of the infant, that a document relative to the valuation of the estate, and of a character rendering it doubtful whether the valuation which throughout the inquiry had been treated as correct, and was not based on erroneous principles, so as to give an undervalue, was in the possession of the owners of the estate, but was not laid before the master. The compromise was set aside by Turner, L.J., who in the course

of his judgment made the following observations: "It is sufficient to say that in my opinion this document shows that the materials necessary to enable a fair judgment to be formed upon the question whether this compromise was for the benefit of the infant were not fairly and properly brought under the master's consideration—that there was a suppression of material facts that were within the knowledge of Lord Mostyn and his advisers, and were not within the knowledge of the plaintiff, or of those who acted for him. It may be said, perhaps, that the master was satisfied with the information laid before him, and called for no further information; but the question is not whether the master called for further information, but whether the parties having this further information in their possession were justified in withholding it. I am satisfied that information was withheld which was material to have been given, and which, if given, might have altered the conclusion arrived at, and I think the fact of such information having been withheld amounts, in the eye of this court, to fraud." The views thus expressed by Turner, L.J. are, in our opinion, such as should regulate our decision upon the present appeal. Again, it has been argued, and the point ought not to be passed over, that the purchasers gave to the Master of the Rolls all the information which the contract required. But this contract was one which could not be made without the sanction of the court, and the first question is, how was that sanction obtained? By submitting the case to the Master of the Rolls, with the draft agreement, the defendants were trying to induce him to approve and sanction the contract, and in so doing impliedly represented that the case showed the terms on which it might be expected that insurances could be effected. Independently of any such implied representations, it was the duty of those who came for the sanction of the court to state fairly the evidence in their possession as to the facts. In our opinion the defendant Bunyon deceived the court by laying the case before it, when he knew and had in his possession evidence proving that insurances could be effected on much easier terms, and the other purchasing defendants are affected by his knowledge. And even if the facts had been, as alleged by the defendants, that Mr. Brown was informed of the Scotch insurances, we could not assent to the contention on their behalf that they ought not to be held responsible for any failure on his part to communicate the intention to the Master of the Rolls. The defendant Bunyon on his own showing, as before pointed out, took an active personal part in inducing the Master of the Rolls to give his sanction to the contract upon the insufficient materials before him, and must have been well aware, or, at any rate, had very good reason to believe, that the Master of the Rolls had no information, either through Mr. Brown or any other source, upon the subject of the Scotch insurances; and it was the duty of the defendant to see that full information upon the subject was afforded, and, if necessary, to supply any omission in that respect upon the part of Mr. Brown. It has also been contended on behalf of the purchasers that, having regard to the time which has elapsed since the purchase which it is now sought to set aside was completed, the court should not interfere. To this the answer



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is, that when the court is asked to set aside a concluded transaction on the ground of fraud on the part of those against whom relief is sought, and especially when the fraud has been practised upon the court itself, the mere lapse of time is no bar to the relief prayed. It may happen that there has been such an amount of laches on the part of those seeking relief that the court may be of opinion that more injustice would be upon the whole done by granting than by refusing relief; but we can find no trace of any such laches in the present case. As to much of the materials upon which the appellants rely, and upon which, in our opinion, they are entitled to succeed, information has apparently been for the first time obtained by them by the proceedings in the action. This remark particularly applies to the production of the very voluminous correspondence which has been put in evidence, without which the cleverly contrived, and the, for the time, cleverly executed scheme of the defendants could not have been detected and exposed. The plaintiffs represent a large body of creditors, and it is more difficult to hold that a class has, by delay, forfeited its rights, than that an individual has done so; moreover, in the present case there are circumstances to excuse the delay. The proper person to question the transaction was the defendant Hill, the executor of Sir Robert Harvey, or, if he failed to do so, one of the plaintiffs in the suits of *Lacey v. Hill* and *Leney v. Hill*; but the defendant Coaks was the solicitor of the defendant Hill in both suits, and though he was not acting in the suits for either of the plaintiffs, he was the general solicitor of the plaintiff Lacey, and had occasionally acted for the plaintiff Leney, and the order of the 9th Dec. 1880 giving leave to the present plaintiffs to commence this action was made upon the refusal of the defendant Hill to institute proceedings. Moreover, the grounds on which we principally rely for setting aside the contract are the concealment from the Master of the Rolls of material evidence within the knowledge of the purchasers, that is, a misrepresentation to the judge who sanctioned the contract; and it would be very difficult for any person not a party to the action to ascertain whether any such concealment or misrepresentation had taken place. But there are many cases in which, though the delay may be fairly attributable to want of knowledge on the part of the plaintiffs of facts which had been ascertained by means of the action, yet in consequence of the prejudice to the defendants arising from the delay the court might refuse relief which, if sought promptly, would have been granted. In the present case, though it is not one in which relief should be refused, the court may, and in our opinion ought to prevent the defendants suffering any loss from the time which has elapsed since the contract, and for this purpose the defendants ought, in taking the accounts, to be allowed all payments made for premiums on the policies and for interest on money borrowed to pay for the purchase, and ought to have repaid to them with interest the sums paid out of their own means for the purchase, and to be relieved of liability for the sums borrowed for the purchase and still remaining due from them. Having arrived at the conclusion that the purchase must be set aside upon the grounds which we have stated, we deem it unnecessary to enter upon the consideration of the alleged fiduciary position of

the defendant Coaks towards the estate of Sir Robert Harvey, which was the substantial question discussed before Fry, J.

*Appeal allowed.*

Solicitors for the plaintiffs, *Whites, Renard, and Co.*, for M. S. Emerson, Norwich.

Solicitors for the defendants, *Johnson and Master; Smythe and Brettell; Blake and Haseltine*, for Field, Son, and Pulley, Norwich; *S. W. Johnson and Son; Aldridge, Thorne, and Morris*, for Copeman and Cadge, Loddon; *G. F. Hudson, Matthews, and Co.*, for Bailey, Cross, and Barnard, Norwich; *W. Sturt*, for I. B. Coaks and Co., Norwich.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Monday, July 14.*

(Before KAY, J.)

SNOW v. WHITEHEAD. (a)

Covenant—"House"—Water—Adjoining cellars—Percolation—Damage.

*The defendants were the assignees of a piece of land which adjoined the plaintiff's, and which was subject to a covenant entered into with the plaintiff that no house should be erected upon the land of less value than 400l. The defendants commenced to build two houses or shops, each two stories high, upon the land, but the local board objected, for certain reasons, to the mode of building.*

*In consequence of these objections the two houses were thrown together by making a communication between them on the ground floor. On the plan, as submitted by the defendants to the local board, there was also shown a communication on the upper floor, but this did not appear to have been carried out. As altered, the houses had two separate doors opening to the road, and two separate shop windows fronting to the road. They each had a separate staircase, but one of them had no kitchen. In the yard behind, which was common to the two houses, there was only one water-closet and ashpit. It was admitted that each of the two houses, if they were to be considered as separate, was of less value than 400l., but that the value of the two exceeded that sum.*

*One of the houses adjoined a house of the plaintiff's. The defendants had fitted their house with pipes which did not communicate with any drain. The water flowing down these pipes settled in the cellar of the defendants' house, and thence percolated through the ground into the plaintiff's cellar, which was on a lower level, and did some injury.*

*The questions were, first, whether a breach of the covenant had been committed; and, secondly, whether the injury done to the plaintiff's cellar by percolation of water was an actionable wrong.*

*Held, that the building substantially formed two houses and not one, and that, therefore, a breach of the covenant had been committed.*

*Held, also, that the defendants, by allowing the water to escape from their cellar, had committed an actionable wrong, and were liable to pay damages.*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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*Ballard v. Tomlinson* (50 L. T. Rep. N. S. 230; 26 Ch. Div. 194) not followed.

By an indenture, dated the 15th Jan. 1870, a piece of land situate at Woodford, Essex, on the north side of and adjoining the Maybrook-road, was conveyed by the British Land Company Limited to Frederick Beard.

The land formed part of an estate which was offered for sale by auction in forty-three lots.

The indenture contained a covenant by the vendors, the company, for themselves and their assigns, and by the purchaser, F. Beard, for himself, his heirs, executors, administrators, and assigns, with and to each other, and, as to the purchaser, with and to the owners or owner of any land to which the stipulations specified in the second schedule related (viz., the land which remained vested in the vendors) other than the land conveyed, that the covenantors would comply with such stipulations.

One of the stipulations was that, on the premises comprised in the indenture, no house should be erected of less value than 400*l.*, and that the value of a building should be the amount of the net first cost, in materials and labour, of construction estimated at the lowest current prices.

In Aug. 1878 the plaintiff Snow became the purchaser at an auction of certain lots forming a portion of the land which was conveyed to F. Beard, subject to the same stipulation.

In 1882 another adjoining lot was purchased by the defendant Whitehead. An interest therein was claimed by the defendant Wilson.

The plaintiff alleged that the defendants proceeded to build upon their land three houses containing shops, and a fourth shop at the end of the third house without any rooms over it; that the second and third houses adjoining his property were connected by a doorway in the party wall on the ground floor; that there was also a doorway in the party wall between the third house and the fourth shop; that neither the house which had no doorway in the party wall, nor either of the other two houses, nor the fourth shop, was or would be, when completed, separately of the value of 400*l.*; and that the doorways in the party walls might be bricked up at any time, when all the houses and the fourth shop would be as distinct and separate tenements in fact as they were in appearance. He also alleged that the three houses and the fourth shop were four distinct houses within the meaning of the stipulation.

The plaintiff had built on his land houses with shops in accordance with the stipulation, and on the faith of its being complied with by the owners of the other lots subject to it; and he contended that it would be detrimental to his property if the defendants' houses and shop then being built were allowed to remain.

The plaintiff further alleged that the defendants, before their buildings were commenced, had caused a large hole to be dug on their land, in which a quantity of water had accumulated, and that some of the water was allowed by them to escape and run into the basement of the plaintiff's adjoining premises, causing damage to his property.

The plaintiff claimed a declaration that the defendants' houses and buildings constituted a breach of the stipulation, and asked for an injunction to restrain the defendants from erecting,

or permitting to continue on the premises, any house which should not be of the value required thereby, and he also claimed damages for the injury caused to his premises by the water so allowed to escape by the defendants.

The defendants alleged that they had, since the commencement of the action, completed two houses (which two they were building, and no more, when the action was commenced) in accordance with the stipulation.

The defendant Wilson admitted that he caused a hole to be dug on the land, but only for the purpose and in course of laying the foundations of the houses. Both defendants submitted that the action was premature and frivolous, and ought to be dismissed with costs.

The evidence *vis à vis* was conflicting. It is sufficiently referred to in the judgment.

The action now came on for trial.

*Graham Hastings*, Q.C. and *G. E. S. Fryer*, for the plaintiff, contended that the evidence showed that the defendants' buildings formed separate houses, which were not of the value specified in the covenant; and that the defendants were liable to pay damages, estimated at from 3*l.* to 4*l.*, for the injury caused by the percolation of water from their cellar.

*Robinson*, Q.C. and *Boome*, for the defendants, submitted that in the erection of the houses the defendants had done all that was required of them by the local board, and that they had substantially complied with the covenant. They referred to

*Richards v. Swansea Improvement and Tramways Company*, 38 L. T. Rep. N. S. 833; 9 Ch. Div. 425,

upon the question of the erection of the houses; and to

*Ballard v. Tomlinson*, 50 L. T. Rep. N. S. 230; 26 Ch. Div. 194,

to show that the defendants were not liable on the claim made for damages to the plaintiff's premises.

*Hastings*, in reply, referred to

*The London, Brighton, and South Coast Railway Company v. Humphrey* (not reported).

KAY, J.—The object of this action is mainly to enforce the provisions of a covenant affecting certain land, which was to the effect that no house should be erected upon any part of the land of a less value than 400*l.*, and that the value of a building should be the amount of the net first cost in materials and labour. The defendants recently became the possessors and occupiers, under a lease for a long term of years, of a piece of land subject to this covenant. It is a triangular piece of land, having one of the larger sides pointing to the Maybrook-road, and running at an acute angle, as appears on the plan before me. On the land adjoining this the plaintiff, the covenantee, has erected certain houses of a class that are very often seen in the neighbourhood of towns—houses three stories high, having on the lower floor a shop and two stories above the shop. The defendants, who had acquired this triangular piece of land, began to erect three houses upon it, two of which were only two stories high, and the other, at the extreme corner, where the acute angle is, was a smaller building one story high. The question arose whether the larger buildings were in accordance with the require-

ments of the local board. These houses, as originally intended, were so constructed that the local board did not approve of them, and, the plan being submitted, intimated their disapproval. Accordingly the plan was altered, and I understand the chief reason for the objection by the local board, and why they would not allow the three houses to be so erected, was that there was not sufficient air space behind each of the three houses intended to be erected. An amended plan was submitted in which the two larger houses were thrown together, a communication being shown upon the plan as intended to be between them on the ground floor and upper floor. The houses as so intended to be erected would have been houses each having a door in Maybrook-road and shop windows in that road, each of them in separate structures. One of the houses, it is said, had a kitchen, but the other had not, and in the yard behind, which was common to the two houses, there was a water-closet and ashpit, but only one. The local board, however, approved of the altered plan—which was also altered in some other respects to which I need not refer—and were willing to treat the two houses, upon these communications being made on the ground floor and the upper floor, as being one house. It is suggested that even thus the air space behind would not have been sufficient. There is no distinct evidence as to that, but anyhow the throwing the houses together in that way did satisfy the local board. Now the case made out in the evidence brought before me is this: These houses thus thrown together were, it is contended, in fact one house only, because the local board treat them as one house, and therefore the court must be satisfied that they are one house within the meaning of this covenant. If they are one house it is admitted that they are together of the value of 400l. In the first place, the fact that the local board treat the two houses as one is not conclusive at all that they were really one house within the meaning of the covenant. In the second place, the evidence that they really are one house has broken down. The surveyor of the local board was called to prove that they were one house, and to give evidence as to the negotiations with the board, and the sending in of the altered plan showing the communication on the lower floor and the floor above, with which the local board was contented. He himself says, as I understand, that the communication was not actually made on the floor above, and he says distinctly that joining one floor would not, in his opinion, constitute the building one house; so that the defendants, who bring forward this witness, prove by the evidence of their own witness that this is not one house in accordance with the requirements of the local board. Why, therefore, should it be held to be one house within the meaning of the covenant? Of course the answer is the only answer that could be given. Some other witnesses said that, notwithstanding that fact, in their opinion it is one house. The court has after all to determine what is the meaning of the covenant, and in order to do that it is necessary to look at the object and intention of a covenant of this kind. The object and intention of the covenant was quite clearly that a certain class of houses of a respectable kind might be built upon the property. The peculiarity of the case is, that it is proved that upon the

triangular piece of land it is not possible to build three houses which would comply with the requirements of the local board, and yet be of the value of 400l. I do not mean to say that it would not be possible to do so by carrying up the buildings to a very great height, or by constructing them of very costly materials. Looking, however, to the nature of the ground and the nature of the buildings in the neighbourhood, it is not practicable, by building upon this curiously shaped piece of land, to erect three houses which would be of the value required, because, supposing these two houses were run up another story, and so made of the value of 400l., there would not be any yard room whatever for the third house, in compliance with the requirements of the local board. Accordingly the plot which would then be left must either be left unbuild upon, or else added to the houses which I am supposing to be raised another story. The practicable way of dealing with the matter seems, according to the evidence, to be this, to make these houses, now called A. B. and C. into one house; that is to say, to build upon this piece of land one house of the value of 400l. I do not think that if that were done the plaintiff would have any right to complain, and it seems it might be done with the present building without any great expenditure. But at present I am clearly of opinion that the covenant has not been complied with; that these houses A. B. and C., as designed to be built, formed at least two, if not three, separate tenements. The order of the local board required them to be altered so as to make two of them into one, and the board made what seems to me a very reasonable requirement, that at least there should be communications on the upper floor as well as the lower. That requirement has not been complied with. As to whether that would be enough to bring them within the covenant, I confess I feel some doubt. I think some structural alteration would be necessary. I think that the covenant has not been observed, and I should have come to that conclusion without the authority of the unreported case of *The London, Brighton, and South Coast Railway Company v. Humphrey*, which has been referred to. The argument that the two houses must be one house because, if they are treated as two, the second house would have no proper accommodation, is one I cannot listen to for one moment. You cannot say two adjoining structures must be one house because one of them has not got a water-closet; that might be a good reason why they should not be made into one house, but it would not be a good reason why they should be considered as being one house. It appears to me that these houses certainly are two houses within the meaning of the covenant, and that I must treat the covenant as not having been complied with. Then there is another question which I have to decide, and which involves a point of law of very considerable importance. In constructing one of the houses built upon this land referred to as B. in the evidence (which houses, as originally constructed, were only two stories high, and not completed, but which have since the beginning of the action been raised an additional story) the defendants excavated the ground in order to form a cellar, and put pipes to carry off the water which were not connected with any drain. The rain came down the pipes, flowed into the cellar, and col-

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lected there in a pool, and it was evidently a considerable pool of water, because it was used, as the evidence shows, for the purpose of making mortar during the construction of the building. The plaintiff built a house, which adjoined this house of the defendants. The water in the pool never touched the party wall. The plaintiff had a cellar of his own under the house adjoining B., which was somewhat deeper than the cellar under B., and the water which the defendants allowed to collect in the cellar of the house B. found its way, I presume by percolation, through the ground into the cellar of the plaintiff's adjoining house, and he has been put to some expense—3*l.* or 4*l.*—in getting rid of this water which so came to the cellar of his house. The question is whether that is a wrong. I was referred to the case before Pearson, J. of *Ballard v. Tomlinson* (50 L. T. Rep. N. S. 230; 25 Ch. Div. 194), which shows that this was not a wrong in law in respect of which an action would lie. I have read that case more than once with very great interest and attention, and, with all respect for the learned judge who decided it, I am clearly of opinion that I am bound by authorities of great weight, and not only of considerable antiquity, but also decisions of higher tribunals, which seem to me entirely inconsistent with the decision in *Ballard v. Tomlinson*. The law is very ancient law expressed in the maxim, *Sic utere tuo ut alienum non lædas*, and in the old case of *Tenant v. Golding* (1 Salk. 21, 360). The case is reported twice in the first volume of Salkeld. In the report, at p. 21, it is stated: "The plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy and parted by a wall, part of the defendant's house, which the defendant *debuit et solebat reparare*; and that for want of repair the filth of the privy ran into his cellar, &c.; judgment by default; and after a writ of inquiry it was moved in arrest of judgment, that this being a charge laid upon the owner himself, the plaintiff should have showed a title by prescription; *sed non allocatur*, for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it." Holt, C.J. (at p. 361) gave judgment for the plaintiff: "The reason he gave for his judgment in the principal case was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape; or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to repair; as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next the old privy before, in such case the plaintiff must defend himself. But that cannot be the case here, for then he could not be bound to repair; and upon the words *debet reparare* he must be acquitted upon the trial. But, on the other side, if A. has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must

repair the wall of the house of office; for he whose dirt it is must keep it that it may not trespass." Now that case came on to be considered with several other decisions, which are all referred to in the judgment in *Rylands v. Fletcher* (19 L. T. Rep. N. S. 220; L. Rep. 3 E. & I. App. 330). That was a case where a man made a reservoir on his own land, which he had a perfect right to do. He employed competent persons, an engineer and a contractor, to construct it. He was the owner of a mill standing on land adjoining that under which certain mines were worked by another person. The mines had been worked up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages, and flooded the mines. Cairns, L.C., in giving judgment, after stating the principles upon which he thought that the case must be determined, said: "These simple principles, if they are well founded, as it appears to me they are, really dispose of this case. The same result is arrived at on the principles, referred to by Blackburn, J. in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words: 'We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass and corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there) harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And, upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.'" Those authorities, which, as I have said, are of the highest possible kind, have recognised, and again and again affirmed, the

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rule that anyone who brings on his land that which, in a natural state of the land, would not be there—whether it be filth, or water, or anything else—is bound to keep it there, and answerable if it escapes in any way and injures the land of a neighbour, unless it be owing to the neighbour's default. It would be very easy perhaps to draw some kind of distinction between *Ballard v. Tomlinson* (*ubi sup.*) and some of those authorities, but I am entirely unable to draw any which would amount to a distinction in point of principle. The short effect of that case was this: The plaintiff and the defendant were the owners of adjoining lands, and each of them had on his own land a deep well going down to a depth of 300 feet below the surface. The distance between the wells was ninety-nine yards, and the plaintiff's land was at a lower level than the defendant's. The defendant turned sewage from his house into his well, and this sewage polluted the water in the plaintiff's well. The defendant, in other words, poured filth on to his land which escaped into the well of his neighbour and poisoned his neighbour's well, so that he did not observe the rule that, having brought upon his land that filth, he was bound to keep it there and see that it did not get in any way whatever on to his neighbour's land. The argument, so far as I understand it, in that case seemed to be this: The water would not have got there if his neighbour had not taken water out of his own well. By taking water out of his own well he drew the water from his neighbour's well on to his own land through his neighbour's land. But that was a perfectly lawful act; he had a right to pump as much as he liked on his own land. It has been decided, as we all know, that, if a man pumps water from his own land, and, by so doing, drains his neighbour's well dry, yet that is no wrong or harm in respect of which his neighbour can maintain an action. But, if one neighbour poisons his own land, so that anybody, in the natural state of his well on adjoining land, has that poison coming into the water in his well, how can it be said that the man who so poisons his land to the injury of his neighbour is keeping in the filth which he is bound to keep in and see that it does not escape? I am not able to make any distinction between the case of *Ballard v. Tomlinson* (*ubi sup.*) and the other authorities to which I have referred, and I therefore prefer to follow the well-known case of *Tenant v. Golding* (*ubi sup.*) and the long series of cases down to *Rylands v. Fletcher* (*ubi sup.*), which affirm very distinctly the proposition that, as an application of the maxim, *Sic utere tuo ut alienum non ledas*, anyone who collects upon his own land water, or anything else which would not, in the natural condition of the land, be there, ought to keep it in at his peril, and that, if it escapes, he is liable for the consequences. This case seems to me to come within that principle. The matter is a very trifling one, and, if the plaintiff had not been right upon the other point, I should not have thought it proper to encourage him in maintaining an action in this division of the High Court for so slight an amount of damage, which is said to be between 3*l.* and 4*l.* I assess the damages at 3*l.* It seems to me that this water collected in the cellar of the house B. constructed by the defendants was not kept there by them as it ought to have been, but did percolate and get into the

cellar of the plaintiff's house adjoining thereto, and that seems to me a wrong within the decision in *Rylands v. Fletcher* (*ubi sup.*). I accordingly order that the defendants do pay to the plaintiff 3*l.* as damages. As to the rest, it being admitted that the houses are not of the value of 400*l.*, there will be a declaration that they are separate houses, and the defendants will be ordered so to construct the houses as to bring them within the terms of the covenant.

Solicitor for the plaintiff, Charles Blake.

Solicitors for the defendants, G. and W. Webb.

July 25 and 26.

(Before KAY, J.)

Re FLOWER AND THE METROPOLITAN BOARD OF WORKS. (a)

*Vendor and purchaser—Trustee vendors—Receipt of purchase moneys—Attendance of trustees—Authority to co-trustee—Breach of trust.*

Where trustees are vendors a purchaser from them has, as a general rule, a right to insist upon paying the purchase money in the presence of all the trustees, or into a bank to their joint account, and is not bound to pay the money to one of their number on a written authority from his co-trustees. Payment in the presence of all is payment to all if they accept the payment.

Freehold and leasehold property having been agreed to be purchased by the Metropolitan Board of Works from the trustees (three in number) of a certain will, the board made a requisition that the trustees should attend personally, on completion of the purchase, to receive the purchase moneys, or that they should give to the board a written direction, signed by the trustees, for payment of the same purchase moneys to their joint account at some bank. The trustees objected to this, and desired that the moneys should be paid to one of their number, to whom they proposed to give their written authority to receive it.

Held, that the principle in *Re Bellamy* and *The Metropolitan Board of Works* (48 L. T. Rep. N.S. 801; 24 Ch. Div. 387) applied to the case, and that the requisition must be complied with.

THE Metropolitan Board of Works were authorised to take, and required for the purposes of a storm relief sewer supplemental to the main drainage system, the riverside premises at Limehouse, known as London Wharf; and on the 19th Feb. 1884 the board entered into a contract with Mary Flower, Wickham Flower, and Philip William Flower, executors and trustees of the will of John Wickham Flower, for the purchase of one moiety of such property at the price of 4350*l.*

On the same day the board entered into a similar contract with Cyril Flower, M.P., James Brand, and Wickham Flower, executors and trustees of the will of Philip William Flower, for the purchase of the other moiety thereof at a like price.

The purchased property was partly freehold and partly leasehold. The vendors of both moieties sold as trustees, in pursuance of a trust for sale contained in the wills of the testators.

One of the trustees resided in South Wales,

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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and as to one other, viz., Mary Flower, there was some question as to whether, at the time of these transactions, she was resident in London or in Devizes. The rest of the trustees resided in London.

On the 8th May 1884 the board made a requisition, applying to both moieties, that the vendors being trustees should attend personally on completion of the purchase to receive the purchase moneys, or that the purchase moneys should be paid in each case by the purchasers into a bank to the joint account of the trustees, under a written direction to be signed by them and given to the purchasers.

The vendors refused to adopt either of such alternative courses, but on the 9th May 1884 they replied that Wickham Flower, a trustee of both estates, would obtain from his co-trustees a written direction for payment of the purchase moneys to him.

The board were not satisfied with this answer, and insisted upon their requisition being complied with. A somewhat long correspondence ensued, and at length, on the 12th June 1884, as regarded the moiety of the late Philip Wickham Flower, the vendors sent an amended reply stating that they were selling as executors of the will of Philip Wickham Flower; that they could not, without great inconvenience, all attend at the office of the board to receive the purchase moneys; and that they were sending an authority in writing, signed by Cyril Flower and James Brand, to the board for payment of the money to Wickham Flower. With reference to the proposal to pay the money into a bank, the reply proceeded to state that the suggestion could not be acceded to, and that the accounts of Philip Wickham Flower's estate had, as a matter of family arrangement and convenience, and by direction of the beneficiaries, been kept by P. W. Flower and Sons, a firm of merchants, and that the practice, for a long time past, had been to pay purchase moneys direct to them, which course would be pursued with regard to the purchase moneys of London Wharf when received.

The authority referred to in the amended reply was as follows:

To the Metropolitan Board of Works and to their Solicitors or Agents.

We hereby authorise and direct you to pay the purchase money or sum of £350k., payable by you to us for our interest in London Wharf, Limehouse, to Mr. Wickham Flower, of 1, Great Winchester-street, London, one of the vendors and co-executors with ourselves of the late Mr. Philip William Flower's will, and his receipt will be a sufficient discharge to you for the same.—Yours, &c.,

Dated this 26th May 1884.

CYRIL FLOWER.  
JAMES BRAND.

The vendors offered in their amended reply to get the proposed direction confirmed in writing by all the beneficiaries, at the expense of the board.

The board, however, declined to comply with the vendors' proposals, and accordingly, on the 2nd July 1884, they took out two summonses, under the Vendor and Purchaser Act 1874, to try the validity of their requisition.

The summonses were adjourned into court, and now came on to be heard.

W. Pearson, Q.C. and Frank Pownall for the purchasers.—The question here is similar to that raised in *Re Bellamy and The Metropolitan Board of Works* (48 L. T. Rep. N. S. 801; 24 Ch. Div.

387). The only authority that the trustees may authorise one of their number to receive purchase money is a dictum of Lord Hatherley, when Vice-Chancellor, in *Webb v. Ledsam* (1 K. & J. 385, 388). That dictum has not met with the approbation of conveyancers. It is merely a statement by the judge that he has not been able to find any authority for holding a man liable to pay over again purchase money which he has paid to one of several trustees upon a receipt signed by them all. Lord St. Leonards, in his *Vendors and Purchasers* (14th edit. p. 667), states that what is proper to be done by the purchaser is that which we say should be done in the present case. The question is not only whether the trustees can authorise one of their number to receive the money, but whether, as was put by the Court of Appeal in *Re Bellamy* (*ubi sup.*), a prudent purchaser is liable to go into it at all, and whether it is not a proper and reasonable thing for him to require that either they should all attend to receive the money, or they should authorise it to be paid into a bank to their joint account. [They were stopped by the Court.]

*Graham Hastings, Q.C., J. G. Wood, and Manby* for the vendors.—*Re Bellamy* (*ubi sup.*) has nothing to do with this case. The question really is, whether by doing what the vendors say they are willing to do, the purchasers are involving themselves in a breach of trust. The purchasers are bound to pay to one of the trustees, if that trustee produces a receipt and direction by the others to pay to him. It is equivalent to a payment to all. Only one can receive it. In *Re Bellamy* it was put on the ground that the delegation to an agent was a breach of trust. Here the trust property is vested by will in these trustees, and the will provides that one trustee shall not be responsible for the receipts of the other trustees, but only for his own wilful defaults. The object of such a clause is to show that if, for the sake of formality, two trustees out of three sign the receipt, that is perfectly right. It is what the trustee who receives the money does with it afterwards constitutes the breach of trust, but that does not affect the purchaser. In *Brice v. Stokes* (11 Ves. 319) the conclusion Erskine, L.C. came to was, that the money was received only by one, that it was received on the receipt of them all, and that the question was as to the liability of the others, not only by reason of the receipt, but by reason of the misapplication of the fund afterwards. There the trust for sale had not been exercised necessarily for the administration of the trust as here, but simply for the purpose of converting realty into personalty. [KAY, J.—If trustees allow money to get into the hands of one of them, by whom it is lost, they are all liable. The receipt is the thing which makes them liable.] *Brice v. Stokes* is an authority that that is not so. In that case there was an authority for one trustee to receive, and he was allowed to receive the money by the others. [KAY, J.—There lies the distinction between that case and *Stykes v. Guy*, 1 Mac. & G. 422.] The judgment in *Brice v. Stokes* has been universally accepted by the text-writers. In *Lewin on Trusts* (5th edit. p. 239) it is said: "When the property is reduced into possession by actual payment, as both trustees cannot receive, but both must join in signing the receipt, the money may be paid for the time to one with-



out responsibility on the part of the other. A trustee will not be justified in allowing the co-trustee to retain the money in his hands for a longer period than the particular circumstances of the case may necessarily require." That is the crucial test. [KAY, J.—Lord St. Leonards observes that if the money is paid to one, as it is impossible the whole can be got together, the purchaser is satisfied, or the purchase money can be paid to their account, and then it cannot be disposed of or dealt with except by their direction. If one of the trustees act for himself and the others, a payment of the purchase money to him will be held to be in his character of trustee, but even such a payment should be avoided: Sugd. V. & P. 14th edit. p. 667.] The rule must come from this, that it is not physically possible to pay more than one person. If three trustees attend to receive the purchase money, they cannot all receive it. It is paid into the hands of one. They are all present, and it is just the same as paying it to all. What can it matter whether the assent is signified by the presence of the other trustees or by their writing? That has not been altered by *Re Bellamy*, because there the decision really turned on the fact, that the payment was a payment to the solicitor. Cotton, L.J. referred to that in discussing *Speight v. Gaunt* (48 L. T. Rep. N. S. 279; 50 Ibid. 330; 22 Ch. Div. 727). It is said that a purchaser ought never to pay to one trustee only, but into a bank to the account of all. That is a delegation of authority. The bank are agents of the trustees. If the bank fails the protection is gone. If paid into a bank it is just the same thing as paying to the agent of the trustees. They do not receive it themselves, but their account receives it, and the fact that it can be drawn out by the joint cheque of the trustees makes no difference, because, if it is paid to the account of an agent, it can only be dealt with properly by the joint delegation of the trustees. All the purchaser is entitled to is the receipt of the vendors for the money. He is entitled upon that receipt to pay the money in such a way as not to involve himself in a breach of trust. We admit that *Re Bellamy* decides that the payment to an agent is a breach of trust, and that the purchaser is involved therein if the agent should misapply the money. But no decision can be produced that, if two out of three trustees say, verbally or in writing, Pay the money into the hands of the third, that is not a good payment. It is the authority which the other two gave to the one which exonerates the purchaser:

*Webb v. Ledsam* (ubi sup.).

[KAY, J.—The Court of Appeal has held in *Re Bellamy* that the most positive authority to an agent to receive the money will not exonerate the purchaser. At any rate, the purchaser has a right to say that he will not be satisfied with the most distinct authority to an agent, unless the circumstances are such as make it absolutely necessary that such an authority should be given, but he may insist on payment to all.] The decision in that case was simply that three trustees could not delegate to a stranger the authority to receive the money. [KAY, J.—It seems to me it decided no such thing.] It is not a payment to all till it has got into the hands of the three trustees, and if the purchaser puts the money

down the payment is not completed until the trustees have taken possession of it. It must happen that one of the trustees takes it up, and what is that but a payment to one with the assent of all? [KAY, J.—The taking it up is a subsequent act which the purchaser has nothing to do with.] The mere fact that the trustees may get the money is not enough. It is true that in *Re Bellamy* there is that observation about its being prudent and cautious. Cotton and Bowen, L.J.J. put it on the ground that it was a breach of trust before the Conveyancing Act 1881, and that the law had not been altered by that Act. [KAY, J.—As I understand it, these three propositions are maintained by your argument: If payment is made to one trustee without any authority from the others, that would be a bad payment; if payment is made with the authority of the others, it is good, though no receipt is given; and if it is paid with a receipt, it is good, though no other authority is given.] Then comes the question whether the course we propose is not a reasonable one to take. One of the trustees is resident in South Wales, and another in Devon. Are they to be dragged up to satisfy a requisition of this kind? That is vexatious in the highest degree no one can deny. It can only be done for the sake of harassing the vendors, because it cannot be supposed that there is the slightest risk in the transaction. Then, further, as to the payment into a joint account at a bank. Why should the vendors have the trouble of opening a banking account at some bank for the purpose of drawing the money out again the next day? The bank would require a commission, and it is unreasonable to ask such a thing. Assuming that the court should feel bound by the authority of *Re Bellamy*, still there are circumstances here which render it desirable that that decision should not be applied.

No reply was called for.

KAY, J.—I think the purchaser has a right to insist on this requisition, the object of which is to make him perfectly safe without embarrassing himself with anything which may arise between the vendors. The case is this: There are three trustees, who are trustees for sale, and who have sold certain property. The purchase of that property is to be completed, and the vendors say, "Hand the purchase money to one of our number, and he will produce to you the conveyance with the receipt on it." The purchaser says, "No, I am not satisfied with that; I would rather pay it to your joint account at a bank. I do not want to be embarrassed with any questions which may arise hereafter, and I want to make myself perfectly safe." Now, if it had not been for the decision of the Court of Appeal in *Re Bellamy* and *The Metropolitan Board of Works* (48 L. T. Rep. N. S. 801; 24 Ch. Div. 387) I should have said, on the authority of *Webb v. Ledsam* (1 K. & J. 385, 388), that what was proposed to be done would make the purchaser perfectly safe, and that he would not be reasonably justified in requiring anything else to be done. But I have tested the argument that has been addressed to me in this way. I asked, first, this question: "Suppose the requisition be, that you shall pay to one of these trustees, without his producing any receipt from the others, or any authority by the others to receive the money, would that be a good payment?" It is admitted



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frankly that it would not. The purchaser might then be possibly obliged to pay his money over again. Then I asked, secondly, "Suppose the one trustee had said, 'I will produce a written authority from my co-trustees that I alone shall receive the money,' would that do?" It was said that that would be a good payment. Why? The reason given was, because in that case there would be an authority from the co-trustees to the one trustee to receive the money which, without their special authority, he would have had no right to receive. The third question I put was this: "Suppose there was no such written authority at all, but the trustee said, 'I will produce to you the conveyance with the receipt of myself and my co-trustees for the money indorsed on it, and you shall pay the money then to me,' would that do?" It was said that that would be a good payment which would exonerate the purchaser. Why? Only because the receipt would be equivalent to the written authority in the other case, and then the trustee would have an authority from his co-trustees to receive the money, which he could not receive without that special authority. Therefore it comes to this, that the single trustee, who is to receive the money, is made, for the purpose of that receipt, the agent of his co-trustees. Without a special authority to receive the money, it is admitted by the argument that he could not receive it so as to make the purchaser safe. Have the trustees a right to make one of themselves agent to receive the money or not? Obviously, if they do, it may be the one particular trustee who, without that special authority, had no right to receive the money (I do not suppose anything of that kind would happen here, but I am looking at it from a legal point of view) might be enabled by the authority so given to him to receive the money and misapply it, and it might be lost to the trust. The theory of every trust is, that the trustees do not allow the trust money to get into the hands of one of them, but they all exercise control over it, taking care that it is in the hands of all, or invested in their names, or placed in a proper bank in their joint names. It is quite clear that, if by the act of the trustees they enable one of themselves to receive the money, they are liable for that receipt just as much as if they all received it, because they have enabled the one trustee to do that which, but for the special authority, he would not have been enabled to do. The reason for appointing more than one trustee is, that they shall take care the money shall not get into the hands of one of them alone, but shall always remain under the power and control of every one of them. They have no right, as between themselves and the *cestuis que trust*, unless the circumstances are such as to make it imperatively necessary to do so, to authorise one of themselves to receive the trust money, and therefore the case of their authorising one of themselves does not, for the purpose of the decision in *Re Bellamy*, differ in the least degree from the case of all of them authorising any other agent to receive the money. In *Re Bellamy* I was of opinion that the 56th section of the Conveyancing Act 1881 (which makes the possession by a solicitor of a purchase deed with the receipt of the vendors upon it a sufficient receipt to him to receive the money) applied to the case where the vendors were trustees. The case went to the Court of Appeal, and all the Lords Justices, as I

understand, agreed in that, but then they said this, and as this is the reason of the decision I will not give it in my own words, but in the words of Cotton, L.J.: "I think it may be safely stated as a general rule under ordinary circumstances that trustees are not justified in authorising their solicitors or other agent to receive purchase money which ought to be paid personally to them." I never doubted that for a moment; that certainly is the law; but does not "other agent" include one of themselves? Suppose there are three trustees and there is a sum of 10,000*l.* to be paid, are they justified in allowing one of themselves to receive that money any more than they are justified in allowing any other agent, not one of themselves, to receive it? Most certainly not. The duty of trustees is to prevent one of themselves having the exclusive control over the money, and certainly not, by any act of theirs, to enable one of themselves to have such exclusive control. That is contrary to their duty, and, although it differs in degree, it is precisely the same kind of breach of trust which is committed by authorising their solicitor or any other agent outside themselves to receive it. Therefore, if the purchaser is not bound to pay to the agent of the trustees, not being one of themselves, upon that agent producing a power of attorney from the trustees, or, if he is a solicitor, the purchase deed with the receipt indorsed upon it (which is now equivalent to a power of attorney in the case of a solicitor being the agent), how is he bound when one of the trustees says, "I have got authority from my co-trustees to receive the money, I am their agent to do that which, but for a special authority, I should not have any power to do," how is he bound to pay to that one trustee any more than to a solicitor? I confess that I do not see that he is. It seems to me quite plain that the purchaser has nothing to do at all with the question whether the authority is a good one or not. He is not bound to investigate that. All that it concerns him to say is this: "My vendors are three trustees; I am not exonerated unless the money gets into their hands; I do not choose to embarrass myself by any inquiry whether they have given a proper authority to their co-trustee to receive it or not; I will see that that money gets into their hands, or, what will satisfy me equally well, I will pay it into a solvent bank, approved by me, to their joint account, and then I shall be completely exonerated." Is he, or is he not, to use the language in *Re Bellamy*, "justifiably prudent" in doing that? In my opinion he is. It might happen, for aught he knows, that the trustees never gave any authority to the co-trustee to receive the money. The circumstances might be such that the payment was a bad payment altogether as between him and the trustee. The purchaser does not choose to be embarrassed with that question. He says: "I want to make myself safe," and *Re Bellamy* has decided that he has a right to do so, that he has a right to say, "I will pay this money in such a manner as makes me quite safe, and frees me from any question as to the authority of the person who receives the money." In my opinion this case comes within the principle of that decision entirely, and I am therefore bound by it, and I must hold that the purchaser has a right to insist upon paying the money in the presence

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of all the trustees, or upon paying it into a bank to a joint account. But then it is said that in no case can there be a payment to all the trustees, that if they did all meet and the money was laid on a table before them all, that money would be taken up by one, and the payment would not be to all. I absolutely dissent from any such proposition. If the money were laid down on the table in the presence of all of the trustees, that is a payment to all of them, if they accept the payment, and what is done with it afterwards does not concern the purchaser. If the trustees say to one of their body, "Will you take the money to the bank." that is a subsequent act to the receipt. The receipt is the acceptance, by their presence in the room, of the money which is laid on the table before them. Then it is said that this is a case in which the circumstances show that the purchaser ought to be satisfied with the authority given to the one. Upon that there seems to be some difference of opinion. On the one side it is said there is only one of the trustees in London. On the other hand it is said that that is not so. The deed shows that the trustees are in London. Why should the purchaser trouble himself with all these circumstances? A course is proposed which will put the trustees to very little inconvenience, namely, that the money should be paid to a joint account at the bank. It seems to me that no case is made out which can compel him to take any kind of risk or possibility of risk in the matter, and he is justifiably prudent in insisting that the money should be paid as he proposes, either to all the trustees, meeting in a room, or to their joint account at some bank approved by him. I order that the requisition be complied with.

Solicitors: *Reginald Ward*, Solicitor to Board of Works; *W. and J. Flower and Nussey*.

### QUEEN'S BENCH DIVISION.

Tuesday, March 25.

(Before COLERIDGE, C.J. and STEPHEN, J.)

SEAGER (app.) v. WHITE (resp.). (a)

*Licensing Acts—Selling liquor at an unlicensed place—Transaction in the nature of a sale—Wife licensed—Husband taking spirits to an unlicensed house to be raffled for—Whether husband an admissible witness—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 3, 51, 62. (b)*

*The appellant, Mrs. S., a married woman who had a licence to sell intoxicating liquor, was convicted under the 3rd section of the Licensing Act 1872 of selling intoxicating liquor at a place where she*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

(b) Sect. 3 of the Licensing Act 1872 provides that, "Any person selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to certain penalties."

Sect. 51, sub-sect. (4) provides that "In all cases of summary proceedings under the Act the defendant and his wife shall be competent to give evidence."

Sect. 62 provides that, "In proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed, or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place."

*was not authorised by her licence to sell the same. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Evidence, however, was given by a constable of a statement made to him by the husband, in the wife's presence, to the effect that "on the 24th Dec. 1883 he took spirits from the licensed house of the appellant to the house of one B.; the drink was then raffled for, and he was present during the raffle; the money was put in a basin on the table, and it was afterwards brought to the inn and put on a table there; one or other of them, the landlady or the husband himself, took it from the table; during the time of the raffle he took some spirits up to B.'s house; he took it all." Other witnesses proved that the liquor brought from the appellant's house by her husband was raffled for at B.'s house, the husband himself being present at the time.*

*The justices convicted the appellant of selling the liquor at B.'s house.*

*Held, that what took place at B.'s house was a transaction in the nature of a sale within the meaning of sect. 62 of the Act, and that, as the appellant was a competent witness and did not contradict the statement made by her husband, there was sufficient evidence to support the conviction.*

*Quære, whether, under sect. 51 of the Act, the husband of the appellant is a competent witness.*

Case stated by justices:—

1. The appellant was charged by summons, upon an information laid by the respondent, a superintendent of police of the county of Hants, for that she, then being duly licensed to sell by retail intoxicating liquors in her house and premises, known by the sign of the Montagu Arms, in the parish of Beaulieu, in the county of Hants, did, on the 24th Dec. 1883, in the said parish of Beaulieu and county of Hants, sell and expose for sale, by retail, intoxicating liquors at a certain other house in the occupation of Tom Biddlecomb, situate in Beaulieu-street, in the parish of Beaulieu aforesaid, where she was not authorised by her licence to sell the same, contrary to the statute 35 & 36 Vict. c. 94, s. 3.

2. Upon the hearing of the information it appeared that the appellant was a married woman, having married since the renewal of her licence for the Montagu Arms in 1883, and kept the Montagu Arms, Beaulieu, aforesaid, as the holder of a licence granted under 9 Geo. 4, c. 61, to sell excisable liquors by retail, to be drunk or consumed on the premises therein specified.

3. In support of the information, the respondent called as witnesses Tom Biddlecomb, the person at whose house the alleged unlawful sale took place, Edward Shergold, Harry Vine, and Walter Payne, all of whom, acting on the advice of the appellant's solicitor, objected to answer the question whether they were present at Biddlecomb's on the occasion in question, or the question as to what they did there, on the ground that the answer might incriminate them, but, notwithstanding their objections, were directed by us to answer such questions, and who, subject to the aforesaid objections, then proved that on the evening of the 24th Dec. a number of persons, including themselves and the husband of the appellant, were on the premises of one Tom Biddlecomb, where some bottles con-

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taining spirits were deposited by the appellant's husband in the room in which the same, or some of them, were subsequently raffled for. It was stated by Biddlecomb that his premises were not licensed for the sale of intoxicating liquors. The licence granted to the appellant was not called for or produced in evidence.

It was further proved by the same witnesses that, at the same time and place, some of the said bottles of spirits were put up to be raffled for by the persons present, whose names were then and there taken down. Each person, before being allowed to take part in a raffle, paid over a sum of money, the amount of which was determined by the value of the spirits put up for sale, and the number of the persons joining in the raffle. All money so paid was placed in a basin on the table.

5. The husband of the appellant was about to be called as a witness for the respondent, but it was objected that he was not a competent, or if competent, not a compellable witness, and the objection was allowed. Subsequently evidence of a statement made to an inspector of police by the husband of the appellant, in the presence of his wife, was tendered on the part of the respondent. The inspector stated as follows:

I am an inspector in the detective department of the police. On Wednesday, the 2nd Jan. instant, I was at Beaulieu to investigate the case in connection with the Montagu Arms raffling at Tom Biddlecomb's house, accompanied by Superintendent White. I went into a private room at the inn. Mrs. Seager, the defendant, and her husband, were in the room. I said to Mr. Seager, "I am a police officer; I have been sent down by the chief constable to investigate this case of raffling in connection with this public-house. If you have any statement to make, Mr. Seager, in this matter I will take it down, but before you commence I tell you that you are not the landlord, and don't hold the licence, therefore I should like Mrs. Seager to remain in the room while you make the statement."

Such evidence was objected to as inadmissible on the following grounds: 1. That whatever took place in connection with the alleged offence, it being in the presence of the husband, the wife was irresponsible as acting under duress. 2. That the statement by the appellant's husband was not a voluntary one. 3. What was said, either to or by the husband, could not, under the circumstances, be evidence against the wife. These objections were overruled, and the evidence was admitted, and was to the following further effect:

James Seager stated that he was the husband of the landlady. On Monday, the 24th Dec. 1883, he took spirits from the Montagu inn, at Beaulieu, to the house of Tom Biddlecomb; it was then raffled for; he was present during the raffle; the money was taken by a Mr. Goff. Mr. Goff was staying at the inn at the time as a friend. The money was put in a basin on the table; the money was afterwards brought to the inn, and put upon the table there (pointing to the table the witness was writing at when the statement was made). One or other of them, the landlady or Seager himself, took it from the table. During the time of the raffle he took some spirits up to Biddlecomb's house; he took it all.

Mr. Seager further stated, if anything took place he would stand by it, he was to blame and no one else; he did not want raffling in his house.

6. It was contended on behalf of the appellant: 1. That in consequence of the wrongful admission of evidence she was entitled to have the information dismissed. 2. That even on the evidence wrongfully admitted, there was nothing to bring the appellant within the section of the statute under which the information was laid, as any part

she took in the transaction was entirely at the Montagu Arms, from which the liquor was sent, and where alone she received money; the sale, if any, by her being there, and there only. 3. That, excluding the evidence wrongfully admitted, there was no evidence at all against the appellant. 4. That if an unlawful sale did take place at all at Biddlecomb's, all such sale was by the husband of the appellant, not by her. 5. That anything the evidence disclosed against the appellant, she was not responsible for, as it was done by her husband, and under his control and duress.

7. It was contended, on behalf of the respondent, that the sale took place on the premises where the liquor was, in fact, disposed of, and where the appellant was not authorised by her licence to sell the same.

8. It was held by the justices that a transaction in the nature of a sale by the appellant had taken place, and that consumption of intoxicating liquors actually did take place, with the appellant's privity and consent and for her benefit, within the meaning of the 62nd section of the Licensing Act 1872. The appellant was therefore convicted of the offence charged, and fined 10*l.* and costs.

9. The questions for the opinion of the court are: (1) Whether, in the circumstances proved at the hearing, there was any legally admissible evidence to show that the appellant had committed the offence charged; and (2) whether we rightly convicted her.

If this honourable court should be of opinion there was such evidence, and that we rightly convicted, then the conviction will stand; otherwise it will be quashed.

*Footnote for the appellant.*—The justices referred to sect. 62 of the Act, and they thought that, under that section, it was not necessary to show that the liquor was sold with the privity of the appellant. [He was stopped.]

*Bulletin for the respondent.*—There was here some evidence to support the conviction. The sale, such as it was, actually took place at Biddlecomb's, and by the husband acting for the wife. The justices actually find, as a fact, that a transaction in the nature of a sale did take place. This is in accordance with the very words of the 62nd section of the Act. The spirits were taken away from the Montagu Arms without being paid for, and taken to Biddlecomb's for the purpose of sale by the raffle, and it was there that the sale, or what was equivalent to a sale, took place. Mrs. Seager, the appellant, is the person who held the licence of the Montagu Arms, and therefore she is the person who is responsible in this case. There was ample evidence in the case to support the conviction. [COLERIDGE, C.J.—The husband, but not the appellant, was in the house when the drink was sold. He said that he, and he alone, was to blame in the matter.] My contention is that, even if the husband was the person acting in the matter, he was not the holder of the licence, but was acting for the benefit of the appellant. She was the real acting party in the matter. The justices held that what was done was done with the consent and privity of the appellant. By the 51st section of the Act both husband and wife were competent witnesses, and the fact of the appellant not giving any evidence on the matter, though entitled to do so, was some evidence that she was guilty of the offence.

*Footnote in reply.*—Apart from the husband's evidence, there was no evidence to support the conviction. [STEPHEN, J.—The wife was either in court or might have been, and, as she was a competent witness, the fact that she did not appear and give evidence is strongly against her.] The money was taken by Seager or Biddlecomb; there was nothing she was called on to contradict. The case finds that, one or other of them, the landlady or Seager himself, took the money from the table. This is evidence to be acted on with great caution. [STEPHEN, J.—That was all for the magistrates to consider. COLERIDGE, C.J.—You ask us to infer, after all the facts, that all this was done without the knowledge and consent of the wife; the money was laid on her table and taken up by her or her husband.] As to the value of the statement made by the husband, it is worthless. [COLERIDGE, C.J.—I thought all along that there was hardly sufficient proof to convict the wife, but, when I find that she could have been called, and was not, that difficulty is removed.] The wife was acting under the coercion of her husband in what she did.

Lord COLERIDGE, C.J.—I confess that I think this is a clear case now, though I did not at first. At first I was under the impression that the proof was defective, but Mr. Bullen has satisfied me that the evidence of the husband was not only stronger than it seemed, but it was given in the presence of the wife, and she did not attempt to contradict it, though she was entitled to do so, as by sect. 51 of the Act she was competent to give evidence in the matter. The evidence of the other witnesses did not contradict the husband's account of the transaction, and his evidence was to the effect that he took the liquor from this licensed house, the Montagu Arms, to the house of Biddlecomb, where a raffle was going on, and brought back the money and placed it on a table in the Montagu Arms, and that one or other of them, the appellant or himself, took it from the table. Now, the appellant could have been called as a witness to contradict this evidence and to show that the transaction took place without her knowledge, but she did not appear to give any such evidence; this shows, to my mind, that the case is extremely strong, that this sale did take place for the benefit and with the consent of the appellant, and I think that the case was proved against her. The offence with which the appellant is charged, it will be remembered, is that she sold intoxicating liquor at Biddlecomb's house, where she had no licence to sell the same, contrary to the provisions of the 3rd section of the Licensing Act 1872. I think, therefore, our judgment must be for the respondent.

STEPHEN, J.—I am of the same opinion. The husband, in the wife's presence, made a statement which would go far to show that the wife was cognisant of the transaction, but the wife, although a competent witness, is silent and says nothing at all. I think, therefore, that the appellant did sell the liquor at an unauthorised place, and that what took place was quite sufficient to satisfy the words of the 62nd section of the Act. This section provides that in proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed, or any intoxicating liquor was

actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place. With regard to the question of the admissibility of the husband's evidence, in a case like the present, where the wife is the licensed person, the 51st section of the Act says nothing, for it merely says, that in all summary proceedings under this Act the defendant and his wife shall be competent to give evidence; but there are no corresponding words, "the defendant and her husband." But then it is said that the wife, being presumed to be under the husband's pressure, would not be an admissible witness if he would not be. There is, no doubt, a rule relating to larceny, that the wife, in her husband's presence, is deemed to be acting under his coercion, but if that rule were inquired into, it would be found to have arisen as a compensation to women instead of the benefit of clergy which was denied to them. It is a melancholy rule, and one not to be extended or commended. In this case, however, the wife, being the defendant, was clearly admissible as a witness, and, as she did not give any evidence to rebut the charge, there is a moral certainty that she was not able to do so; and when a state of moral certainty is produced before a court, it is enough. I have no doubt that, in the present case, the woman knew all about it, and, as she could have explained the matter and did not do so, and did not even ask for an adjournment for the purpose of giving further evidence, I think there was evidence against the appellant, and that, therefore, our judgment must be for the respondent.

*Conviction affirmed; judgment for respondent.*

Solicitors for the respondent, *Stocken and Jupp.*

Solicitors for the appellant, *Bell and Tayler,* Southampton.

*Saturday, March 29.*

(Before Lord COLERIDGE, C.J. and WILLIAMS, J.)

SANDERS v. TEAPE AND SWAN. (a)

APPEAL FROM BLOOMSBURY COUNTY COURT.

*Animals—Negligence—Trespass—Injury caused by dog—Liability of owner of dog—Liability of person in charge of dog.*

"The plaintiff, a labourer, was digging a hole in the garden of a house adjoining that of the defendant T. There was a small wall, only three feet high, between these gardens. This wall belonged to the defendant T. The plaintiff was engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant T. had been taken out by the other defendant S., and, as the defendant S. was returning, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. As the dogs were running about in playfulness, one of them, a large Newfoundland dog, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries through which he was confined to bed for three weeks, and he was unable to work for some time after. The defendant T. had offered the plaintiff a couple of sovereigns as compensation, which was refused.

*In an action for these injuries against the defen-*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*dant T. as the owner of the dog, and against the defendant S. as having the dogs in charge: Held, that, inasmuch as the dogs were not shown to be mischievous to the knowledge of the owner, the plaintiff had no cause of action against either of the defendants either as for a trespass or as for any breach of duty.*

The plaintiff, a labourer, was digging a hole in a garden of a house adjoining that of the defendant Teape. There was a wall which belonged to the defendant Teape only three feet high between these two gardens. The hole was about ten feet deep, and the plaintiff was, at the time in question, engaged in doing some work at the bottom of the hole. Three dogs belonging to the defendant Teape had been taken out by the other defendant Swan, and as the defendant Swan was returning with the dogs, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. The dogs began to run about in playfulness, and one of them, a large Newfoundland dog, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries for which he was confined to bed for three weeks, and he was unable to work for some time after.

For these injuries the plaintiff, who had refused two sovereigns offered to him as compensation, brought an action in the Bloomsbury County Court against the defendant Teape as the owner of the dogs, and the defendant Swan as being in charge of the dogs when the injuries in question were received.

The learned County Court judge ruled that there was no evidence to go to the jury in support of the plaintiff's case, and that, even assuming all the facts as alleged by the plaintiff, he had no cause of action against either of the defendants; and he gave judgment for the defendants.

The plaintiff now appealed.

*Laing* for the plaintiff.—I submit there was negligence here on the part of the defendants, which ought to have been left to the jury. We have a large dog and a low wall belonging to the defendant Teape, and under the circumstances he was bound to take such care of his dog as to prevent it jumping over the wall. [Lord COLERIDGE, C.J.—Was the negligence in the owner of the dog in not preventing it jumping over, or in the owner of the wall in not having it higher?] In the owner of the dog. The mere fact of the dog jumping over the wall was a trespass. If a sheep had jumped over and caused this injury, the owner would have been liable, and there can be no difference in this respect between a large dog and a sheep. There is a difference between an injury caused in a highway and one caused in private grounds. The offer of the compensation was proof of *scienter*. In *Lee v. Riley* (12 L. T. Rep. N. S. 388; 18 C. B. N. S. 722; 11 Jur. N. S. 822; 34 L. J. 212, C. P.) it was held that, where, through the defect of a gate which the defendant was bound to repair, the defendant's horse got out of the defendant's farm and strayed into the plaintiff's field, where it kicked the plaintiff's horse, the defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove that the defendant's horse was vicious and that the

defendant was aware thereof; and it was also held that the damage the plaintiff had sustained was not too remote. [WILLIAMS, J.—You do not suggest to us that there was anything more than the natural act of the dogs in playfulness.]

Addison on Torts, 5th edit. p. 110;

*Read v. Edwards*, 11 L. T. Rep. N. S. 311; 17 C. B. N. S. 245;

*Star v. Rookesby*, 1 Salk. 335;

*Powell v. Salisbury*, 2 Y. & J. 391.

*Mote*, for the defendant, was not called on.

Lord COLERIDGE, C.J.—It seems to me to be clear that the learned County Court judge was quite right, and it must be manifest upon ordinary principles of common sense that he was so. An action under the circumstances of this case is quite preposterous. It was an action against a person who kept a dog, because the dog, jumping about playfully, jumped over a low wall and into a hole where the plaintiff happened to be at work. On referring to the authorities, it is manifest that such an action could not be maintained. In *Mason v. Keeling* (1 Ld. Raym. 606, the well-known case in the time of Lord Raymond and Lord Holt) it was held that an action would not lie against a man for mischief done by his dog, unless he knew that he had done mischief before, or was of a mischievous nature; and the same principle has also been laid down by Parke, B. in our own time. In *Brown v. Giles* (1 C. & P. 118) it was held that a dog, jumping into a field without the consent of its master, is not a trespass for which an action will lie. In *Beckwith v. Shordike* (4 Bur. 2093) it was held that an involuntary trespass may be justified, but not a voluntary one, and though the verdict there was for the plaintiff, this arose from the jury finding that the trespass was an intentional trespass, and not a mere involuntary accident. The result of all these cases is, that if a dog, going about, commits an injury or does any mischief, the owner of the dog will be liable only if the dog was of a mischievous nature and he was aware of that fact; but if there be no evidence of that, then no action will lie. Here there is no suggestion of any proof of the mischievous nature of the dog. The only thing suggested as a *scienter* is, that the owner of the dog offered the plaintiff a couple of sovereigns as a compensation, but this was entirely from his good nature, and not because he was liable in point of law. I am of opinion, therefore, that the plaintiff has shown no cause of action, and that this appeal should be dismissed.

WILLIAMS, J.—I am of the same opinion. If a man keeps horses and other animals, he is bound to keep them on his own ground; if he does not he may be liable to an action of trespass. There is an exception to this when they are on a public highway, as they have a right to be there, and then the owner is bound to use ordinary care. But in the case of dogs, pigeons, and the like, the case is different: if a dog, not being exceptionally mischievous, acting in playfulness goes over another man's land, there is no trespass, and the owner of the dog would not be liable. Here, so far as the defendants are concerned, the occurrence was purely accidental and involuntary, and no action lies against them in respect thereof, either as for a trespass or for any breach of duty.

*Judgment for defendants. Appeal dismissed.*

Solicitor for the plaintiff, John Willis.

Solicitor for the defendants, *Mote*.

Q.B. Div.]

CUNDY (app.) v. LE COCQ (resp.).

[Q.B. Div.]

Monday, May 26.

(Before STEPHEN and MATHEW, JJ.)

CUNDY (app.) v. LE COCQ (resp.). (a)

*Licensing Acts—Selling intoxicating liquor to a drunken person—Conviction for—Knowledge of condition of customer—No indications of insobriety—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 13.*

*Sect. 13 of the Licensing Act 1872 enacts that, "If any licensed person permits drunkenness, or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding, for the second and any subsequent offence, twenty pounds."*

*Held, that this section contains an absolute prohibition against selling liquor to a drunken person, and is not confined to those cases where the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk, the object of the Act being that, when licensed persons sell intoxicating liquor, they should find out that the person to whom it is sold was not drunk.*

CASE stated under 20 & 21 Vict. c. 43:—

At the West Ham Police-court, on the 1st Feb. 1884, the appellant was charged by the respondent, under sect. 13 of the Licensing Act 1872, for that he, being the keeper of certain licensed premises, had, on the 14th Jan. 1884, sold intoxicating liquor to a drunken person.

It was proved that there had been a sale of intoxicating liquor, and that the person served was drunk, but it was also proved, in answering the complaint, that neither the appellant nor his servants had noticed that the person served was drunk, and that the drunken person, while in the licensed premises, had been quiet in his demeanour and had done nothing to indicate insobriety, the evidence showing that there was no apparent indication of intoxication.

Upon the evidence, it was contended for the appellant that there was nothing to show any knowledge or means of knowledge on the part of the appellant or his servants that the person served was drunk.

The magistrate convicted the appellant, holding that the offence was complete on proof that a sale had taken place and that the person served was drunk, and that it was unnecessary to determine whether the appellant or his servants knew, or had the means of knowing, that the person served was drunk, or could, with ordinary care, have detected the drunkenness.

The question for the opinion of the court was, whether the construction placed by the magistrate on the section was right, or whether in arriving at his decision it was necessary for him to consider whether or not the appellant or his servants knew or had the means of knowing, or whether they could with ordinary care have detected, that the person served was drunk.

Sect. 13 of the Licensing Act 1872 (35 & 36 Vict. c. 94) is as follows:

*If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not*

*exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds.*

*Bealey for the appellant.*—Before the appellant can be convicted, it is necessary to show that he knew or had the means of knowing that the person served was drunk. There can be no conviction for a crime unless there be a "guilty mind." In *Somerset v. Hart* (53 L. J. 77, M. C.; 12 Q. B. Div. 360), where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person, employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises, it was held that the justices were right in refusing to convict the licensed person of suffering gaming on the premises; and, though in *Mullins v. Collins* (29 L. T. Rep. N. S. 838; L. Rep. 9 Q. B. 292; 43 L. J. 67, M. C.; 22 W. R. 297) a licensed person was held to have been properly convicted under sub-sect. 2 of sect. 16 of this Act, where his servant knowingly supplied liquor to a constable on duty, Archibald, J., in giving judgment in that case, said: "In construing this enactment adversely to the appellant, we are not interfering with the maxim that, before a person can be criminally convicted, he must be shown to have a *mens rea*" (L. Rep. 9 Q. B. at p. 295):

*Reg. v. Prince*, 32 L. T. Rep. N. S. 700; L. Rep. 2 C. C. R. 154; 44 L. J. 122, M. C.; 24 W. R. 76; *Hearne v. Garton*, 2 E. & E. 66; 28 L. J. 216, M. C.

*R. S. Wright (Danckwerts with him).*—All the sections of the Licensing Act 1872 which make knowledge essential to the commission of an offence expressly use that word; e.g., in several sections it is provided that if a licensed person "knowingly" does such a thing, then he shall be liable to conviction. Here the word "knowingly" is omitted, and, as these are sections dealing with offences against public order, the word cannot be imported into them where it is not used. The rule as to guilty knowledge is a presumption merely, and the question whether knowledge is or is not essential to the commission of an offence depends on the wording of the particular statute which may be applicable to it:

*Nichols v. Hall*, 28 L. T. Rep. N. S. 479; L. Rep. 8 C. P. 322; 42 L. J. 105, M. C.; 21 W. R. 579.

In *Reg. v. Bishop* (42 L. T. Rep. N. S. 240; 5 Q. B. Div. 259), where the defendant was convicted of receiving two or more lunatics into her house without a licence, and where the jury found that, though the persons so received were lunatics, the defendant honestly and on reasonable grounds believed that they were not lunatics, it was held that such belief was immaterial, and that the conviction was right:

*Reg. v. Woodrow*, 15 M. & W. 404; *Attorney-General v. Lockwood*, 9 M. & W. 378.

So knowledge on the part of the seller that an article is adulterated is not necessary to sustain a conviction under sect. 2 of the Adulteration Act 1872 (35 & 36 Vict. c. 74):

*Roberts v. Egerton*, 30 L. T. Rep. N. S. 633; L. Rep. 9 Q. B. 494; 43 L. J. 135, M. C.; 22 W. R. 797; *Fitzpatrick v. Kelly*, 28 L. T. Rep. N. S. 558; L. Rep. 8 Q. B. 337; 42 L. J. 132, M. C.; 21 W. R. 681.

So, to support a charge of assault on a constable in the execution of his duty, it is not necessary

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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that the defendant should know that he was a constable then in the execution of his duty:

*Reg. v. Forbes*, 10 Cox C. C. 362.

In *Davis v. Harvey* (30 L. T. Rep. N. S. 629; L. Rep. 9 Q. B. 433) a person was convicted of an offence under sect. 77 of the Poor Law Amendment Act 1834, although he had not a guilty knowledge. Effect ought to be given to the distinction, drawn in various sections of the Act, between offences in which knowledge is expressly made an element and those in which it is not so made.

*Besley* in reply.

STEPHEN, J.—I am of opinion that this conviction should be affirmed. The case turns upon the question whether the words of the 13th section,—the section under which the conviction took place—taken in connection with the general scheme of the Act, should be read as implying that a licensed person, before he can be convicted under that section of selling intoxicating liquors, must know, or have reasonable means of knowing, that the person served was drunk, or whether the section amounts to an absolute prohibition against selling intoxicating liquor to a drunken person, even when the seller had no such knowledge. I am of opinion that the words of the statute amount to an absolute prohibition of the sale of intoxicating liquor to a drunken person, and that, if the person selling the liquor did not know, or had not the means of knowing, that the person served was drunk, this is no answer to the charge, but is merely a matter to be urged in mitigation of the penalties imposed by the section. I come to this conclusion, not only in consequence of the general object of the Act, which is an Act for the prevention of drunkenness, but also by a comparison of the sections dealing with “offences against public order.” In some of these sections the word “knowingly” is introduced; for instance, by sect. 14, a penalty is imposed upon a licensed person who “knowingly” permits his premises to be the habitual resort of prostitutes, and by sect. 16 a penalty is imposed for “knowingly” harbouring a constable. Now, in those cases knowledge is necessary to constitute the offence. But in the section we are now dealing with, the word “knowingly” does not occur, and I believe the object of omitting the word was to throw on the publican the duty of finding out whether the person served was drunk or not, the consequence being that, if a customer is drunk, the publican or his servants must find out that he is drunk, or take the consequences of serving him. On the other side it has been urged that the maxim of the criminal law, that before a person can be convicted of a crime there must be a “guilty mind,” applies to this case. This maxim came into use in early times, when the criminal law was in an undefined state, for the guidance of those who administered that law, and in those times the maxim may have been of general application. A “guilty mind” is a necessary element in some crimes, but those crimes have now been defined, and the maxim has been superseded in consequence of the greater precision in the definitions of crimes, and now, the question whether a “guilty mind” is necessary to constitute an offence turns upon the words of each particular statute. The case of *Reg. v. Prince (ubi sup.)* shows that a guilty knowledge is not always necessary to

constitute an offence; and *Reg. v. Bishop (ubi sup.)* is to the same effect. The object of this part of the Act is to preclude all disputes as to whether the publican or his servants knew, or had reasonable means of knowing, that the person served was drunk at the time, the duty being thrown on the publican to find out that the person so served was not drunk. I think, therefore, that this conviction was right.

MATHEW, J.—I am of the same opinion. The language of this section is perfectly clear. This section would be altogether useless if Mr. Besley's construction were to prevail. It can be no hardship on the publican to have to find out whether the customer is drunk or not. It seems to me that the word “knowingly” was purposely omitted here. I quite agree with my brother Stephen that this conviction should be affirmed.

*Judgment for respondent. Conviction affirmed.*

Solicitors for the appellant, *Peckham, Mailland, and Peckham*.

Solicitor for the respondent, *Solicitor to the Treasury*.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Thursday, June 12.

(Before BUTT, J.)

GOWAN v. SPROTT. (a)

*Co-ownership action—Order for an account—District registrar—Report—Order III., r. 8—Order XV., r. 1—Order LVI., r. 11.*

Where an action is instituted in an Admiralty District Registry by part owners of a ship against the managing owner thereof for an account, and the writ claims an account under Order III., r. 8, and an order for the filing of the accounts is made under Order XV., r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Order LVI., r. 11, otherwise the plaintiff will be entitled to judgment thereon.

Where a district registrar has made an order in an action in the Admiralty Division for an account between the part owners of a ship that the accounts be filed, and that they be proceeded with, it is too late to take objection to his making such order after he has reported, there having been no appeal against such order.

The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object.

THIS was a motion by the plaintiffs to confirm a report made by the Liverpool Admiralty District Registrar in an action *in personam*, in which the plaintiffs, as part owners of the vessel *Edderside*, of which the defendant was the managing owner, claimed to have an account taken of the earnings and disbursements of the last completed voyage of the said vessel.

The action was instituted on the 19th Jan. 1884 in the Liverpool Admiralty District Registry.

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.



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and on the 8th Feb. the plaintiffs, having taken out a summons under Order XV., r. 1, for an account, the Liverpool District Registrar made the following order:

Upon the application of the plaintiffs, and on hearing the solicitors on both sides, it is ordered that the defendant, as the managing owner of the ship or vessel *Edderside*, do, within fourteen days from the date hereof, file an account of the earnings and disbursements of the last completed voyage of the said ship or vessel from Liverpool to Australia, Hongkong, Manilla, and home to Liverpool.

In pursuance of this order the defendant on the 22nd Feb. filed an account, and on the 14th March the district registrar made a further order in the terms following:

Upon hearing the solicitors on both sides, and considering the account filed by the defendant on the 22nd day of February last, and the examination of the defendant taken *vis à vis* this day, it is ordered that the defendant do file a further and better account showing the items at credit of the owners of the ship or vessel *Edderside* at the commencement of the voyage, an interest statement, and an amended statement of freight on her homeward voyage, and that such account be filed within one week from the date hereof, and be proceeded with on the 22nd instant, at eleven o'clock.

On the 20th March the defendant obtained an order extending the time to file the further account until the 24th March, and the 27th March was appointed to proceed with the taking of the accounts. The defendant did not file his further account within the extended time, and on the 27th March his solicitor attended before the district registrar and contended that the registrar had no authority to make the order of the 20th March, and that his jurisdiction ended when the first account was filed.

The matter was then adjourned to the judge in chambers for directions, whereupon Butt, J. on the 1st April deferred making any order until the order of the 20th March had been drawn up and served on the defendant; but, before any further application was made, the defendant on the 24th April filed a further or amended account.

The registrar thereupon proceeded to take the account, and found that there was a balance due from the defendant to the plaintiffs. The following is an extract from the registrar's report, which was given on the 7th May 1884:

We consider it to be our duty to report to your Lordships that the defendant did not in our opinion keep proper books of account as ship's husband, and that had he done so he could have more readily made up and rendered a proper statement of accounts to his co-owners at the termination of the voyage. We also must advert to the fact that several of the accounts for the outward voyage were not paid for until a long period after they were due instead of being paid at the time, and the usual discount obtained, and it is partly because we are unable to point out the specific loss sustained by the owners in consequence of this that we consider that the defendant should be charged with interest at 5 per cent. on the money in his hands and credited with interest on his payments from the date on which they were made.

June 10.—The plaintiffs now moved for judgment.

J. P. Aspinall, for the plaintiffs, after stating the facts, was stopped.

Bucknill, for the defendant, *contra*.—This is an action under Order III., r. 8, and Order XV., r. 1. [Butt, J.—Do those orders apply to the Admiralty Division?] It is submitted that they do. According to Order XV., r. 1, "an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in

similar cases" is to be forthwith made. According to the registrar's first order, by which he is bound, it is ordered that the defendant do file an account of the earnings or disbursements of the *Edderside*. No mention is made of an account being taken, and in the absence of any such order it is submitted that the registrar had no jurisdiction to take the account, and therefore this report is valueless. It has been decided in the Chancery Division that a district registrar has power to make an order for an account under Order XV., r. 1, and if the order so directs, but not otherwise, he can then proceed to take the account:

*Re Bowen*, 20 Ch. Div. 535; 47 L. T. Rep. N. S. 114.

That case is directly in point. It is true that by the second order it is directed that a further account be filed and be proceeded with. But, inasmuch as the registrar in the commencement took upon himself jurisdiction without a proper order, he cannot remedy that defect by this subsequent order. Moreover, the words "be proceeded with" are not sufficient to constitute an order to take the accounts.

BUTT, J.—The case referred to is in the Chancery Division, where it is possible to conceive many instances in which the mere filing of an account is all that is requisite. There are many cases in which the mere delivery of documents into the custody of the chief clerk is alone necessary. But, according to the practice of this court, where accounts are ordered to be filed, it means that the registrar is to go on and take an account. There has been no appeal against this order, and in the absence of such it is to be assumed to be right.

Bucknill.—As your Lordship is against me on the point of law, I would submit that the case should be adjourned in order that objection may be taken to the amount allowed to the plaintiffs. [BUTT, J.—Has not the time expired within which you should have taken such objection?] It is submitted not, because this is a reference under Order XV. and not under Order LVI., by which the time for objecting is limited to six days. It is to be remembered that this is not the ordinary form of Admiralty reference to which the provisions of Order LVI. are applicable, but that it is an action for an account under Order III., r. 8, and Order XV., r. 1. According to Order XV., r. 1, it is an order "with all necessary inquiries and directions now usual in the Chancery Division in similar cases;" and therefore the Chancery practice applies, and not the Admiralty.

J. P. Aspinall.—The action was instituted under the Admiralty Court Act, but we availed ourselves of the provisions of Order XV.

BUTT, J.—It is an action for an account under the Admiralty Court Act, and as the six days within which objection should have been taken have expired, I cannot accede to this application.

Bucknill.—Assuming the time has expired, the court has jurisdiction to extend it, and on the merits of the case this should be done.

BUTT, J.—The defendant has throughout persisted in taking a highly technical objection, in consequence of which he has not taken objection to this report within the proper time. He has, therefore, brought about the difficulty in which

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he is now placed, and, in the absence of special grounds, I see no reason for extending the time.

*The report was accordingly confirmed, with costs.*

Solicitors for the plaintiffs, *Hill, Dickinson, Lightbound, and Dickinson.*

Solicitors for the defendant, *Banks and Kendall.*

Tuesday, April 29.

(Before BUTT, J.)

THE PONTIDA. (a)

*Bottomry—Cargo owners—Necessity—Master—Agent.*

*The authority of a master to raise money on bottomry on ship, freight, and cargo is limited as against the cargo owners to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced and the bond given to a person who is not the ship's agent or in any way connected with the ship, he cannot recover as against the cargo owner anything in respect of items other than those which are absolutely necessary.*

*Upon a reference to the registrar and merchants, in an action on a bottomry bond, the registrar and merchants have a discretionary power to reduce the amounts claimed and expended for any specific item which they shall deem unnecessary or exorbitant, and also the amounts charged for commissions and premium, whether the bond be given to the ship's agent or to a person unconnected with the ship.*

THIS was an action in rem brought by the Comptoir d'Escompte de Paris to enforce payment upon a bottomry bond, they being the holders thereof, against the Italian barque *Pontida*, her cargo and freight.

The facts as set out in the statement of claim were (so far as they are material) as follows:—

1. On the 2nd April 1883 the Italian barque *Pontida* was at Ponta del Garda, in the island of San Michael, in distress, laden with a cargo of wheat shipped under bills of lading, making the same deliverable to shipper's order, and bound on a voyage from Philadelphia to Queenstown, Plymouth, and Falmouth, for orders for a port of discharge, and her master Marco Antonio Faradine being without funds or credit, was compelled to borrow on bottomry of the said ship, her cargo and freight, from Bensande and Co., of Ponta del Garda aforesaid, the sum of 91,375·76 francs for the necessary disbursements and expenses of the said ship and cargo, to enable her to proceed on her voyage.

2. On the 2nd April 1883 a bottomry bond for the said sum of 91,375·76 francs was duly executed between the said master and the said Bensande and Co.

3. By the said bottomry bond, after reciting that the said master and Mr. Henrique Bensande, in the capacity of managing partner of the firm of Bensande and Co. personally before the consular agent for the kingdom of Italy, at Ponta del Garda aforesaid, for the purpose of executing the said bond, that the said master was the legal representative of the owners of the *Pontida*, and duly authorised on their behalf, and likewise the legal representative of the owners of cargo on board, to whom he had communicated the necessity in which he was placed of executing the said bond, not having done so to the consignees through ignorance of who they were, and that in consequence of average suffered by the Italian barque *Pontida* during her said voyage the said vessel was forced to put into the said port . . . that thereby a necessity had arisen for contracting a loan in

the sum of 91,375·76 francs to meet the expenses incurred so as to be able to continue in safety the said voyage which bond had been legally authorised by the said Royal Consular Agency of Italy in the said place, and which in presence thereof had been on the 14th Dec. then last adjudicated to the said firm . . . that the said Henrique Bensande declared to the said consular agent his wish to advance on bottomry . . . the aforesaid sum . . . at a premium of 20 per cent. if discharged in the United Kingdom . . . that the said M. A. Faradine declared that he had already received from the said firm the said sum . . . And that it was covenanted between the contracting parties that the *Pontida* should be hypothecated together with her freight and the whole of her cargo of wheat.

4. The said bottomry bond was subsequently indorsed to the plaintiffs, who are the legal owners thereof.

5. The *Pontida* proceeded on her voyage on the 28th April 1883, and safely arrived with her said cargo on board at Avonmouth, Bristol, her port of discharge within the meaning of the said bond.

The 6th paragraph recited that the bond had been executed according to all the formalities required by Italian law; that the said sum of 91,375·76 francs, together with bottomry premium at 20 per cent., amounted to 109,650·91 francs, and was then still due to the plaintiffs and unpaid.

On the 19th June 1883 judgment in the action was pronounced for the validity of the bond against the *Pontida* and her freight, and subsequently the owners of cargo admitted the validity of the bond as regards the cargo, subject to a reference to the registrar and merchants. The amount claimed at the agreed rate of exchange was 4386l. 0s. 8d.

The usual order for reference to the registrar and merchants was made.

On the 12th July 1883 the question came on for hearing at the reference before the registrar and merchants, and from the evidence then given and the documents put in the following additional facts were proved:

From the log of the *Pontida* it appeared that whilst on her voyage from Philadelphia she had met with very severe and tempestuous weather and made a great deal of water, and that all hands had forcibly called on the master to put into the nearest port, and that in consequence she had put into the island of San Michael. Upon her arrival a survey was held by the direction of the Italian consul and by surveyors appointed by him, and it was found that the cargo was in a good condition, but the surveyors advised that the vessel should be lightened up to the copper line in order that they might be better able to examine the true state of the cargo and caulking; they also found that the putting into port was indispensable through the vessel having sprung a leak.

The mate, who was a co-owner of the vessel, then authorised the captain to have the repairs executed which the surveyors had reported to be necessary.

The captain having no funds at his disposal, it became necessary for him to raise the money for such repairs by giving a bottomry bond. He thereupon wrote to the shippers in New York informing them of the circumstances, and an advertisement was inserted in the local paper giving notice that the captain would receive tenders for the money required on bottomry (about 600l.). Two tenders were received, and that of Messrs. Bensande and Co. being the more advantageous for the interests of those concerned, was accepted by the master with the sanction of the consul.

(a) Reported by J. P. APPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

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A second survey was then held by the same surveyors, the vessel having been lightened as recommended by them, and they found that the oakum had been washed out of the seams and much metal had been ripped away; a diver was also sent down to examine the ship's bottom, and he found that a quantity of metal had been ripped off all along the bottom of the vessel, in consequence of which the surveyors advised that the whole of the cargo should be discharged to enable them to see the bottom of the vessel, and order what should be done. The remainder of the cargo was then discharged, and the surveyors examined the vessel and gave an estimate of the repairs which they considered necessary. The repairs and other expenses being greater than at first contemplated, it became necessary to increase the sum required on the bottomry bond; which was accordingly done. On the completion of the repairs the surveyors examined the vessel, and finding that the necessary repairs had been properly done, pronounced her to be in a fit condition to reload her cargo and prosecute her voyage. The vessel was then reloaded and proceeded on her voyage. Before leaving San Michael, the captain wrote again to the shippers in New York, informing them that the whole of the repairs would amount to 2500*l*.

The surveyors' estimate for repairs was as follows:

	Reis.
To caulking from metal line up, and deck, &c.	1,600,000
To port holes covering boards	100,000
Rigging backstays to foretopail	540,000
Two yards, &c., topsails	190,000
To relining the hold, &c.	150,000
To new bolts and nails to knees and caulking, &c.	2,177,000
To metal, bolts, felt, nails	5,490,000
To repairing rudder	50,000
To scraping and painting	200,000
	10,497,000

Equal to £2099 *8s*.

The amounts claimed in respect of the work done, as recommended by the surveyors were as follows:

	Reis.
Ship chandler's account for rope, nails, &c.	80,780
Ditto	452,100
Labour in dry dock—recaulking and remetal-ling, &c.	5,994,800
Metal, felt, and nails	3,911,280
Blacksmith's account for bolts, tools, &c.	509,135
	10,948,095
Less charge in account for provisions	22,390
	10,925,765

Equal to £2185 *8s*.

It was proved at the reference that the weight of metal required had been carefully ascertained, and the quantity used had been duly weighed and no more used than required.

The other items claimed (so far as material) were 5 per cent. commission, being the ship's agent's charge upon disbursements, and amounting to 814,520 reis; 2½ per cent. commission on 46,809,280 reis, being the value of the cargo discharged, as per manifest less the damaged cargo; and the bottomry premium of 20 per cent. on the total amount advanced.

The commissions were claimed as being the usual and ordinary commissions charged at San Michael under the like circumstances and it was

shown that the master had sought to have them reduced, but without success.

The premium claimed was that named in the tender and was the lowest offered.

On the 21st July 1883 the assistant registrar made his report and found the sum of 3685*l*. 3*s*. 4*d*. to be due to the plaintiffs upon the bottomry bond, the sum disallowed being 700*l*. 17*s*. 4*d*. Reductions had been made in three items, namely: (1) the amount of the bill for new metal, felt, and nails; (2) the commissions of 5 per cent. and 2½ per cent. by the ship's agent at San Michael; (3) the bottomry premium.

The amounts disallowed appeared in the schedule to the report, as follows:

	Claimed. Reis.	Allowed. Reis.
Metal and felt, &c.	3,911,280	3,000,000
Commission at 5 per cent.	814,520	500,000
2½ per cent. on 46,809,280 value of cargo as per manifest deducting value of damaged wheat sold	1,170,230	500,000
	5,896,030	4,000,000
Equal, at agreed exchange of 200 reis per franc, to	29,480.15	20,000
Bottomry premium at 20 per cent.	18,275.15	10,236.58
France	47,755.30	30,236.58

The total amount claimed without premium was 91,375*fr*. 76*c*. The total amount allowed was 81,375*fr*. 66*c*. The premium was therefore reduced to 12½ per cent.

The reasons upon which the assistant registrar had acted in giving his decision not appearing in his report, an application was made for them, and they were obtained. They were as follows:

(1) Bill for metal.—Taking the cost of copper metal in England at 3*l*. per cwt. and allowing an ample amount for cost of conveyance to San Michael, it was considered that the price of 7*l*. per cwt. was exorbitant. I am also advised that more metal was used than was probably necessary to repair the vessel. On these grounds 911,280 reis were disallowed, rather less than one quarter of the amount charged.

(2) The commission of 5 per cent. on the amount expended, and 2½ per cent. in addition on the value of the cargo charged by the ship's agent at San Michael was considered excessive. The amount allowed, 500,000 reis on the ship, and the like amount on the cargo, in all about 200*l*., was considered an ample *quantum meruit* for his services.

(3) The premium of 20 per cent. was considered exorbitant for a voyage of less than three weeks, with a ship that had just been thoroughly repaired and remetalled. In these circumstances 12½ per cent. which was allowed was considered to be a high rate of premium.

And he further added that, before making the reduction for the latter item, one of the merchants who had assisted him in the reference had ascertained by inquiring that the amount of the loan might have been insured for so short a voyage for a small percentage.

On the 19th Nov. 1883 the plaintiffs filed a petition in objection to the assistant registrar's report on the grounds (1) that they were entitled by Italian law to the full amount of principal and premium, and (2) that if the question were governed by English law they were also entitled to the principal and premium, and that nothing had been proved by the defendants upon the reference to justify the reduction. To this the defendants filed an answer, and to the answer the plaintiffs filed a conclusion

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*April 1 and 8.*—The case came on for hearing upon the petition, in objection to the report of the assistant registrar.

*Phillimore and Aspinall* for the plaintiffs.—The reductions which the registrar has made in the amounts claimed by the plaintiffs, are not warranted either by the facts which were proved at the reference, or the reasons which the registrar has himself given for so reducing them, or upon the authorities which exist on these points. First of all, taking those cases which are against the plaintiff, they are divisible into two classes, namely, those which affect the cost of repairs, and those which affect the commissions and premium. As to the first, there are no cases which lay down the principle that, when the sum advanced on bottomry has been advanced by a person other than the ship's agent, he is bound to see to the application of it, or that the amount expended in repairs can be reduced on the ground of being unnecessary or exorbitant except in the case of fraud. As to the second point, the two strongest cases are

*The Cognac*, 2 Hagg. 377;

*The Glenmanna*, Lush. 115,

in both of which the advance was made by a person not the ship's agent. In the former the bottomry premium having been reduced from 20 to 12½ per cent. was restored by the court, but the reduction in the commissions was affirmed. In the latter the commissions claimed upon the goods landed, and on the advances, were disallowed. In neither case, however, was there a foreign consul acting on behalf of the ship of his nation. In the former case the learned judge held "that the court has not authority to reduce the premium on a bottomry bond, unless specifically affected with fraud or collusion, which must be shown in a clear and distinct manner" (p. 386). But both of these cases, so far as they affect commission, are inconsistent with *The Prince of Saxe Coburg* (3 Moo. P. C. 1; 3 Hagg. 387), which lays down that, if the foreign merchant after due inquiry shall have reasonable ground for concluding that the repairs are necessary and that the money cannot be raised on personal credit, then his security on ship and cargo shall not be impeached, because it might happen notwithstanding such inquiry that such repairs were not necessary or the money might have been obtained on personal credit. It must follow that, if commissions are payable at all, it cannot be the duty of the lender to inquire into the amount of those commissions or the mode of their application; it is not for him to judge whether the full amount was necessary; and this applies with double force in a case where it appears that the commissions charged are usual at the place where the bond is given. Passing to the cases in favour of the plaintiffs' claims, it has been distinctly laid down that there is no obligation on the part of the lender (not being the ship's agent) to see to the application of the money, or to calculate the expediency of the repairs, if he is sufficiently well assured that the money has been fairly borrowed and that there is nothing in the transaction that is fraudulent:

*The Jane*, 1 Dobs. 464, 465;

*The Vibilia*, 1 W. Rob. 1, 10;

*The Orelia*, 3 Hagg. 75, 84;

*The Royal Stewart*, 2 Spinks, 260.

As to the reduction of premium, in the case of

*The Cognac* (*ubi sup.*) the premium of 20 per cent. was reduced by the registrar to 12½, but restored by the court. And in another case a reduction from 14 to 10 per cent. was also restored:

*The Zodiac*, 1 Hagg. 320.

Except in the case of a loan by a ship's agent the owner of cargo should be held estopped from disputing his liability to pay particular items when once a necessity for the loan has been shown; he, by putting his cargo on board the ship impliedly authorises the master to act as his agent on an emergency arising; in other words, he holds the master out as his agent in case of necessity, and once given that necessity, the acts of the master in supplying the needs of ship and cargo ought not to be open to question by the principal as against a third person. The whole transaction was formally carried out before the Italian consular agent, and competent surveyors were duly appointed by him, who examined the vessel and made reports both before and after the repairs had been executed, and certified that the quantity of the metal paid for had been used for the necessary repairs. Under such circumstances the item for metalling ought not to be impeached, but should be allowed:

*Messina v. Petrocchino*, L. Rep. 4 P. C. 144; 1 Asp. Mar. Law Cas. 298.

*Bigham, Q.C. and Barnes* for the defendants.—The amount which the defendants are compelled to pay upon the bond is limited to what are considered as necessities in the strict sense of the term; and further, the cost of such necessities must not be exorbitant, but reasonable under the circumstances, and it has always been the practice of the registrar and merchants to go into figures under these heads:

*The Rhoderick Dhu*, Swabey, 177;

*The Albion*, 1 Hagg. 333;

*The Zodiac*, Ib. 321;

*The Tartar*, Ib. 1;

*The Nelson*, Ib. 169;

*The Calypso*, 3 Hagg. 162;

*The Lord Cochrane*, 2 W. Rob. 320;

*The Huntley*, Lush. 24;

*The Ysabel*, 1 Dods. 273.

*Phillimore* in reply.

*Cur. ad. vult.*

*April 29.*—*BUTT, J.*—This is an action brought by the plaintiffs the Comptoir d'Escompte de Paris, as holders of a bottomry bond given at San Michael, on the Italian ship *Pontida*, her freight, and the cargo of wheat laden on board. The shipowners admitted their liability, but an appearance was entered on behalf of the owners of the cargo, who dispute the amount, although they do not contest the validity of the bond. The matter having been referred to the registrar and merchants, the plaintiffs' claim of 4386l. 0s. 8d. was by them reduced to 3685l. 3s. 4d. with interest. The reductions of which the plaintiffs complain relate to charges for metal, commissions, and bottomry premiums. With reference to the item for metalling the ship, the plaintiffs contend: (1) That it being admitted that some metal was necessary, and the lender on bottomry not being the ship's agent but a banker who came forward in answer to advertisements, it was not competent for the registrar to go into the question of the reasonableness of the quality or price of the metal; (2) That the bond having been entered into with the sanction and approval of

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the Italian consul at San Michael, is by Italian law binding on all parties. As to this latter contention it is sufficient to say that there is no evidence of the Italian law being such as is alleged. With respect to the quantity of metal used and the price charged, the question in this as in all such cases must be, was the expenditure necessary for the completion of the voyage? The master is, and can only be, agent of the owners of cargo so as to bind them, *ex necessitate*; and it is no more within his competency to fix them with liability for an excessive quantity or an excessive price of material, than for material none of which was necessary for the voyage. The question of excess must always be a question for the registrar and merchants. The same considerations apply to the commissions and maritime premiums, both of which appear to me exorbitant. It is scarcely necessary to cite an authority for what I consider the settled law and practice of this court to refer questions of excessive charges, whether for repairs, commissions, or premiums to the registrar and merchants, but the observations of Dr. Lushington in *The Lord Cockrane* (2 W. Rob. 320, 336), and of Lord Stowell in *The Gratitude* (3 C. Rob. 240), may be referred to. It was further contended, more especially I think with reference to the commissions, that the ship might have been detained at San Michael had payment been refused; but, as pointed out by Lord Stowell in the case of *The Augusta* (1 Dods. 288), that alone will not suffice. With regard to the facts it does not appear to me that the registrar and merchants were precluded by the evidence adduced from exercising their discretion in the matter, or that they have erred in its exercise. I must, therefore, overrule the objections and confirm the registrar's report, with costs.

*Judgment for the defendants.*

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Ingledeu and Ince*, for *Henry Brittan and Co.*, Bristol.

Tuesday, Aug. 4.

(Before Sir JAMES HANNEN and BUTT, J.)

THE BELFORT. (a)

*Charter-party—Demurrage—Stamp Act 1870 (33 & 34 Vict. c. 97), ss. 15, 67, and 68.*

*A charter-party wholly executed by both parties thereto abroad, is duly stamped so as to be admissible in evidence if it has been stamped within two months after it has been first received in the United Kingdom as provided by sect. 15 of the Stamp Act 1870, and it is not necessary that such a charter-party should be stamped under sect. 68 of the same Act.*

*Semble, that such a charter-party must be stamped with an impressed stamp, and not with an adhesive stamp.*

This was an application for a new trial by the plaintiffs in an action instituted in the County Court to recover demurrage amounting to 57l. 10s. in respect of four voyages of the steamship *Belfort* belonging to the plaintiffs.

The charter-party under which the defendants' goods had been carried was dated Nov. 30, 1883, and had been entered into and signed by or on

behalf of all the parties at La Rochelle in France. On the 13th March 1884 the original charter-party was received unstamped in England by the plaintiffs' agents for the purposes of the action, and was sent by them to the Inland Revenue Office on or about March 17, in order that it might be stamped. On the 2nd April the charter-party was returned from the Inland Revenue Office unstamped with a memorandum in the following words:

If this charter-party was executed and intended to be dated as at Cardiff it cannot now be stamped under any circumstances. But if signed and intended to be dated as at La Rochelle, an adhesive stamp of 6d. must be affixed and cancelled within ten days after its receipt in the United Kingdom, and before being signed by any party within the United Kingdom. But the impressed stamp is not applicable in such a case.

On the 2nd April the plaintiffs' agents in England placed a 6d. adhesive stamp on the charter-party and cancelled such stamp. During the hearing of the plaintiffs' case it was proposed to put in the charter-party, but objection was taken by the defendants to the admission of that document on the ground that it had not been stamped in compliance with the provisions of sects. 67 and 68 of the Stamp Act 1870. On this question the County Court judge decided that the charter-party should have been stamped under the provisions of sect. 68, and gave judgment for the defendants.

On the 8th April the plaintiffs wrote, inclosing the charter-party, to the Inland Revenue Commissioners for their opinion as to whether or not the document could be stamped. The charter-party was subsequently returned with an adjudication stamp affixed thereto, and dated April 10, the commissioners being of opinion that the case came within sect. 15 of the Stamp Act 1870, and not within sect. 68 as decided by the County Court judge.

Thereupon application was made to the said County Court judge for a new trial, but such application was refused. An application was then made to the Admiralty Division of the High Court, under sect. 27 of the County Courts Admiralty Jurisdiction Act 1868, for leave to appeal, and such application was granted.

*Barnes*, on behalf of the plaintiffs, in support of the appeal.—This charter-party, which is executed by both parties on Nov. 30, 1883, out of the United Kingdom, is not received in the United Kingdom until March 13. Within two months of that date it has been stamped, and if the provisions of sect. 15 of the Stamp Act 1870 apply there has been a compliance with those provisions. That section enacts that, in the absence of express provision to the contrary, any unstamped instrument executed at any place out of the United Kingdom may be stamped within two months after its receipt in the United Kingdom. No express provision to the contrary exists. It is true that sects. 66, 67, and 68 expressly deal with charter-parties, but only under circumstances different from the present case. In this case the charter-party was executed wholly abroad. Sect. 68 could not have been meant to apply to such a charter-party as the present, because it fixes the utmost limit of time within which it must be stamped as one month, and yet there must be many places out of the United Kingdom whence it would be impossible for a charter-party to reach the United Kingdom within the prescribed month. Sect. 67 cannot

a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

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apply to the present case, because it deals with charter-parties partly executed abroad, and then sent over to England to be finally executed. Sect. 66 is clearly meant to apply to charter-parties made in this country. There is therefore no "express provision to the contrary," and hence sect. 15 is applicable.

Dr. Phillimore and Bucknill, for the defendants, *contra*.—Sect. 68, which deals exclusively with charter-parties, contains express provision contrary to the enactment contained in sect. 15. According to sect. 68 a charter-party can only be stamped within one month after its execution, and in this case that month has elapsed. [Sir JAMES HANNEN.—If it is physically impossible that in consequence of the locality where the charter is entered into it should be stamped within the month, what then?] Parties who contemplate entering into charter-parties should have adhesive stamps with them to meet such a contingency.

Sir JAMES HANNEN.—I am of opinion that this document was properly stamped when it was produced on the second occasion before the County Court judge. Sect. 15 of the Stamp Act is general and provides that "(1.) Except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty where the unpaid duty exceeds ten pounds of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty. And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. (2.) Provided as follows: (a) Any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received within the United Kingdom on payment of the unpaid duty only. (b) The commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties, or any part thereof." Now this was a document first executed out of the United Kingdom, and it has been stamped with an impressed stamp within two months after it had been received in the United Kingdom. It lies therefore upon the party who is impeaching the legality of the stamping to show that there is "express provision to the contrary." The express provision to the contrary relied upon is to be found in the sections specially relating to charter-parties. Sect. 66 is: "The duty upon an instrument chargeable with duty as a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract." I am of opinion that that section does not refer to charter-parties executed abroad. It is there dealing with charter-parties executed in this country. When we come to sect. 67, I find that the marginal note, which is "as to charter-parties executed abroad," is strongly confirmatory of the contention that sect. 66 does not apply to charter-parties made abroad. This 67th section enacts that, "Where any document charge-

able with duty as a charter-party, and not being duly stamped, is first executed out of the United Kingdom, any party thereto may, within ten days after it has first been received within the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument with an adhesive stamp thereon so affixed and cancelled shall be deemed duly stamped." That contemplates the case of a charter-party first being executed abroad and then being executed in the United Kingdom. That section therefore does not apply to this particular case, because the charter-party here has been executed by both parties out of the United Kingdom. Sect. 68 enacts that, "An executed instrument chargeable with duty as a charter-party and not being duly stamped, may be stamped with an impressed stamp upon the following terms: that is to say, (1.) Within seven days after the first execution thereof, on payment of the duty and a penalty of four shillings and sixpence; (2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds; and shall not in any other case be stamped with impressed stamp." I am of opinion that that section does not relate to a document wholly executed out of this country. It seems to me that it was never intended that in the case of charter-parties executed abroad the parties should have adhesive stamps with them. It appears to me, therefore, that Dr. Phillimore has failed to show that there is any express provision to the contrary, and if so the case comes within sect. 15, and the stamping has been done within the time prescribed by that section. I would only add that in my view the course taken has been most productive of waste of time in rendering it necessary that the whole case should be tried a second time. The proper course would have been to have ordered an adjournment in order that this point might be settled. The result, therefore, is that this appeal must be allowed and a new trial ordered.

BUTT, J.—I am of the same opinion. I think that this document was properly stamped under sect. 15, and that the case comes within the provisions of the sub-sections of that section. It is provided under sub-sect. 1, that with regard to instruments executed abroad they may be stamped within two months after they have been received within the United Kingdom, and by sub-sect. 2 power is given to the commissioners to remit the penalty if they think fit. Now, unless this case is taken out of sect. 15 by some express provision to the contrary, it seems clear that the commissioners have power to do that which they have done. For the express provision to the contrary we are referred to sects. 67 and 68. I do not, however, think that those sections apply to this case, in which the instrument is wholly executed out of the United Kingdom. For instance, sect. 67 applies to a charter-party first executed out of the United Kingdom, because it speaks of something being done within ten days after it has been received in the United Kingdom. Therefore I think that there is nothing to take this case out of the operation of sect. 15 and that this appeal should be allowed.

The Court ordered each party to bear their own

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costs in the court below, the respondents to pay the costs of the appeal.

Solicitors for the plaintiffs, *Ingledeu, Ince, and Coll.*

Solicitors for the defendants, *Stokes, Saunders, and Stokes.*

## Judicial Committee of the Privy Council.

March 19 and 29.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, and Sir ARTHUR HOBBHOUSE.)

THE ORIENTAL BANK v. RICHER. (a)

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

*Law of Mauritius—Bankruptcy Ordinance No. 33 of 1853—Evidence as to bankrupt's estate—Form of adjudication.*

*By sect. 43 of the Bankruptcy Ordinance, No. 33 of 1853, of Mauritius, a trader may petition for an adjudication of bankruptcy against himself, "provided always that unless such trader shall . . . make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges, to be estimated by the court, of prosecuting the bankruptcy, such petition shall be dismissed."*

*Held (affirming the judgment of the court below), that the satisfaction required by the section is in the personal discretion of the judge, and that strict legal proof is not necessary, and that the adjudication is conclusive on the point.*

*Held, further, that where a merchant carried on business under the style of "R. and Co.," being in fact himself the only person interested in the business, an adjudication against the firm was valid as against the individual, the defect being merely formal.*

THESE were two appeals against two judgments of the Supreme Court of Mauritius (Ellis, C. J. and Mure, J.), in one case affirming and in the other reversing a judgment of Cox, J., sitting as a commissioner in bankruptcy.

The questions arose upon the bankruptcy of one Frederic Richer, trading as "Frederic Richer and Co.," who was made bankrupt on his own petition in Jan. 1881.

The appellant bank, who were large creditors, raised two objections to the validity of the adjudication, namely, that there was no sufficient evidence that the estate of the bankrupt was able to pay 5s. in the pound, clear of all charges, as required by the Bankruptcy Ordinance in force at the time of the adjudication; and, secondly, that an adjudication against "F. Richer and Co." was invalid, there being in fact no such firm in existence.

The learned Commissioner decided against the first objection, but upheld the second, and on appeal his ruling was affirmed on the former point, and reversed on the latter.

The bank then obtained leave to appeal against both judgments, and the appeals were consolidated by order.

*Davey, Q.C. and Linklater* appeared for the appellants, and contended that the only evidence

as to means before the commissioner was the petitioner's own affidavit, on which he could not be judicially satisfied as required by the section, and there was not in fact any finding by the court that the estate was sufficient. Sect. 93 of the English Bankruptcy Act of 1849 contained a provision in the same words, and decisions on it are applicable to the present case. See

*Re Davis*, 18 L. T. Rep. O. S. 280;  
*Anonymous case*, Fonblanque, 6;  
*Pennell v. Butler*, 18 C. B. 209;  
*Re Pearce*, 22 L. T. Rep. O. S. 180;  
*Anonymous case*, Fonblanque, 15.

As to the evidence necessary to support an adjudication see

*Malkin v. Adams*, 2 Rose, 23.

As to the second point, the firm of "F. Richer and Co." had no existence in law or fact, and could not be adjudicated bankrupt, and the order does not purport to adjudicate Richer personally bankrupt, and is bad as against him.

*Cohen, Q.C., Kekewich, Q.C., and Latham*, who appeared for the respondent, were requested by their Lordships to confine their argument to the first point, as to which they maintained that the amount of evidence to satisfy the court was a matter for the discretion of the judge, and in fact the court was, in this case, satisfied of the sufficiency of the estate to meet the requirements of the section.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 29.—Their LORDSHIPS gave judgment as follows:—Two questions are raised by the two appeals in this case. One is whether the adjudication of bankruptcy which was passed on the 20th Jan. 1881 against Frederic Richer and Co. is a valid adjudication against Frederic Richer, who is the sole member of that firm. Their Lordships do not think it necessary to hear the respondents on this question. Nor do they now think it necessary to say anything, except that they concur with the Supreme Court in holding that the defect, which undoubtedly appears in the order, affords no ground for annulling the adjudication, because it is merely formal and is not calculated to injure anybody. The other question is, whether under sects. 40, 43, and 50 of Ordinance No. 33 of 1853, a creditor can challenge the validity of an adjudication against his debtor, who, being a trader, has been made bankrupt on his own petition, on the ground that he has not made it appear to the satisfaction of the court that his estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges of prosecuting the bankruptcy. The bankrupt, Frederic Richer, gave, so far as appears on the face of the proceedings, no evidence of this qualified solvency of his estate except the petition and affidavit required by sect. 40. And it is contended that, by sects. 43 and 50, the court is bound to require some further evidence, and to attain the requisite satisfaction on some judicial grounds capable of being tested by the parties concerned, and of being made the subject of contention, and, when necessary, of appeal. Their Lordships are of opinion that on the true construction of sect. 43 the judge is to satisfy himself as to the requisite solvency of the estate by such evidence as he thinks fit. The proceedings are *ex parte*. The matter is one which cannot possibly be the subject of exact proof, and

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



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in most cases the proof can be but rough, provisional, or even conjectural. If the question were to be subject to dispute, nothing could solve it short of an administration, or at least an exhaustive and conclusive account, of the estate, and a long litigation might attend this preliminary proceeding. It is not provided by the Ordinance that creditors shall attend the adjudication, and it is not intended that they shall in any way put in issue the fact of qualified solvency. That being so, is it right that they should by any process bring into contest the propriety of the court's conclusion? It is a question of difficulty, but their Lordships think it must be answered in the negative. Instead of saying that the qualified solvency shall be proved, the Legislature in sect. 43 says that it shall be made to appear to the satisfaction of the court. The use of that language indicates rather a satisfaction in the personal discretion of the judge than a judicial process on which issues may be taken and appeals presented. Whether the court had reasonable ground for the satisfaction which it felt in this case is not the question. The question is whether this particular preliminary to the adjudication can be contested so as to bring the propriety of the adjudication itself into discussion. Their Lordships concur with the Supreme Court in thinking that the adjudication is conclusive upon the point. Their Lordships will humbly advise Her Majesty that both appeals should be dismissed, and the appellants must pay the costs.

Solicitors for the appellants, *Murray, Hutchins, and Stirling*.

Solicitors for the respondents, *Freshfields and Williams*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, July 2.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

GRIFFITH v. BLAKE. (a)

*Practice — Interlocutory injunction — Plaintiff's undertaking to be answerable in damages.*

*Where a plaintiff, on obtaining an interlocutory injunction, has given an undertaking to be answerable for the damages, if any, sustained by the defendant by the injunction being granted, and at the hearing it is decided that the interlocutory injunction ought not to have been granted, the plaintiff will be liable to the defendant under his undertaking, whether the injunction was wrongly granted owing to the misrepresentation, suppression, or other default by the plaintiff, or owing to a mistake of the judge without any such default.*

*The dictum of Jessel, M.R. in Smith v. Day (48 L. T. Rep. N. S. 54; 21 Ch. Div. 421), that where there has been no such default damages are not payable under the undertaking, overruled.*

THE plaintiffs in this action were Messrs. Griffith and Corbett, solicitors, of Cardiff, and by the indorsement of their writ of summons, issued on the 20th March 1884 they claimed an injunction

to restrain the defendants, their agents, servants, or workmen, from working their steam engines and machinery and using their tin goods manufactory and premises at Great Western Approach, Cardiff, adjacent to the premises of the plaintiff, in such a way as to cause annoyance and injury to the plaintiffs, and from otherwise using or permitting to be used the said manufactory and premises in such a manner as to occasion a nuisance to the plaintiffs, &c.

The nuisance particularly complained of was the hammering carried on in the process of tin blocking.

On the 9th May 1884 Chitty, J., on the plaintiffs by their counsel undertaking to abide by any order the court might make as to damages, in case the court should thenceforth be of opinion that the defendants had sustained any by reason of the order, which the plaintiffs ought to pay, granted an interlocutory injunction, restraining the defendants, their agents, servants, and workmen, until judgment in the action or further order, from so carrying on their business as to occasion a nuisance by noise to the plaintiffs.

The defendants appealed.

Their Lordships dismissed the appeal with costs, but the only point worthy of report is that referred to in the portion of the argument of the appellants' counsel given below.

*Seward Brice* for the appellants.—It is suggested that, if the interlocutory injunction is allowed to stand, the defendants will suffer no injury, even if the action is dismissed at the hearing, inasmuch as the plaintiffs will be liable under their undertaking as to damages. But it has been laid down by Jessel, M.R. in the Court of Appeal that a plaintiff is only liable if he has induced the court to grant the injunction by false statement or oppression, and not when the injunction has been wrongly granted owing to the mistake of the court, as when the judge is wrong in his law:

*Smith v. Day*, 48 L. T. Rep. N. S. 54; 21 Ch. Div. 421.

*Romer, Q.C. and W. P. Beale*, for the plaintiffs, were not called upon.

BAGGALLAY, L.J. (after stating the facts, and that in his opinion such an amount of noise had been made by the defendants as to justify Chitty, J. in granting the interlocutory injunction, and this court in dismissing the appeal, continued):—I cannot agree with the dictum of Jessel, M.R. in *Smith v. Day*, that "the undertaking was not intended to apply where the injunction was wrongly granted owing to the mistake of the court; as, for instance, if the judge was wrong in his law." I am bound to say, as the point has been raised, that I cannot adopt that view. It was only an opinion, which was not necessary to the decision in the case.

COTTON, L.J.—I am also of opinion that we ought not to interfere with the injunction granted by Chitty, J. I should have said nothing as to the extent of the plaintiffs' liability under the undertaking if the point had not been raised by Mr. Brice. He cited *Smith v. Day* as an authority in favour of what was said by the late Master of the Rolls, but the case is really equivalent to an authority the other way. Jessel, M.R. was of opinion that an inquiry as to damages ought only to be taken when an injunction had been obtained through the default of the plaintiff, but in my

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

opinion, whatever is the cause of an interlocutory injunction being erroneously granted, the court may at the hearing direct an inquiry as to damages. If the injunction in this case turns out at the hearing to have been improperly granted, the plaintiffs must answer under their undertaking for any damages sustained by the defendants.

LINDLEY, L.J.—I am of the same opinion. I concur in the observations made by the other members of the court as to what was said in *Smith v. Day* by the late Master of the Rolls. I think the course of practice in this court at the present day is contrary to that which he mentioned, and I also think that what he said is against a case in this court decided at the time when Knight Bruce, L.J. presided.

*Appeal dismissed.*

Solicitor for the appellant, *Joseph Gibbs, for Gibbs, Llewellyn, and Lock*, Newport, Monmouthshire.

Solicitors for the plaintiffs, *Torr and Co. for Griffith and Corbett*, Cardiff.

Wednesday, July 2.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

LAWSON v. THE VACUUM BRAKE COMPANY. (a)

*Practice—Evidence—Witness abroad—Commission—Special examiner—R. S. C. 1883, Order XXXVII., r. 5.*

It is the duty of the applicant (whether plaintiff or defendant) for the examination of a witness abroad, when making the application, to bring such evidence as will satisfy the court that it is in the interest of justice that the witness should be examined abroad, and inconvenient for him to attend to be examined in this country, or improbable that such attendance could be procured.

The plaintiff alleged that a witness abroad had been a party to a scheme by which the plaintiff had been defrauded. A clerk of the plaintiff's solicitors deposed that he was informed and believed that the witness abroad was employed by a company in Chicago, and that he believed he could not come over to England to give evidence at the trial, and that the defendant derived his knowledge from letters to his principals written by the plaintiff from America. The plaintiff's solicitor deposed that the witness was not under the control or influence of the plaintiff, and that it would not be possible by any means, so far as the deponent was aware, to procure his attendance in England. It was also sworn that the application was made *bona fide*, and not for the purpose of delay.

Held, that this evidence was not sufficient to induce the court to order the examination of the witness abroad.

This was an appeal by the plaintiff from an order of Bacon, V.C., dismissing with costs a summons taken out by him for the examination of a witness named Yeomans at Chicago before a special examiner to be named in the order, or, in the alternative, for a general commission to examine witnesses in the United States.

The circumstances under which the action was brought appear in the judgment of Baggallay, L.J.

In support of the application an affidavit was read (which was filed after the refusal of the application by Bacon, V.C.), in which a clerk to the plaintiff's solicitors stated as follows:

I am informed and believe that David Maitland Yeomans, who was, I believe, the manager of the defendant Smith's Vacuum Brake Company Limited, as in the amended statement of claim mentioned, is employed in the Union Switch and Signal Company, Grand Pacific Building, 232, Clark-street, Chicago, in the United States of America, and I believe that the said David Maitland Yeomans cannot come over to England to attend to give evidence on the trial of this action. I am able to make the foregoing statements from knowledge derived from letters written by the plaintiff from America to my said principals.

Mr. Harper, one of the plaintiff's solicitors in the action, deposed that the witness Yeomans was in no way under the control or influence of the plaintiff, and that it would not be possible by any means, so far as the deponent was aware, to procure his attendance in this country. It was also sworn that the application was made *bona fide*, and not for the purpose of delay.

One of the defendant's solicitors deposed that it was of great importance to the defendants that, if the witness was examined, he should be examined and cross-examined in open court at the trial, and that the defendants' case would be seriously prejudiced if the witness were examined in any other way.

*Northmore Lawrence* for the appellant.

*F. W. Maclean* for the defendants.

The following cases were referred to:

*Nadin v. Bassett*, 40 L. T. Rep. N. S. 454; 25 Ch.

Div. 21;

*Armour v. Walker*, 50 L. T. Rep. N. S. 292; 25 Ch.

Div. 673;

*Berdan v. Greenwood*, 20 Ch. Div. 764, n.

BAGGALLAY, L.J.—The action in which this application is made is rather a singular one, and I will very shortly refer to the nature of the claim made by the plaintiff, and the relative positions of the parties. The plaintiff seems to have been, in a way which is described in the statement of claim, an accomplice of Yeomans in introducing a patent into this country. A company was formed in this country called Smith's Vacuum Brake Company, the capital of which was divided into 3000 preference shares of 5l. each, 9000 ordinary shares of 5l. each, and ten founders' shares of 1l. each, to be issued as fully paid up. It appears that none of the 9000 ordinary shares of 5l. each were issued. It is stated that, by the memorandum of association of the company, it was provided that the preference shareholders should be entitled to a dividend of 15 per cent. per annum out of the first net profits of the company, and that the ten founders' shares should each entitle the owner thereof to one-hundredth part of the net profits which should remain after payment of the 15 per cent. dividend to the preference shareholders. In three of those ten founders' shares it is alleged in the statement of claim (and, for the purpose of the observations I am about to make, I assume the facts alleged in the statement of claim to be correct) that the plaintiff acquired an interest as early as Sept. 1876, but the actual transfer of those shares into his own name was postponed until the month of Aug. 1882. In Aug. 1882, therefore, he became the owner of three 1l. shares, and he was entitled in respect of each

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of them to an one-hundredth part of the net profits which should remain after payment of the 15 per cent. dividend to the preference shareholders. The charges made in the statement of claim are that, while the plaintiff held three of these founders' shares, Yeomans apparently retaining the other seven, a plot was formed between Yeomans and certain other persons, which resulted in the formation of a company called the "Vacuum Brake Company Limited," and that arrangements were made by which, in effect, that company swallowed up "Smith's Vacuum Brake Company," and that thereby the interests of the holders of these ten 1/10 shares were materially affected; and there are gross charges of fraud and collusion as to the manner in which these matters were carried out, and the plaintiff asks for relief framed on that footing. He has, therefore, in his statement of claim charged Yeomans—the person whom it is now asked may be brought forward as a witness—with being an accomplice in the acts which are the foundation for the action. It appears that Yeomans no longer sides with the defendants, with whom he is alleged to have been associated in the fraud, but is willing to assist the plaintiff in his action, and the present application on behalf of the plaintiff is that he may be allowed to examine Yeomans, as regards all these matters, at Chicago. Now, assuming the facts of the case to be as alleged in the statement of claim, I think that Yeomans cannot be regarded otherwise than as a material witness, as to the matters referred to in the statement of claim. He is charged with being an accomplice, and is a person who is now willing to tell the truth as against his accomplice, and must therefore be regarded as an important witness. Then, the question is, how is he to be made a witness? He is residing at Chicago. Rule 5 of Order XXXVII. provides that the court or a judge may, in any cause or matter, where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court, or any other person or persons, and at any place, of any witness or person." Therefore, there is no doubt that, in a case of this kind, the court has jurisdiction to direct the issue of a commission, or to appoint a special examiner to take Yeoman's evidence in Chicago. The court, in considering whether it will grant a commission, or appoint a special examiner, no doubt takes into consideration the difference in expense occasioned by the witness being brought over to this country and that which is caused by his being examined abroad, and it also takes into consideration the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that if an application is made, whether by the plaintiff or the defendant, for the examination of a witness abroad, it is the duty of the party making that application, when making it, to bring to the attention of the court such circumstances as will satisfy the court that it is in the interest of justice that the witness should be examined abroad, and that it would be inconvenient to the party to come here, or that there is a probability that the party would not attend at all to be examined in this country. But the only evidence I find is contained in an affidavit made some time after the original

application had been refused in the court below, by a clerk to the solicitors of the plaintiff. [His Lordship read the affidavit and continued:] Anything more vague than the testimony given by this gentleman upon his information and belief, one can hardly imagine. We have no affidavit of Yeomans himself at all, and no evidence of the plaintiff; but this application is based upon this clerk's information and belief, followed up by Mr. Harper's affidavit. All we have to rely on is the affidavit of the clerk of the solicitor in England as to the information received and derived from letters. In my opinion that of itself would be very insufficient. But I cannot shut my eyes to the peculiar position that this witness Yeomans occupies in relation to the parties to this action. He was originally an accomplice to the frauds charged against the defendants, and he now becomes a partisan of the party who is seeking to set aside this transaction on the ground of fraud. He comes forward, therefore, to give evidence against his own accomplice in the transaction. Now, I can hardly conceive a case in which it would be more essential that the testimony of the witness should be given in court upon the trial of the action, where he would be subjected to cross-examination. As has been observed in one of the cases, you cannot, by giving instructions to persons to cross-examine in America, provide for every possible suggestion that may arise on his cross-examination in this country, where the parties are present and are fully acquainted with all the circumstances of the case. If you have to send over the solicitors of the parties to America an enormous expense is incurred, and not only does it appear not necessary "for the purposes of justice" that this person should be examined in Chicago, but it would appear that the purposes of justice would very likely be defeated by his being examined, if at all, elsewhere than in this country. For these reasons I think the view taken by the Vice-Chancellor is right, and that the appeal should be dismissed with costs.

COTTON, L.J.—I think we ought to treat this application as an application to examine Yeomans by an examiner and not on commission. Ought that to be granted? It depends on the rule which has been read by Baggallay, L.J. We have to consider whether such an examination is necessary for the purposes of justice, and of course that must depend on the circumstances of each individual case. In the present case I do not think it can be said that the plaintiff has been guilty of any such delay as to prevent him from obtaining an examination, if he would be otherwise entitled to it. This motion must be dealt with as if it had come on in March, and, as far as one can see, up to that time the plaintiff had not been guilty of delay, though of course we must consider his conduct in the action as compared with that of the other side. The plaintiff in an action undoubtedly stands in a different position from that of an ordinary witness. Where the witness is the plaintiff in an action, an order will not be made to examine him abroad, unless very strong positive reasons are shown for his not coming here to be examined. *Berdan v. Greenwood* (20 Ch. Div. 764, n.) was a case of that sort. There the court thought the plaintiff was keeping out of the way, and that it was essential that the court should examine him in open court, and

the court therefore refused a commission. The case before us is not that of a plaintiff. If the plaintiff had asked for a commission for his examination abroad, there would have been no difficulty about the matter; but it is the case of a witness, and undoubtedly a most material witness—that is, a witness who is coming to give evidence on the part of the plaintiff to assist the plaintiff in upsetting a scheme which the plaintiff says was a fraudulent scheme. His evidence is most material, and he is a witness who ought, if possible, to be examined in open court. Whenever the case arises in which a witness of that kind cannot be induced to come here, and the plaintiff cannot be expected to bring him here, I will say whether in my opinion justice requires that he shall be examined abroad, or whether he ought to be brought here. Of course, if he were examined abroad, the judge and jury would take his evidence with the qualification that they had not seen or heard him. But I think that, in a case of this sort, where it is important that the witness should be examined in court, a heavy burden lies on the party who wishes to examine him abroad to show clearly that he cannot be reasonably expected to come here. On that point, therefore, the plaintiff has failed. In my opinion, there is not sufficient evidence to satisfy me that this witness cannot and will not be brought here. It is true, as Mr. Northmore Lawrence says, that the evidence is all one way, but this is not a matter on which the defendants could bring evidence. The question is, whether the evidence brought by the plaintiff is sufficient to satisfy my mind that the witness cannot be brought here or will not come here. I cannot say I am so satisfied. It is said that he is in the employment of some company. We do not know what the character of that employment is, or that he would not be able, at comparatively small expense, to leave his position there for a time, and come over to this country. The expense of bringing him here would be very much less than the expense of sending over a special examiner to examine him and all the other persons who ought to be present. In my opinion, therefore, in this case it is not shown to be necessary “for the purposes of justice” that the examination of this witness should take place in Chicago, and I think it is most important that this witness should be examined in open court.

LINDLEY, L.J.—I am of the same opinion, and for the same reasons, but I wish to make one or two additional remarks with reference to the words “where it shall appear necessary for the purposes of justice” in rule 5 of Order XXXVII. Those words mean, I suppose, for the purposes of justice between the plaintiff and the defendant. In order to form any judgment upon the justice of their case we must look at the pleadings to see what the case is about. I do not say we are bound to go into evidence. We are not. But having looked at the pleadings, and especially at the statement of claim, I am not prepared to say that it is “for the purposes of justice” that all the expense and delay of going out to Chicago should be incurred. On the contrary, I think the purposes of justice will be best answered if the witness comes over here if he likes, or if he stops away if he likes. In other words, the plaintiff's case is of such a shadowy, frivolous, and vexatious character that I think it would not be “for the

purposes of justice” that we should make this order.

*Appeal dismissed.*

Solicitors for the appellant, *Harper and Batcock.*

Solicitors for the defendants, *Linklater and Co.*

*Tuesday, July 15.*

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

NORTON v. COMPTON. (a)

*Practice—Appeal—Order on claim in administration—Admission of further evidence—R. S. C. 1883, Order LVIII., rr. 4, 15.*

*An order on the claim of a creditor in an administration action, although interlocutory for the purpose of settling the time within which notice of appeal is to be given, is final in its nature, and therefore further evidence cannot be given on an appeal from such an order without special leave.*

IN this action, which was brought for the administration of the estate of a deceased person, H. E. Piper, a creditor, claimed, by summons the sum of 234*l.* 6*s.* 8*d.* The summons was adjourned into court, and dismissed by Pearson, J. on the 7th July 1883.

Within three weeks, that is to say, on the 25th July, Piper served a four days' notice of appeal, and of his intention to read further evidence on the appeal.

*Cozens-Hardy, Q.C.* and *Bardswell* for the appellant.—Pearson, J. decided against us because he thought our evidence on certain points was insufficient. We have an affidavit proving the facts, which, however, has been filed since the hearing below. Although the order appealed from finally determines the rights of the parties, it is, within the meaning of rule 15 of Order LVIII., an interlocutory order:

*Physey v. Phyesey*, 41 L. T. Rep. N. S. 607; 12 Ch. Div. 305;

*Trail v. Jackson*, 4 Ch. Div. 7.

We are therefore entitled, with the leave of the court, to read the further evidence without obtaining special leave to do so: (Order LVIII., r. 4.)

*Methold* for the respondent.—The further evidence cannot be read without special leave. The order is only treated as interlocutory for the purpose of settling the time for bringing an appeal; for all other purposes it is a final order.

BAGGALLAY, L.J.—We are all of opinion that an order made on the claim of a creditor in an administration action is in the nature of a final order, though, in order that the administration of estates may not be impeded, it has been decided by the courts that an appeal from such an order must be brought within twenty-one days, the time limited for bringing an appeal from an interlocutory order. The further evidence cannot, therefore, be read without special leave.

COTTON, L.J.—The question before us turns on the interpretation which is to be given to rule 4 of Order LVIII. The words in that rule as to admitting further evidence without leave must be read with reference to what follows. Though in form the order now appealed from is interlocutory, it is in its effect a final decision of the court.

LINDLEY, L.J.—I quite agree with what has

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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been said by the other members of the court. I look upon a claim of this kind as an action in another form.

The further evidence was subsequently read by consent, and the appeal was dismissed with costs.

Solicitors for the appellant, *Letts Brothers*.  
Solicitors for the respondent, *Carr and Co*.

Tuesday, March 11.

(Before COTTON, BOWEN, and FRY, L.JJ.)

Re GRIFFITHS; GRIFFITHS v. LEWIS. (a)

*Practice—Costs—Executor of defaulting executor—Appearance in two capacities—Apportionment of costs.*

*An action was brought for the administration of a testator's estate, against the executor of a defaulting executor whose estate was insolvent.*

*Held, that the defendant, being before the court in two capacities, in one only of which he was entitled to costs, the most convenient order would be that he should have his costs of taking the accounts of the original testator's estate and half the remaining costs of the action out of the estate.*

*Decision of Chitty, J. affirmed.*

This was an appeal from an order of Chitty, J. so far as it related to the costs of the defendant William Lewis.

David Griffiths, by his will, dated the 15th Dec. 1869, gave certain real and personal estate to T. Griffiths and Talieson Evans, in trust for his wife for life, and after her death for his daughter, the plaintiff in the action; and he appointed T. Griffiths and Talieson Evans his executors.

Talieson Evans alone proved the will in 1874, the other executor having died.

In May 1878 the testator's widow died.

In Nov. 1878 Talieson Evans died, having by his will appointed W. Lewis his sole executor.

The plaintiff afterwards commenced this action against W. Lewis for the administration of the real and personal estate of D. Griffiths, and on the 2nd May 1879 a decree for the administration of the estate was made, and, among other things, an account was ordered of the personal estate of D. Griffiths and the rents and profits of his real estate received by T. Evans and by the defendant W. Lewis as his executor, and the defendant was appointed receiver of the estate.

The chief clerk found by his certificate that a sum of 228*l.* was due from the estate of T. Evans on account of the personal estate of D. Griffiths, and that 50*l.* was due from the defendant W. Lewis for money received by him after the death of T. Evans on account of the personal estate of D. Griffiths. He also found that the estate of T. Evans was insolvent.

The case came on before Chitty, J. for further consideration, and an order was made that the defendant should pay the 50*l.* due from him into court, which he did, and directions were given for the payment into court and investment of the assets of D. Griffiths.

With reference to the costs, his Lordship ordered that the defendant should have out of Griffiths' estate his costs as between solicitor and

client of taking the accounts of the estate of D. Griffiths, and his costs and charges properly incurred in the administration of the trusts of the will, and one half the remaining costs of the action; and it was ordered that he might retain a sum of money which he had in his hands belonging to the estate of T. Evans, towards the other half of the remaining costs of the action.

From this order, so far as it related to the costs, the defendant appealed.

*Maclean* for the appellant. — A question of principle is involved, so that it is a proper subject for appeal. The defendant is entitled to his own costs out of Griffiths' estate, except the costs of taking the accounts of Evans' estate, but he has only been allowed half the general costs of the action. The defendant has not been guilty of any misconduct. He has accounted for all Griffiths' estate which he has received, and the estate of T. Evans being insolvent, he has nothing to account for in respect of it. He referred to

*Samuel v. Jones*, 2 Hare, 246;

*Bowyer v. Griffin*, L. Rep. 9 Eq. 340;

*Smith v. Dale*, 44 L. T. Rep. N. S. 460; 18 Ch. Div. 516;

*Lewis v. Trask*, 21 Ch. Div. 862;

*Clare v. Clare*, 46 L. T. Rep. N. S. 851; 21 Ch. Div. 865;

*Hannay v. Basham*, 48 L. T. Rep. N. S. 476; 23 Ch. Div. 195.

[FRY, J. referred to *Haldenby v. Spofforth*, 9 Beav. 195.]

*Sturges* for the plaintiff. — The defendant is the executor of Evans, the defaulting executor, as well as of the original testator, and cannot have the costs of the action so far as it was caused by Evans' default. It is difficult to separate these costs from the remainder of the costs of the action, and the judge having a discretion to apportion them as he thought best, followed the usual course:

*Palmer v. Jones*, 43 L. J. 349, Ch.;

*Kitto v. Luke*, 23 W. R. 411.

*Maclean* in reply.

COTTON, L.J. — This is an appeal as to costs from an order of Chitty, J. in a creditor's administration action. The defendant is in an unfortunate position. He is executor of a deceased executor, who was a defaulter in respect of his testator's estate. The estate of the deceased executor, whom the defendant primarily represents, is not sufficient to pay the whole sum due from him to the estate of Griffiths, the original testator. The question on this appeal is, what is the right order to make as to the costs of the defendant. The order made by Chitty, J. was, that the defendant should be allowed out of Griffiths' estate his costs as between solicitor and client of taking the accounts of the testator Griffiths, and half the remaining costs of the action towards which he was to retain a sum in his hands belonging to Evans' estate. It is contended that the defendant ought to have all his costs of the action paid to him out of Griffiths' estate, except merely the cost of taking the accounts of Evans' estate. The defendant is here in two capacities. In one capacity he is trustee for the plaintiff, in the other he is the personal representative of a person against whom the plaintiff has an adverse claim for a debt due to the testator's estate. The strict order would be to allow the defendant out of Griffiths' estate all

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

the costs incurred solely with reference to Griffiths' estate, but as to the costs incurred by the defendant solely as representative of Evans, the person indebted to that estate, he ought to be allowed them solely out of Evans' estate; and as to the costs incurred with reference to both estates he ought to be allowed half of them out of Griffiths' estate. That is undoubtedly the principle on which the judge has proceeded; but, as it would be very difficult to distinguish the costs so accurately as this, in order to avoid the expense of such an inquiry the judge has given the defendant the costs of taking the accounts of Griffiths' estate out of that estate, and has given him one half of the rest of the costs of the action. The division of the costs is not mathematically accurate, but in my opinion we should be doing wrong if we were to interfere with the exercise of his discretion. The appeal must, therefore, fail.

BOWEN, L.J.—I cannot speak with the authority of the other members of the court, but it would be very unfortunate if the court had come to any other conclusion. The defendant comes into court in two capacities. He must fail in his contention unless he can show he is entitled to his costs in both capacities. In one capacity he is entitled to costs; in the other capacity he is in the same position as if he were an executor sued for default, in which case he would not be entitled to any costs. There must be some solution of the difficulty. The judge in the court below has taken a course which is not strictly correct, but was adopted ten years ago as sufficiently accurate in *Palmer v. Jones* (*ubi sup.*) and followed in *Kitto v. Luke* (*ubi sup.*). I think we ought to allow some discretion to the judge in such a matter, and that we ought not to entertain an appeal which would only result in expensive inquiries.

FAY, L.J.—I am of the same opinion. In this case the same person is legal personal representative of different persons whose estates are being administered. Strictly speaking, the costs of the action are divisible into three categories: First, those incurred in taking the accounts of the original testator; secondly, those which are incurred in seeking relief against the defaulting executor; thirdly, those which come under neither of those heads. The first set of costs ought to be borne by the estate which is being administered, the second ought to be borne by the estate of the defaulting executor, and the third ought to be divided. In substance the judge has adopted this plan. There may be cases in which it may be proper and necessary to follow the strict rule, but in other cases it would lead to great complication and expense. I think that this case is one of the latter description. The judge thought it best to deal with the costs as he has done, and I have not heard anything to lead me to overrule his decision. I therefore agree that the appeal must be dismissed.

Solicitors: Young, Jones, Roberts, and Hale; H. Wrentmore.

March 12 and 14.

(Before COTTON, BOWEN, and FAY, L.JJ.)

HILL v. HART-DAVIS. (a)

*Practice—Affidavit—Prolixity—Taking off file—Costs—R. S. C. 1883, Order XXXVIII., r. 11; Order LXV., r. 27, sub-sect. 20.*

*Although the Rules of Court contain no provision for taking a document off the file for prolixity, the court has an inherent power to do so, in order to prevent its records being made the instruments of oppression.*

*Where an affidavit of documents was of very great length, which the court found was unnecessary and improper, but it appeared that delay and expense would be caused by filing a fresh one, the Court allowed it to remain on the file, but ordered the party filing it to pay the extra costs occasioned by its unnecessary length.*

This was an application to take an affidavit of documents off the file, in that it was prolix and irrelevant.

The action was brought by the trustees of the Independent Mutual Brethren Friendly Society to restrain the publication of certain statements contained in a circular issued by the defendant with reference to the affairs of the society, and alleging that it was insolvent (47 L. T. Rep. N. S. 72; 21 Ch. Div. 798.)

The defence was that the statements were true.

The defendant having obtained an order for the production of documents by the plaintiffs, they made and filed an affidavit of very great length, containing 307 sheets and 1146 folios, for a copy of which the defendant had to pay 19l. 2s. Among other things the plaintiffs set out separately, by their dates and names of the writers and recipients, 4216 letters from the secretary of the society to the agents of the different lodges, and also a very large number of receipts for sick allowances from the various lodges of the society, and also the return sheets of the expenses of the numerous lodges.

On the 24th Jan. last, on the application of the defendant, Kay, J. ordered the affidavit to be taken off the file as being oppressive and irrelevant, and by its prolixity an abuse of the practice of the court, and ordered the plaintiffs to pay the costs occasioned by it, including the 19l. 2s. paid by the plaintiffs, and the costs of the application.

From this order the plaintiffs appealed.

In the course of the argument it was stated that when a document is ordered to be taken off the file, the practice is not to return it to the party who has placed it there, but to destroy it by burning.

*Hastings, Q.C. and Colquhoun for the appellants.*—The only objection to this affidavit is its length, there is nothing scandalous in it. The court will not consider the relevancy of the documents scheduled in the affidavit on this motion. It is contrary to the practice of the court to take an affidavit off the file for prolixity, the penalty imposed being the disallowance of costs: (Order XXXVIII., r. 11; Order LXV., r. 27, sub-sects. 20, 21, 29.) In *Walker v. Poole* (21 Ch. Div. 835) Kay, J. made an order similar to this, but that case is not binding on this court. If this affidavit is ordered to be taken off the file it will be destroyed and the plaintiffs will have to prepare

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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[CHAN. DIV.]

a fresh one, which would cause delay and expense to both parties. [COTTON, L.J. referred to *Drake v. Symes*, 1 L. T. Rep. N. S. 186; 2 De G. F. & J. 81.]

W. Pearson, Q.C. and Des Graz for the defendant.—The court has an inherent jurisdiction to order any document which is vexatious or oppressive to be taken off the file. This is a gross abuse of the practice of the court, the object being to cause unnecessary costs to the defendant. The only way the defendant could recover the costs he has been put to was to make this motion:

*Taylor v. Batten*, 39 L. T. Rep. N. S. 408; 4 Q. B. Div. 85;

*Bewicke v. Graham*, 44 L. T. Rep. N. S. 220, 371; 7 Q. B. Div. 400.

COTTON, L.J.—This is an appeal from an order of Kay, J. ordering an affidavit of documents filed by the plaintiffs to be taken off the file, and that the plaintiffs should pay the costs occasioned by it. The plaintiffs have appealed from this order, and they have argued that the court ought not to order the affidavit to be taken off the file, and that such a course would be contrary to the practice of the court. They contend that, if a document is alleged to be irrelevant or improper, the right order is to refer it to the taxing master, and if it is found to be so, to make the party filing it pay the costs. It is further contended that this affidavit is not irrelevant or unnecessarily prolix. In my opinion the appellants' contention cannot be maintained. It is better not to give an opinion at the present time whether the documents referred to in the affidavit are relevant, but whether they are so or not, I am of opinion that they are set out at unnecessary and improper length. They ought to have been set out in bundles and schedules, and numbered in such a way that the defendant might have asked for those which he wanted to see, specifying them by their numbers. The conclusion I have come to is, that the affidavit is unnecessarily and oppressively long. The question is, however, what order ought to be made. We are of opinion that a different order to that made by Kay, J. would be better. This would not be at variance with the principle on which he acted. I agree that, although the rules contain no provision for taking a document off the files for prolixity, yet it is the duty of the court to see that its files are not made the instruments of oppression, and that, without any provision in the rules, the court has the power, and it is its duty, to order oppressive documents to be taken off the file, even though this should result in their being burnt. But in the present case the defendant has got a copy of the affidavit in question, and if it is taken off the file and destroyed the plaintiffs will have to prepare another, and the defendant will have to wait while they do so. While, therefore, I quite affirm the principle on which the learned judge acted, I think it will be better to order the plaintiffs to pay to the defendant the amount of the cost, 19l. 2s., less 2l., which would have been the cost of an affidavit of proper length. The plaintiffs must pay the costs which they have been ordered to pay in the court below, and the costs of this appeal. And at no further stage of the action will the plaintiffs be allowed any costs of this affidavit. There is another point to which I wish to allude. By Order LXV., r. 11, the court has power to call upon a solicitor to show cause why costs which

have been improperly incurred should not be disallowed, and to order the solicitor to pay to his client any costs which may have been improperly incurred if he has been ordered to pay them to the opposite party. At present the court will make no such order in this case. This will be a matter between the plaintiffs and their own solicitor.

BOWEN, L.J.—I am of the same opinion. I think the order, as modified in the way mentioned by Cotton, L.J., will meet the purposes of justice in this case without throwing doubt upon the larger jurisdiction of the court to take off its files documents which have been placed there for purposes, not of justice but of injustice. It is not denied that the court has such jurisdiction, though it may not have been the practice of the court since the Judicature Act to take documents off the file merely for prolixity. Yet it is a power which could be exercised if necessary. Every court must have the power to protect its own records from being abused. I prefer not to define what constitutes oppression or vexation. It is better to determine in each case whether the circumstances are such as to come within a perfectly intelligible expression.

FRY, L.J.—I am of the same opinion. I am not inclined to express any opinion whether the documents set out in the affidavit are relevant or not. But assuming that they are, it is perfectly plain to my mind that they might have been set out in a way which could not have been oppressive. There is a prolixity in this affidavit of which no account can be given, except a desire to cause vexation and costs to the defendant. I agree with the proposed order.

Solicitors for the appellants, *Montagu Scott, and Baker*.

Solicitors for the respondent, *Poole, Hughes, and Poole*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

March 14, 21, and 26.

(Before KAY, J.)

Re WALHAMPTON ESTATE. (a)

*Mortgage—Power of sale—Voluntary settlement by mortgagor—Subsequent mortgages of the settled and other property—Consolidation—Sale by first mortgagee—Right to surplus proceeds of sale.*

A. B. executed a voluntary settlement of the W. estate, and he afterwards mortgaged it in fee to C. D. Later on he mortgaged the X. estate, which mortgage became vested in C. D.

Held, that C. D. was not entitled to consolidate, as against the persons claiming under the voluntary settlement, the mortgages on the W. and X. estates.

A. B. having mortgaged estates in fee simple, subsequently made a voluntary settlement of the same estates, and all his interest therein, to grantees to uses to hold subject to the mortgage, and to a power of raising a sum of money for himself, to the use of himself for life, with remainder to his first and other sons successively in tail male, with remainders over.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.



The mortgagee afterwards sold the estates under the power of sale in his mortgage, and, after payment of the mortgage debt and costs, he paid the balance of the purchase money into court, under the Trustee Relief Act.

Upon a petition for payment out, A. B. contended that the sale had entirely destroyed the settlement, and that the persons claiming thereunder had no equity against the proceeds of the sale, which must be treated precisely as though the sale had been made, subsequently to the settlement, by A. B. himself.

Held, that the voluntary settlement was a complete disposition by A. B. of the proceeds of the sale of the estates in case the prior mortgages should exercise his power of sale; and that the persons interested under the settlement were entitled, as against A. B., to the fund in court.

By an indenture, dated the 29th Aug. 1871, Sir Harry Paul Burrard mortgaged the Walhampton estate to W. G. Mount in fee simple to secure the sum of 5000*l.* The mortgage deed contained a power of sale, and it was thereby declared and agreed that the mortgagee, his executors, administrators, and assigns, should out of the proceeds in the first place pay the costs of the sale, and in the next place the moneys due on the security, and should then pay the surplus, if any, to the mortgagor, his heirs or assigns.

On the 11th Oct 1871 Sir Harry Paul Burrard by a voluntary settlement, after reciting that he was desirous of making a settlement of the Walhampton estate, "subject to a mortgage for a sum of 5000*l.* and interest, made by an indenture dated the 29th day of August last," being the mortgage above mentioned, granted the same hereditaments, "and all the estate, right, title, interest, claim, and demand of him, the said Sir H. P. Burrard, in, to, and upon the same premises," to certain grantees to uses to hold, subject to the said mortgage and to a power of raising 1500*l.* for himself, to the use of Sir H. P. Burrard for life, with remainder to his first and other sons successively in tail male, with divers remainders over; and this deed contained the usual covenants for title, quiet enjoyment, and further assurance.

The settlement vested in certain trustees powers of sale and exchange, and reinvestment in the ordinary form.

In 1877 Sir H. P. Burrard executed several mortgages in fee upon the Walhampton estate, and in 1878 he executed another mortgage upon other property, all of which became vested in the petitioners.

In May 1883 W. G. Mount, under the power of sale in his mortgage, sold the Walhampton estate, and after retainer and payment of the mortgage debt and all expenses, he paid into court, under the Trustee Relief Act, the balance of the purchase money amounting to more than 41,000*l.*

The questions arising upon the petition were as follows:

1. Whether the petitioners, who claimed under the mortgages created over the Walhampton estate by Sir H. P. Burrard after the date of the voluntary settlement, were entitled to consolidate their subsequent mortgage upon Sir H. P. Burrard's other property (which had turned out insufficient in value to secure the amount advanced

upon it) with their mortgages upon the Walhampton estate so as to obtain payment of that mortgage debt out of the fund in court.

2. Whether the persons claiming under the voluntary settlement were, or Sir H. P. Burrard himself was, entitled to the residue after payment of the mortgages.

The first question only was argued upon the first day of the hearing.

*Graham Hastings*, Q.C. and *Darley* for the petitioners. — Notwithstanding his voluntary settlement, Sir H. P. Burrard could create a subsequent mortgage in fee upon the Walhampton estate, and could give to the mortgagee thereunder all his own equitable rights, including the right to redeem and to consolidate. We are therefore entitled to consolidate. The mortgagor is enabled by the Act 27 Eliz. c. 4, to sweep away the voluntary settlement in favour of a subsequent purchaser for value, and so to create interests in the estate, either by mortgage or sale, as if he were absolute owner. They referred to

*Jennings v. Jordan*, 45 L. T. Rep. N. S. 593; 6 App. Cas. 698.

*W. Pearson*, Q.C. and *Daw*, for persons claiming under the voluntary settlement, *contra*.

*Rawlinson* for W. G. Mount.

*Farwell* for Sir H. P. Burrard.

*Kekewich*, Q.C. and *Leveson* for other parties.

KAY, J.—I consider the claim for consolidation on the part of the mortgagees to be utterly unfounded. It is true that the voluntary settlement is void as against the subsequent mortgagee to the extent of the mortgage, but, because that mortgagee afterwards obtains from the mortgagor another security, is he to be allowed to consolidate his two securities so as to throw on the estate subject to the settlement any part of the sum which may be owing to him beyond that originally charged thereon? In my opinion, he clearly cannot do so. The statute of Elizabeth gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein. No authority has been cited which bears out the contention of the mortgagees in this case, and I therefore hold that the settled estate is liable only to the extent of the sums charged thereon by the mortgages expressly affecting it.

March 21.—The second question was now argued.

*W. Pearson*, Q.C. and *Daw*, for the persons claiming under the voluntary settlement, were stopped by the Court.

*Farwell* for Sir H. P. Burrard.—If the settlor had afterwards sold the settled property, the persons interested under the settlement would have had no title to the purchase moneys, as they are mere volunteers:

*Pulvertoft v. Pulvertoft*, 18 Ves. 84, 91.

The mortgagee sold under the power in his mortgage, and that sale had the same effect, and entirely destroyed the voluntary settlement. It took away its subject-matter. Accordingly, the volunteers claiming under the settlement have no equity against the fund in court. That fund must be treated as though the sale had been made subsequently to the voluntary

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settlement by the settlor himself for valuable consideration:

*Evelyn v. Templar*, 2 Bro. C. C. 148;

*Daking v. Whimper*, 26 Beav. 568;

*Dening v. Ware*, 22 Beav. 184.

[*Kay*, J. referred to *Donaldson v. Donaldson*, *Kay*, 711.] It is a principle of the court to withhold its assistance from a volunteer, whether claiming under a contract, a covenant, or a settlement:

*Jefferys v. Jefferys*, Cr. & Ph. 133.

*Rawlinson* for W. G. Mount.

*Kekewich*, Q.C. and *Leverson* for other parties.

*Pearson*, in reply, referred to

*Hales v. Cox*, 32 Beav. 118;

*Croker v. Martin*, 1 Bli. N. S. 573.

*Cur. adv. vult.*

March 26.—The following written judgment was delivered by

*KAY*, J. (after stating the facts).—If the residue of the sale moneys is to be now considered as personal estate, it will no longer be subject to the 27 Eliz. c. 4, which applies to lands, tenements, or other hereditaments only. It is argued on behalf of the settlor that the sale entirely destroyed the settlement, and that the persons entitled under the settlement have no equity against the proceeds of sale, which must be treated, for this purpose, precisely as though the sale had been made subsequently to the settlement by the settlor himself, in which case *Daking v. Whimper* (26 Beav. 568) is a direct authority that the proceeds of sale could not be treated as being subject to the trusts of the settlement. But suppose a donor, having nothing but a share of the proceeds of certain real estate which was subject to a power of sale vested in another person, were to grant by deed all his interest in that real estate to a volunteer, and that subsequently the power of sale was exercised: I apprehend that his share of the proceeds would, before the sale, be correctly described as an interest in the hereditaments, and that such a grant would be perfectly good and valid as between him and the grantee, because at the time of making the grant it was as complete a transfer of his interest as he was capable of effecting, and this, upon the authority of *Kekewich v. Manning* (1 De G. M. & G. 176) and *Donaldson v. Donaldson* (*Kay*, 711), is binding, although voluntary. The question, therefore, seems to be whether the voluntary deed in this case was or not a disposition of the proceeds of the sale in case the prior mortgagee should exercise his power of sale. By that deed the settlor in terms granted all his interest in these hereditaments. The deed recites the mortgage, and his interest in the hereditaments must include what might remain of the proceeds of sale under the mortgagee's power of sale after satisfying the mortgage debt. I am, therefore, not able to see any difference in principle between this case and that which I have supposed. *Evelyn v. Templar* (2 Bro. C. C. 148), which was relied on, is not any authority against this view. There the bill was filed by persons claiming under a voluntary settlement, against a subsequent purchaser, who had paid his purchase money to the settlor, seeking to make him pay it over again. But the settlement contained a power for the settlor to revoke the settlement and sell the property, and a covenant by him that the

proceeds should be paid to the trustees of the settlement. The purchaser, therefore, as the settlement was revoked, was perfectly right in paying the proceeds to the settlor. The deed contemplated that any purchaser would do so. The covenant being voluntary could not be enforced in equity by way of specific performance, and the plaintiff was therefore not entitled to relief. Damages might have been obtained at law against the settlor for breach of the covenant, but he was dead insolvent. If the settlement had not contained a power of revocation, as the sale was an absolute sale of the property, the case would have been like *Daking v. Whimper* (*ubi sup.*). The truth is, that the statute 27 Eliz. c. 4, does not affect the question which has been decided as to the surplus proceeds in this case. The sale was not by the settlor, nor under any power reserved to him. It was under a power given to the mortgagee paramount to the voluntary settlement, which was expressly made subject to it. If the settlement was an effectual disposition of the surplus proceeds no other question arises. I am of opinion that it effected as complete a disposition of such proceeds as the settlor at the time was capable of making, and upon this ground I must hold that the persons interested under that settlement have a right to the surplus proceeds as against the settlor. In *Dolphin v. Aylward* (L. Rep. 4 H. of L. 486, 499) Lord Hatherley affirmed the well-established doctrine that the settlor can in no wise invalidate such a deed, except by a subsequent disposition by himself for value, and to the extent of that disposition, and in *Hales v. Cox* (32 Beav. 118) that doctrine was carried so far that it was held that persons claiming under such a settlement had a right to marshal the mortgagees of the estate under a subsequent mortgage, which included other property. In *Donaldson v. Donaldson* (*ubi sup.*) Lord Hatherley said: "If the title is so far complete that this court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him." This is no more than a statement of what was actually done in *Kekewich v. Manning* (*ubi sup.*), where the assignor of an equitable reversionary interest, being also one of the two trustees of the fund at the date of the assignment, subsequently became, by the death of the co-trustee, sole surviving trustee of the fund, and the assignment, being as complete as it could be made at the time, was enforced against such surviving trustee. Whether the mortgagee in this case be considered a trustee, or, as I think, more properly, a debtor, who, as between the contending parties, is a stakeholder, I think the grant ought to be enforced against him, and the money having been paid into court by him, I am bound to hold that it belongs to the persons entitled under the settlement.

Solicitors: *Dimond and Son*; *Dunster*; *Hume, Bird, and Eldridge*.

CHAN. DIV.]

Re RAW; MORRIS v. GRIFFITHS—Re GREENWOOD'S TRUSTS.

[CHAN. DIV.]

Thursday, April 24.

(Before PEARSON, J.)

Re RAW; MORRIS v. GRIFFITHS. (a)

Will—Construction—Conversion—Direction for sale—Discretion as to time of sale.

A testator gave to his children all his residuary estate, together with all rents, interests, dividends, and profits arising therefrom, to be divided amongst them equally, and he directed his executors to sell and convert into money his property whenever it should appear to their satisfaction that such sale would be for the benefit of his children, and all the money arising from the sale to be invested for the benefit of his children.

Held, that (following *Doughty v. Bull*, 2 P. Wms. 320) the direction to sell and convert was imperative, and operated from the date of the testator's death.

LEONARD RAW, who died in 1882, by his will dated 3rd March 1877, after bequeathing an annuity to his wife, gave and bequeathed unto his seven children all his real and personal estate to which he should be entitled at his decease, after deducting the annuity, and after his wife's decease the said annuity, together with all rents, interests, and dividends arising from his estate, and directed that the same should be divided between his seven children, but in case of the death of one or more of them, then between the survivors in equal proportions to each one, share and share alike, and he directed his executors to sell and convert into money his household furniture, lands, houses, tenements, and other property, whenever it should appear to their satisfaction that such sale should be for the benefit of his children, and all the money arising from such sale should be invested in trust in their names, in the public stocks or funds of Great Britain, for the benefit of his children, and that all the interest and dividends arising therefrom should be divided between his children in equal proportions to each one, share and share alike.

The testator left his seven children him surviving, but one of them, Walter, afterwards died intestate, having attained twenty-one years. The testator's real estate had not been sold.

The present application was by originating summons taken out by the executors of the will, and asking the opinion of the court as to whether the shares of the testator's children in his property became, under the terms of the will, vested immediately upon his death, and whether the direction for conversion was imperative and operative from the testator's death.

The question as to the shares of the children vesting upon the death of the testator having been answered in the affirmative, the arguments proceeded upon the other point in the case.

Smart for the executors. — The direction to convert operated at the death of the testator. The title to the realty therefore devolves as in the case of the proceeds of sale. The words are the same as in *Doughty v. Bull* (2 P. Wms. 320). He referred also to

*Robinson v. Robinson*, 10 Beav. 484.

Crossley, Q.C. for the infant heir of the testator's child, Walter. — There was no immediate conversion under the terms of the will. There

was merely an option to sell, which has not been exercised:

*Lucas v. Brandreth*, 28 Beav. 273.

He referred also to

*Re Ibbotson's Estate*, L. Rep. 7 Eq. 226;

*Wheldale v. Partridge*, 5 Ves. 387;

*Beecroft v. Wilkin*, W. N. 1867, p. 117.

PEARSON, J. — This case is entirely covered by the decision in *Doughty v. Bull* (*ubi sup.*). There the testator devised lands to trustees in fee, in trust to apply the profits until sale, for the benefit of all his four children, and the survivors and survivor of them equally, and on further trust, that as soon as the trustees should see necessary for the benefit of the children, they should sell the premises and apply the money for the benefit of his four children equally, to be paid at twenty-one or marriage. A., the eldest of the four children, attained twenty-one and married and died without issue, intestate, leaving a wife. The Lord Chancellor (Lord King), confirming the decision of the Master of the Rolls, decreed that the land being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and A.'s widow must have a moiety of A.'s share; and the profits of the land until sale must go as the money arising upon the sale would. In this case the words are in all respects similar to those in *Doughty v. Bull*. One of the children has died since the death of the testator, and the property has not been converted. The question is, whether or not an absolute conversion is directed by the will, in which case the share of the child who has died must be disposed of as if the property had been converted at the death of the testator. It is contended that there is no conversion directed, as there is an option given to the executors to sell or not as they pleased. I come to a different conclusion, and I decide that there is an absolute direction to sell, and that it is not optional. The testator evidently understood that the property would be sold during the life of his wife, because he says both the money arising from the sale as well as the annuity to his wife, and all the interest, was to be divided. It is clear to my mind that the direction is peremptory. Therefore the property must be considered as converted from the death of the testator. I will declare that the interests of the children vested on the death of the testator; and that the direction to convert is imperative, and operates from the death of the testator.

Solicitors for all parties, *Belfrage and Middleton*.

Monday, July 14.

(Before PEARSON, J.)

Re GREENWOOD'S TRUSTS. (a)

Trustee Act 1850 (13 & 14 Vict. c. 60), s. 10—Persons jointly seised—Coheirs of copyholds.

The provisions of sect. 10 of the Trustee Act 1850 empowering the court to make a vesting order in respect of lands held by a trustee jointly with a person out of the jurisdiction, apply to the case of a trust descended upon customary coheirs of copyholds.

THIS was an application under the Trustee Act 1850, whereby the children (one of whom was also administrator) of one Eliza Marriage prayed for

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MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY.

[CHAN. DIV.]

the appointment of new trustees of a certain deed-poll executed by Thomas Greenwood, and for a vesting order.

By the deed-poll in question, which was dated the 25th March 1844, Thomas Greenwood declared that, in order to make provision for his sister Eliza Marriage, the wife of Joseph Marriage, and her children, he and his heirs would stand seised of certain copyholds held of the manor of Chelmsford, in trust to receive the rents and profits arising therefrom during the lifetime of Eliza Marriage, and to pay the same to her for her separate use without power of anticipation, and after her death in trust to sell the property and pay and divide the proceeds to and amongst her children living at her decease.

Thomas Greenwood died on the 12th Dec. 1876, having by his will, dated the 29th Oct. 1873, given the residue of his estate to his son Herbert absolutely. He made no separate devise of trust estates.

His heir, according to the custom of the manor of Chelmsford, was the same son Herbert Greenwood who was admitted tenant to the copyholds on the 11th April 1877, according to the tenour of the will.

From the date of the admission down to his death on the 12th April 1880, Herbert Greenwood acted in the trusts of the deed-poll, but he died intestate as to trust estates.

His customary coheirresses were his aunts Mary Ann Warner and Eliza Marriage, both of whom were also the customary coheirresses of Thomas Greenwood.

On the 6th Nov. 1882 Eliza Marriage died intestate, and her customary heir was her son Oswald Marriage, who also became jointly with Mary Ann Warner customary heir of Thomas Greenwood.

Oswald Marriage was permanently resident in Australia, and the present application was consequently necessary to carry out the trusts of the deed-poll.

*Carson* for the petitioners.—The only difficulty in the case arises upon the construction of the term "jointly" in sect. 10 of the Trustee Act 1850. It is submitted that the provisions of the section apply to the case of coheirs of copyholds, and that the court can make the order which is asked for under the section. In *McMurray v. Spicer* (18 L. T. Rep. N. S. 116; L. Rep. 5 Eq. 527) Malins, V.C. considered that admission on court-rolls as coparceners was a tenancy in common, and each coparcener was solely seised of a moiety. But in the earlier case of *Re Templer* (4 N. R. 494) the section was held to apply to a trust descended upon coparceners.

PEARSON, J.—In my judgment this case is within the section under consideration. It appears to me that the word "jointly" as there used should be construed in a liberal sense as meaning "not solely," and that it applies to such a seisin or possession as that of customary coheirs, who, whether tenants in common or joint tenants, or something which is between the two, are together entitled to the copyhold property. Therefore I make the order as prayed.

Solicitors: Paines, Layton, and Pollock.

Monday, May 12.

(Before PEARSON, J.)

MUTUAL LIFE ASSURANCE SOCIETY v. LANGLEY. (a)  
*Mortgage—Priority—Notice—Stop-order—Part of trust funds in court—Practice—Period for redemption.*

*Where a trust fund is all in court, an assignee of it or of an interest in it must obtain a stop-order, in order to complete his title.*

*Where the fund is partly in court and partly in the hands of the trustees, his proper course is to obtain a stop-order upon the fund in court, and give the trustees notice of his assignment in respect of the remainder. The priority of his claims as between himself and other incumbrancers will, as to the respective portions of the fund, depend on the respective dates of such stop-order and notice; the former being of no effect as to the fund in the hands of the trustees, and the latter being useless as regards the fund in court.*

*As a general but not invariable rule, where there are several defendants to a foreclosure action, one period of redemption should be allowed to all of them.*

In this action the plaintiff society claimed as against the defendant Langley, who was a prior mortgagee, and others, foreclosure of certain mortgages transferred to the society in 1880.

At the commencement of the transactions in question De C. F. Lyne, the mortgagor, was entitled under a will to an absolute reversionary interest in one equal undivided ninety-third part or share of the residuary real and personal estate of the testator, S. L. Stephens, subject to a life interest. The estate, which was very large, was being administered by the court, in a suit of *Bulkeley v. Stephens*, most of the trust funds having been transferred into court, though some part of them still remained in the hands of the trustees under the will.

On the 28th May 1872 Lyne assigned his interest under the will to the defendant Langley, by way of mortgage to secure the repayment of 800*l.* and interest.

On the 27th June 1876 proper notice of this mortgage was given to the trustees of the will. Langley, however, never obtained a stop-order on the funds in court.

On the 27th Feb. 1878 Lyne charged, and covenanted to mortgage, his interest under the will and other property in favour of Pym and Nicolle, to secure the repayment of 200*l.* and interest (subject to a number of prior mortgages, notice of which had been duly given to the trustees of the will before 1876). Pym and Nicolle had notice of the mortgage to Langley.

On the same 27th Feb. notice of the charge was duly given to the trustees of the will, in whose hands part of the trust funds still remained.

In 1880 the benefit of the deed of the 27th Feb. 1878, and of the prior mortgages referred to in it, was transferred to the plaintiff society.

On the 25th Jan. 1883 the society obtained a stop-order on the funds in court.

On the 9th March 1883 the society commenced the present action against Langley, some subsequent incumbrancers, and the trustee in bank-

ruptcy of the mortgagor, for foreclosure of the mortgaged property.

The trustee in bankruptcy disclaimed and was dismissed, as was the case also with some of the subsequent incumbrancers, the remainder of whom put in no defences, and did not (except one) appear, though notice of motion for judgment was duly served on them.

The action now came on for hearing. There were other points raised which do not call for a report.

*Cozens-Hardy, Q.C. and Farwell* for the plaintiff society.—We do not claim priority over Langley as to the funds in the hands of the trustees, except so far as regards the mortgages with notice given earlier than his, which were transferred to us; *i.e.*, we do not claim priority in this respect for the charge under the deed of the 27th Feb. 1878. But by virtue of our stop order we do claim priority for that charge as regards the funds in court in the suit of *Bulkeley v. Stephens*:

*Pinnock v. Bailey*, 48 L. T. Rep. N. S. 811; 23 Ch. Div. 497.

*W. W. Karlake, Q.C. and A. G. Langley* for the defendant Langley.—We agree that the only question is as to the funds in court. No doubt, when a trust fund is all in court, the priorities of charges depend upon the dates of stop-orders obtained against it by the respective incumbrancers. If however, as here, part is in court and part in the hands of trustees, such priorities depend upon the dates of notice given to the trustees. Such notice affects the whole fund. This has been held to be so in the case of a person giving a mortgage to trustees and then becoming bankrupt, in which case notice to the trustees is by itself enough to take the fund in court out of the reputed ownership of the mortgagor:

*Matthews v. Gabb*, 15 Sim. 51;

*Thompson v. Tompkins*, 6 L. T. Rep. N. S. 305; 2 Dr. & Sm. 8.

[PEARSON, J. referred to *Warburton v. Hill*, Kay, 470.] There is no difference in this respect between a trustee in bankruptcy and an ordinary assignee. It would be the duty of a trustee to keep the court informed of any notices he might receive. [PEARSON, J.—It would be just as easy for the court to tell the trustee whenever a stop-order is obtained.] A stop-order alters no rights; and only affects the fund in court at the time when it is obtained:

*Lucas v. Peacock*, 9 Beav. 177.

Notice, however, fixes rights. The principle is, that as long as a trustee has active duties to perform (as here) notice must be given to him and to him only.

*G. Daw* for another defendant.

*Cozens-Hardy, Q.C.* in reply.—Reputed ownership decisions do not apply. They were considered in *Pinnock v. Bailey* (*ubi sup.*). *Bridge v. Beadon* (L. Rep. 3 Eq. 664) is an earlier authority to the same effect. A stop-order is not merely nugatory, for it does give priority, as a notice does:

*Swayne v. Swayne*, 11 Beav. 463;

*Greening v. Beckford*, 5 Sim. 195.

The court is in fact in the position of a trustee of a fund in court:

*Warburton v. Hill* (*ubi sup.*).

PEARSON, J.—This case raises a question of some novelty. [His Lordship stated the facts, and

continued:] The question is whether the defendant Langley, by means of his notice given to the trustees in June 1876, nearly seven years before the stop-order was obtained by the plaintiffs, has acquired priority over them as regards so much of the trust fund as is in court. The plaintiffs claim that by virtue of their stop-order they are entitled to priority as regards the fund in court; they admit that they are not entitled to priority as regards the fund which is in the hands of the trustees. The question is whether, when an assignment is made by a *cestui que trust* of his interest in a trust fund, part of which is in court and part in the hands of trustees, a notice of the assignment given by the assignee to the trustees is sufficient to complete his title as to the fund in court. It has been decided in many cases, and it is not disputed that, if the whole of the trust fund is in the hands of the trustees, notice of the assignment must be given to them in order to complete the assignee's title; and it is not disputed that, if the whole of the fund is in court, a stop-order must be obtained by the assignee in order to complete his title. The question is, when part of the trust fund is in the hands of the trustees and part is in court, do the trustees sufficiently represent the whole fund so that a notice to them is sufficient to bind that part of the fund which is in court? To show that they do, *Matthews v. Gabb* and *Thompson v. Tompkins* have been cited. In both those cases part of a trust fund was in court, and part was in the hands of trustees, but the question was, whether a notice to the trustees was sufficient to take that part of the fund which was in court out of the reputed ownership of the assignor, who had become bankrupt. That question, however, is very different from the question which arises between two incumbrancers, for the very slightest notice is sufficient to determine the consent of the true owner, and to take the fund out of the reputed ownership of the bankrupt. With regard to the effect of a notice to trustees it is said that, though a fund is in court, the trustees still remain trustees of it, and that notice of an assignment given to them is sufficient for all purposes. That, however, can hardly be so, because it is not disputed that, if the whole of the fund is in court, notice of an assignment must be given to the court by a stop-order. This shows that after payment into court the trustees remain trustees with only what I may call suspended animation. It may be said that the rule is, that if there are several trustees notice to one of them is enough so long as the one to whom the notice is given is alive, because the court assumes that he will do his duty by communicating the notice which he has received to the other trustees. But, assuming that I can consider that the trustees are trustees jointly with the court, can that rule apply in the present case? The trustees cannot immediately communicate to the court any notice which they receive, nor is it the practice of the court to direct notice of a stop-order to be given to the trustees. A stop-order is an order of a peculiar kind, and it is well settled that it does not alter any rights. To my mind the principle on which the court has proceeded is this, that the proper person to receive notice of an assignment is the person who has the trust funds in his hands. Can it make any difference that a part only of the fund has been transferred into court? I think not. I am

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of opinion that, as the fund is divided, part of it being in court, and part in the hands of the trustees, so that the original trustees have no control over the fund in court, that fund stands in a different position from the rest, and in a different position from that in which all the funds originally stood. Under the circumstances I must come to the conclusion that, so far as regards the fund in court, notice of an assignment must be given to the court, and that a notice to the trustees can have no effect. One reason why it is required that notice of an assignment of a trust fund should be given to the trustees is, that they may be able to give information, to any person who makes inquiries of them, whether they are aware of any assignment of or incumbrance on the fund. It is quite plain that a stop-order might be obtained without the trustees receiving any notice of it, and, consequently, a notice to the trustees would not, after a part of the fund had been paid into court, answer the same purpose as it would before. You cannot go to the trustees and ask them whether the court has received notice of any assignment, any more than you can go to the court and ask whether the trustees have received notice of any assignment. The fact is, that when part of the fund has been paid into court there are two different sets of trustees, though for some purposes there is a union between them, and different notices are required. I must therefore hold that, as regards the fund in court, the plaintiffs have obtained priority over the defendant Langley by means of their stop-order.

*Cozens-Hardy*, Q.C. asked that one period for redemption might be fixed for all the defendants.

*W. W. Karslake*, Q.C.—There is no reason for that:

*Smith v. Olding*, 50 L. T. Rep. N. S. 357; 25 Ch. Div. 462.

*PEARSON*, J.—I will give six months for redemption to the defendant Langley, and one period of three months afterwards for all the other defendants. My opinion is in favour of fixing, as a general rule, one period for redemption; the practice of giving successive periods has been found very inconvenient. I do not think I was wrong in my decision in *Smith v. Olding*, but the present case is a very peculiar one, and therefore I allow the additional three months.

Solicitors for plaintiffs, *Burchell and Co.*

Solicitors for defendant Langley, *Hores and Pattison*.

Solicitors for the other defendant, *Coode, Kingston, and Cotton*.

June 13, 16, and 19.

(Before *PEARSON*, J.)

Re THE CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION. (a)

*Company*—Director—Misfeasance—Joint and several liability—Qualification shares—"Fully-paid" shares—Promoter—Companies Act 1862 (25 & 26 Vict. c. 89), s. 165—Set-off.

There is no distinction between a payment to directors of cash out of promotion money and a transfer to them of fully-paid promotion shares by way of qualification shares; directors, parties

to such transaction, being in either case all jointly and severally liable for the total amount of what they so receive.

The articles of association of a company provided that each of the first directors (of whom R. was one) must take or hold at least twenty 5l. shares within three months of his appointment, which shares might be shares originally issued as fully-paid shares or otherwise. It was also provided, by a contemporaneous agreement, for the payment to the promoters of the company, for preliminary expenses and promotion, of 3000l. in cash, and 300 fully-paid shares.

Towards the end of the three months the five original directors, in order to qualify for their office, accepted from the promoter, at a board meeting, transfers, without consideration, of the requisite number of fully-paid shares, part of the promotion shares.

The company was afterwards ordered to be wound-up. It was not disputed that each director was liable to the extent of the par value of his own shares if unpaid for; but all of the directors except R. being unable to pay, it was sought under sect. 165 to make R. liable for the whole amount, 500l.

R. contended that he was not liable for anything, having since the date of the transfer advanced 520l. to the company, and having since acknowledging his liability paid 100l. more to the company, intending it to be as and for satisfaction of the amount due upon his twenty shares. He also urged that in any case there was no joint and several liability under the circumstances.

Held, that there was no right of set-off in his favour; that the 100l., however it had been intended, had been accepted as a further advance, and not in payment for his shares; and that he must be declared liable for the whole 500l.

THIS was a summons taken out under sect. 165 of the Companies Act 1862 by the liquidator in the winding-up of the above company, asking that five persons, directors of the company, might be ordered jointly and severally to pay the sum of 500l., being the total nominal amount of twenty shares transferred to each of them respectively by G. Smith, the promoter of the company, and the costs of the application. The summons, however, now came on against one only of the five, Major-General G. Ricketts Roberts, under circumstances which appear below.

The company was registered on the 26th May 1880, an agreement having been signed a few days previously providing for its establishment, and for the payment of promotion money.

By this agreement, dated the 19th May, and made between W. Catt and J. W. Boyfield of the first part, G. Smith of the second part, and T. M. Dobie (as trustee for the company) of the third part, after reciting that G. Smith had agreed to find, provide, and pay all the preliminary expenses of and incident to the formation of the company and the obtaining subscriptions for capital up to the first allotment of shares, and that in consideration thereof Catt and Boyfield had (with the privity of Dobie on behalf of the company) agreed to pay and allot to Smith out of certain cash and shares to be paid and allotted or issued to them "the sum of money and shares thereafter mentioned," it was agreed that the capital of the company was to be 100,000l. in 20,000 shares of

5*l.* each, and that Catt and Boyfield should grant an underlease of certain premises "in consideration of the premium or sum of 7500*l.*," to be paid them as follows: "as to the sum of 5000*l.* part thereof in cash; and as to the sum of 2500*l.* residue thereof, by the allotment and issue to them, or their nominees, of 500 fully paid-up shares of the said intended company, of 5*l.* each."

The agreement then provided that, out of this sum of 5000*l.* cash, Catt and Boyfield should pay G. Smith 3000*l.* in cash, and should transfer or cause to be allotted or issued to him, or his nominees, 300 fully paid-up shares of 5*l.* each out of those so agreed to be allotted and issued to them, and that the company should be at liberty to pay G. Smith the 3000*l.* cash, and to allot and issue to him the 300 shares; and that his receipt for the money and the shares should be a discharge to them, as between the company and Catt and Boyfield.

Art. 3 of the articles of association provided that each of the first five directors should, within three months after his appointment, as a necessary qualification for such appointment as director, hold at least twenty shares in the company, which might be shares originally issued as fully paid-up shares or otherwise, and that if any director should cease to hold in his own right the amount of capital requisite for his qualification his office should thereupon become vacant.

The first five directors were the present respondents, viz., the Earl of Perth and Melfort, Colonel James Dillon Macnamara, Edwin Cantor, Frederick Oswin, and Major-General G. Ricketts Roberts. They did not subscribe for any shares, nor were any shares allotted to them upon the formation of the company.

About the middle of August the attention of the directors was called to art. 3, and it was suggested to them, by or on behalf of Smith and another promoter, that they might obtain the necessary qualification by accepting from Smith without payment a transfer of 100 out of the 300 fully paid-up shares, which had been allotted to him as above stated. This was accordingly done at a board meeting at which all the directors were present; but there was no insinuation that any of the directors knew or believed that the transaction was otherwise than proper, they having, on the contrary, been assured by Chinery (the other promoter) and the company's solicitor that they were doing nothing illegal or irregular.

About Feb. 1881, however, it came to the knowledge of General Roberts that he and his co-directors had perhaps been guilty of a misfeasance in accepting the shares. He immediately expressed his willingness to pay for the twenty allotted to him, and called upon the others to act in the same way. These gentlemen, however, though not denying their liability, pleaded inability; nor did they in fact ever pay anything in respect of their shares.

It should here be stated that, the company not having been very prosperous, General Roberts had on several occasions already been induced to make payments in its favour by way of loan on its behalf, the total sum so advanced by him amounting at the time to 520*l.* He now drew a cheque for 100*l.* more, and handed it to Chinery, intending (as he stated in his affidavit) thereby to pay the 100*l.* which he had just offered to pay upon his twenty shares. Whether by accident,

however, or otherwise this payment was not so treated in the company's books, but was there entered as a further loan.

This took place at a board meeting on the 25th Feb., the exact circumstances being somewhat in doubt, as appears from his Lordship's judgment.

The company having been ordered to be wound-up, the liquidator commenced the present proceedings to obtain payment of the whole 500*l.* The summons was adjourned into court at the request of General Roberts.

*Cookson, Q.C.* and *H. B. Buckley* for the liquidator.—There is no doubt as to the individual liability of directors to pay for "fully-paid" qualification shares given them by a promoter:

*Re Caerphilly Company; Pearson's case*, 4 Ch. Div. 222;

*Re British Provident Association; De Ruvigne's case*, 36 L. T. Rep. N. S. 329; 5 Ch. Div. 306.

But where they are aware of such gifts to each other from the promoter, they are all jointly and severally liable for the full amount:

*Re Englefield Colliery Company*, 38 L. T. Rep. N. S. 112; 8 Ch. Div. 388;

*Re Anglo-French, &c., Society; Ex parte Pelly*, 47 L. T. Rep. N. S. 638; 21 Ch. Div. 492.

Here General Roberts knew all about what was going on. He was present at all the meetings, and he cannot be heard to say that he did not understand the upshot. Then, as to set-off, there is no set-off in such cases:

*Re Anglo-French, &c., Society; Ex parte Pelly* (ubi sup.).

General Roberts can, no doubt, carry in his claim in the winding-up for whatever the company have received from him; but he must pay what is due in full. Nothing will exonerate him but actual express payment; and that there has not been. The 100*l.* was in fact paid to Chinery to defray certain expenses of the company, and was never accepted or in any way treated by the company as payment for the shares.

*Cozens-Hardy, Q.C.* and *Heath* for Major-General Roberts.—This is a very hard case. The preliminary agreement was drawn and settled before General Roberts had anything whatever to do with the company. He trusted others. He has always admitted his liability to pay for his own shares, when once the matter was explained to him. But there is no joint and several liability. There is no evidence of any antecedent bargain with the promoter, as there was in the cases cited. Moreover, General Roberts was entitled to assume that the transfers to the other directors were correct in substance as they were, in form. It would be carrying the doctrine of notice very far to say that merely by sitting at the board he had notice of the actual nature of every one of the transfers. Then, as to his own shares, he has already paid for them. He immediately offered to do so; and at the meeting of the 25th Feb., after admitting his liability, he handed 100*l.* to the company, the exact amount due on his shares—intending, he says, to pay for them. This is not set-off but actual payment. It does not matter that by some misunderstanding there was no proper entry of the payment in the books.

*Buckley* in reply.—The whole misfeasance is in binding the company to part with value and to



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get nothing for it. The measure of the value of the shares so parted with is the par value:

*McKay's case*, 2 Ch. Div. 1.

His Lordship reserved judgment.

June 19.—PEARSON, J. (after stating the clauses of the agreement of the 19th May 1880, and referring more particularly to the terms upon which the sum of 7500*l.* was to be paid, partly in cash and partly in fully-paid shares, to Messrs. Catt and Boyfield, and also to the terms upon which the sum of 3000*l.* was to be paid to Mr. Smith, partly in cash and partly in fully-paid shares) continued:—I have read these clauses because they show most distinctly that these shares were allotted and taken as cash and in lieu of their par value. On the 19th May 1880, the day on which this agreement bears date, of course the company was not in existence, but at that time the articles, as I gather, had been framed; and, by the second of those articles, the several gentlemen whose allocation of shares to themselves is now called in question were named as the future directors of the company; and by the next article it was declared that every director must take or hold, within three months after his accepting office, twenty shares in the company. On the same 19th May there was a meeting of those gentlemen who were to be directors of the company, including General Roberts, and they accepted the agreement. The company was registered, and the transaction was completed on the 26th May. It is quite plain, therefore, as General Roberts was a party to what was done before the company was registered, and inasmuch as from the time when the company was registered he acted as a director, he perfectly well knew what was in the agreement, and must be held to have known also the terms upon which he came in under the articles of association. What happened was this: The 300 shares mentioned in the agreement were allotted in due course to Mr. Smith, and just towards the end of the three months from the establishment of the company it was intimated by Mr. Chinery, who took an active part in getting up this company, to the directors, and, amongst others, to General Roberts, that the time during which they were to obtain their qualification was on the point of expiring, and that it was absolutely necessary, therefore, that they should obtain that qualification. Thereupon, acting upon the advice, General Roberts says, both of Mr. Chinery and of the solicitors of the association, and believing that he was doing that which he was lawfully authorised to do, he and his brother directors sitting round the table accepted from Mr. Smith a transfer to each of them of twenty shares, part of the 300 shares which had been given to Mr. Smith for promotion. There was no consideration of any sort given by the directors for those shares. They were simply transferred to them, and General Roberts says, and I believe him, that he was induced to do this because he relied on what he was informed was the opinion of the solicitors that he could do it properly, and because of the unanimous consent of his brother directors to take the shares in this way. So matters went on for some time, and at last, somewhere about Feb. 1881, it was intimated to General Roberts that in accepting a transfer of part of those shares which had been given to Mr. Smith for promotion he

had done that which he had no right to do; and that if the shares were to come back to the directors they must come back for the benefit of the company, and that the directors who had taken part in accepting this agreement on behalf of the company could not by any possibility take advantage of the premium, if I may so call it, that was to be paid for promotion to Mr. Smith, to put into their own pockets money or shares that were really the property of the company if they came back at all. General Roberts, upon having this brought carefully before him, saw that what was stated was right. Being an honourable man, and desiring to act honourably, he at once said that he regretted exceedingly that he had *per incuriam* done that which he found he ought not to have done, and that he was perfectly prepared to pay for those twenty shares; and he remonstrated with his brother directors, and said, "Of course, if I pay for my shares you ought to pay for yours, and I trust you to pay for them," and he called upon them to do so. According to General Roberts' statements his brother directors admitted at once that they were bound to pay for their shares, but pleaded want of means, and they never did pay. It is admitted by General Roberts' counsel at the bar that General Roberts was liable to pay for those shares which were transferred to him as fully paid-up shares. That is not in dispute on the present occasion. General Roberts has never disputed it, be it said to his credit, and his counsel are not instructed to dispute it upon the present occasion. The question with regard to the payment of those shares depends on the fact whether or not General Roberts ought to be deemed to have paid for them already. He says, and I believe him, that when he found that he ought to pay for his shares, having at that time advanced upwards of 500*l.* to the company, he said, "Set off 100*l.*, if I ought to pay in regard to those shares, against the 520*l.* which you now owe me;" and, as far as I can gather from his affidavit and from the minute-book, that must have been done somewhere about the 25th Feb., because he states that it was at a board meeting between the middle and end of February and the only board meeting that I can find is on the 25th Feb. Curiously enough, on that very same day he advanced a further sum of 100*l.* to the association, making therefore (assuming it all to be a debt) a debt due from the association to him of 620*l.* Now I do not hesitate to say, nor will the counsel for the liquidator deny for one moment, that if on the 25th Feb. he had said, "You are in want of money; I owe you 100*l.* for the shares; I will pay 100*l.* for those shares at once, and you will then have 100*l.* in your coffers," there would have been payment, and there would have been an end of the case so far as regards General Roberts' own shares. Unfortunately that was not done. Unfortunately the cheque, as I imagine—for I can only speculate upon it—looking at the minutes of the board of that meeting—must have been drawn by General Roberts at the beginning of the meeting, and was drawn as an advance to the company, and simply as an advance. The conversation I should gather—for there is no record of it, nor was there likely to be—must have taken place at the end of the meeting, and after that advance. Unfortunately for General Roberts, and I myself regret it, I am obliged to come to the conclusion that there was

nothing but mere conversation about General Roberts' willingness to set off part of his advance to the company against 100*l.* which he had to pay upon his shares. There was never anything concluded in respect of that matter. At the time when the company came to be wound-up it rested in this way, that there was 100*l.* due from General Roberts with respect to these shares, and there was 620*l.* due from the company to him in respect of advances. And then upon the authorities it has been decided that General Roberts has no right to set off, and I am compelled to come therefore to the same conclusion that the Vice-Chancellor and the Court of Appeal came to in *Ex parte Pelly*, and I must decide that General Roberts can only be a creditor of the company for 620*l.*, but is liable now to pay this 100*l.* to the company. The other question is this: There were four other directors who accepted in the same way and on the same day and at the same time, and all in the presence of each other and of General Roberts, a transfer to each of them of twenty shares in the same way that General Roberts did, and unfortunately those gentlemen have never paid for those shares. That they are liable to pay for them is beyond dispute. The question is whether or not General Roberts is liable also with them; whether they are all jointly and severally liable, or whether each director is only liable to pay in respect of his own shares. I have with regret and after consideration come to the conclusion that they are jointly and severally liable. Roberts, because I am satisfied from the whole statement of the case that General Roberts did not intend to do anything that was wrong, still less anything that was fraudulent. I am satisfied that he intended to act as a man of honour in the transaction, and I regret, therefore, being obliged to come to the conclusion that all the directors are jointly and severally liable for what is due in respect of those shares, and it was for that reason that I called attention to the article in the agreement which shows most distinctly that these shares were taken as cash. They were taken in part payment of the 7500*l.* which was the sum that was to be paid. Now, if instead of shares Mr. Smith had given 100*l.* to each of these gentlemen and each of them had been responsible for the money that had been paid to Mr. Smith, I suppose there can be no doubt, looking to the decision in the Engerfield Colliery Company's case and other cases, that each of the directors would be liable jointly and severally with the others for the whole sum that had been paid in that way. I really cannot make any distinction between the transfer of shares in that way and the payment of money. I think the transfer of shares is just the same thing, and that inasmuch as every one of the directors was a party to this transaction by which these shares, which have not been paid for, were treated as fully paid-up shares and were transferred to each of themselves, I think that each of them now is responsible for the loss which the company may suffer by not having got the full amount paid for those shares. It is quite plain to me, at the time when that was done these shares might have been allotted so as to obtain for the company the full amount of their nominal value. This view of the case is, I think, in accordance with what Mellish, L.J. said in *Hay's case*: "That being so, it appears to me quite clear that when the company seek their redress from the agent

who has so behaved, they have their choice, and can say that this cheque never became the property of Prince, but remains the property of the company, and therefore the sum due on the shares has never been paid; or, if they thought it more for their interests, they might have said, 'You having paid this cheque nominally to pay up your shares, we will ratify that part of the transaction and hold your shares as paid, and then say that the money with which you paid for them was our money, and therefore you must pay the money back to us.' In my opinion the consequence of a transaction of this nature is, that the *cestui que trust* has an election in which way he may choose to treat it. He is entitled to say that the calls are unpaid, and are now to be paid." In the case before me Smith took the shares as money, and transferred them to the directors, who accepted them. The company, in my judgment, is entitled to say, You accepted 500*l.* of our money from Smith and divided it among yourselves, and you must repay it, and we will treat the shares as fully paid-up, or we will treat the shares as unpaid, and you who have divided them among yourselves must pay up what is due upon them. Under these circumstances I must make the order that General Roberts is liable for the whole, and in so doing I say most distinctly that I hope the liquidator will endeavour to relieve General Roberts so far as he can from liability in respect of the other shares by enforcing payment from each of the other directors. The costs will of course follow. General Roberts may have two months for the payment of the money.

Solicitors: C. Harcourt; T. Vernon Musgrave.

#### QUEEN'S BENCH DIVISION.

Tuesday, June 17.

(Before MATHEW and DAY, JJ.)

WELDON v. NEAL. (a)

*Married woman—Statute of Limitations* (21 Jac. 1, c. 16)—*Married Women's Property Act 1882* 45 & 46 Vict. c. 75), s. 1, sub-sect. (2)—*Cause of action accruing before that Act—Time within which married woman may bring action.*

*Sect. 7 of the Statute of Limitations* (21 Jac. 1, c. 16) provides that, in the case of a married woman, her right to bring an action in respect of the matters specified in that statute shall commence from the time when she becomes discovert.

*Sect. 1, sub-sect. (2), of the Married Women's Property Act 1882* (45 & 46 Vict. c. 75) provides that a married woman shall be capable of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole.

*Held, that, inasmuch as, by the Statute of Limitations, a married woman's right to sue was reserved until she became discovert—in other words, until she could sue in her own name—and as the Married Women's Property Act 1882 gave her a right to sue in her own name in all respects as if she were a feme sole, a married woman's right to bring an action in respect of a cause which accrued before the passing of the Married Women's Property Act 1882, and while she was a married woman, commences from the date of the coming into operation of that Act,*

(a) Reported by HENRY LEIGH Esq., Barrister-at-Law.

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*i.e., the 1st Jan. 1883, and she can bring her action within the statutable period from that date.*

ACTION for slander and trespass.

From the statement of claim it appeared that in April 1878 the defendant had acted as solicitor for the plaintiff in an action which was then going on, and it was alleged that he had on certain days in that month, specified in the statement of claim, in a conversation with the plaintiff's husband, said, "Your wife is a lunatic and of unsound mind." It was also alleged that on the 24th May 1880 the defendant had, in conversation with three other specified persons, said, "Mrs. Weldon is no better than she should be; it is high time she should be put a stop to;" that the defendant, between the 1st Oct. 1880 and the 14th March 1881 said of the plaintiff, "Mrs. Weldon has committed adultery" with a person therein specified; and that between the 25th Dec. 1877 and the 14th April 1878 the defendant said to a particular person, "Mrs. Weldon is a mad-brained woman, as mad as she can be, and I shall soon have her in a lunatic asylum. There won't be much trouble in getting Mrs. Weldon into a lunatic asylum; that is a very easy matter; there is nothing difficult about that."

The statement of claim set out other slanders of a similar kind, and also certain trespasses alleged to have been committed by the defendant, and the plaintiff claimed damages for the injury and loss of income which she had suffered thereby.

The defendant, in his defence, raised two points of law: namely, first, that the claim was barred by the Statute of Limitations (21 Jac. 1, c. 16); and, secondly, that there was no allegation of special damage.

Sect. 7 of the Statute of Limitations (21 Jac. 1, c. 16) provides that, in the case of a married woman, her right to bring an action in respect of the matters specified in that statute shall commence from, and the period of limitation shall run from, the time when she becomes discovert.

Sub-sect. 2 of sect. 1 of the Married Women's Property Act 1882 provides that a married woman shall be capable . . . of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her.

*E. Bullen* for the defendant.

The Plaintiff appeared in person.

MATHEW, J.—An objection has been raised here on behalf of the defendant that this action could not be brought by the plaintiff, as the time within which it might be brought under the Statute of Limitations had been exceeded. There is, however, in that statute an exception in favour of certain persons and classes of persons therein specified, and, among others, of married women. By that statute a married woman's right to bring an action in respect of the matters specified in the statute commences at the time she becomes discovert. A married woman, then, was entitled to bring her action within such times as were limited by the statute, after being discovert. In other words, a married woman had her rights of action reserved until she was in a position to sue

in her own name. Then came the Married Women's Property Act 1882, sub-sect. 2 of sect. 1 of which gave to every married woman the right of suing either in contract or in tort, in all respects as if she were a *feme sole*. The plaintiff, therefore, obtained her full rights of suing when that Act came into force on the 1st Jan. 1883, so that her right to bring this action first accrued at that time, and she has brought her action within the statutable period from that date. As to the second point that has been raised by the defendant, the statement of claim alleges that the plaintiff has been called a lunatic, and it further alleges that she has suffered injury and loss of income by reason of those defamatory statements. For the present purpose these allegations must be taken to be true, and they are sufficient allegations of special damage to entitle the plaintiff to go to trial. I am of opinion, therefore, that the action must proceed.

DAY, J. concurred.

Solicitor for the defendant, Neal.

Tuesday, June 17.

(Before MATHEW and DAY, JJ.)

SUMMERS AND OTHERS v. MOORHOUSE AND OTHERS. (a)

*Evidence — Ambiguity — Municipal election — Voting paper—Admissibility of parol evidence to explain manifest ambiguity in—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 60.*

Sub-sect. 4 of sect. 60 of the Municipal Corporations Act 1882 enacts that, "Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes."

At an election of aldermen under sect. 60 of the Municipal Corporations Act 1882, a voting paper began in the name of one voter, in the following terms: "I, the undersigned, A. B., being, &c., do hereby vote for the following persons, &c." This voting paper was properly dated, but was signed, not by A. B., but by another voter, C. D. There were other voting papers to the same effect and in similar terms.

On the hearing of a petition under the same statute against the return of the respondents, on the ground that such voting papers ought to have been rejected, the commissioner admitted parol evidence to explain the mistake in the voting papers, when it appeared that the said voting papers were filled in at the top by the town clerk with the names of voters by whom they were intended to be used, but by mistake they were given to the wrong persons, each of whom, without discovering the error, signed his name at the foot of the voting paper, intending thereby to make it his voting paper, and after signing his name personally delivered it, as such voting paper, to the chairman at the meeting.

Held, that such evidence was properly admitted to explain the manifest ambiguity in the voting papers, and that, as each voter had signed his voting paper, and personally delivered it at the

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*meeting to the chairman, the requirements of the statute had been fulfilled, and that the votes were rightly counted.*

## SPECIAL CASE.

1. This was a petition under the Municipal Corporation Act 1882 against the return of the respondents as aldermen for the borough of Wakefield, which came on for trial before me at the said borough on the 12th, 13th, and 14th March 1884.

2. The petition prayed that it might be determined that the respondents were not duly elected, and that John Connor and Thomas Howden (two of the candidates at the said election) were duly elected, and ought to have been returned.

3. On the trial the following facts were admitted, or proved, and I reserved the question, hereinafter mentioned for the opinion of the High Court of Justice.

4. At the election of aldermen for the borough of Wakefield, held on the 9th Nov. 1883, pursuant to the Municipal Corporation Act 1882 (45 & 46 Vict. c. 50), s. 60, the four respondents were the Liberal candidates, and John Connor and Thomas Howden were the Conservative candidates. The number of vacancies to be filled up was four. The mayor acted as chairman at the election.

5. The number of votes recorded for the respective candidates was as follows: George Moorhouse, 16; George Mander, 16; Benjamin Peacock, 16; Reuben Reynolds, 16; John Connor, 12; Thomas Howden, 12; making a majority of four for each of the respondents, who were declared by the chairman to be duly elected.

6. Eight of the voting papers, which were counted in the majority for the respondents, and which were partly printed and partly written, when delivered to the chairman, contained the names of two persons entitled to vote, one of which was inserted in writing at the top of such paper after the printed words, "I, the undersigned," and the other was written at the foot of such paper.

The following is an identical copy of one of those papers:

## ELECTION OF ALDERMEN.

## VOTING PAPER.

*Borough of Wakefield, in the West Riding of the County of York.*

I, the undersigned, Francis Milthorp, being one of the members of the council of the said borough, entitled to vote in the election of aldermen for the same borough, do hereby vote for the following persons to be aldermen of the said borough accordingly:

Christian Name and Surname of the Persons for whom I vote.	Their respective Places of Abode.	Their respective Descriptions.
George Moorhouse ...	Northgate ...	Grocer.
George Mander ...	Margaret-street ...	Solicitor.
Benjamin Peacock ...	Westgate ...	Grocer.
Reuben Reynolds ...	Sandal Magna ...	Corn Miller.

Dated this 9th day of November 1883.

WILLIAM LEE SELLERS.

The other seven papers were to the same effect.

7. It was contended, on behalf of the petitioners, that the above-mentioned eight papers were void and invalid as voting papers, as being uncertain and ambiguous, and that no evidence was admissible to explain this ambiguity, or to show by what voters they were used, and I was of opinion and found that without such explanatory evidence

such papers were void and invalid for the above reasons.

8. The respondents thereupon tendered evidence to show the circumstances under which the voting papers were filled up, and the persons by whom they were signed and used, and contended that such evidence was admissible.

9. I admitted the said evidence (subject to all just exceptions), which was to the following effect: That all the said eight papers were filled in at the top by the town clerk with the names of the respective voters by whom they were intended to be used. In this condition they were then handed by him to one Mr. Horner, who acted on behalf of the Liberal voters.

10. That the said Mr. Horner thereupon inserted in each of the said papers the names, places of abode, and descriptions of each of the respondents as candidates, and having done this proceeded to distribute them among the respective voters by whom they were intended to be used, and in so doing he inadvertently handed each of the said eight papers to a person other than the one whose name appeared at the top of such paper, and to whom he intended to deliver it.

11. Each of the persons who so received a paper thereupon, without discovering the error, signed his name at the foot of it, intending by so doing to make it his voting paper, and to vote for the persons named thereon, and after so signing his name, personally delivered it as such voting paper to the chairman, who then read out the names appearing at the foot of each paper as the names of the persons voting respectively for the candidates named therein.

12. If the above evidence was admissible, I found as a fact that it was true, and consequently held that the above-mentioned eight papers were valid voting papers, and that the respondents were duly elected.

13. The question for the opinion of the court is, whether the above evidence was admissible to explain the said eight voting papers, or whether the voting papers were so ambiguous and contradictory as to render parol evidence to explain them inadmissible.

14. The parties have agreed to my stating this case as a way of reserving the question for the opinion of the High Court of Justice.

15. I have reserved my determination, whether the respondents were duly elected or not, and whether the said John Connor and Thomas Howden were duly elected, and ought to have been returned, until the court has determined the above question, and I shall certify according to the decision of the court thereupon, and order that the costs to be paid by the parties respectively shall follow such decision.

16. If the court should decide that the said evidence was admissible, I shall certify that the respondents were duly elected. If the court should be of the contrary opinion, I shall certify that the respondents were not duly elected, and that John Connor and Thomas Howden were duly elected, and ought to have been returned.

CHARLES MARSHALL GRIFFITH, Commissioner.

*Mattinson* for the petitioners.—These voting papers are clearly void and invalid, as being uncertain and ambiguous, and no parol evidence is admissible for the purpose of explaining the ambiguity. They begin by stating the name of

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one voter, and are signed at the end, not by the same voter, but by a different voter. In *Rowley v. The Queen* (14 L. J. 62, Q. B.), where an election was held to fill three ordinary vacancies and one extraordinary vacancy, and the voting papers contained the names of four candidates, but did not specify the person intended to fill the latter vacancy, such voting papers were held to be void. He also cited

*In the Goods of Hunt*, 33 L. T. Rep. N. S. 321; L. Rep. 3 P. & D. 250.

Cyril Dodd, for the respondents, was not called on.

MATHEW, J.—I am of opinion that our judgment in this case must be for the respondents. There is a voting paper beginning with the words, "I, the undersigned, Francis Milthorp, being one of the members of the council of the said borough entitled to vote in the election of aldermen for the same borough, do hereby vote for the following persons to be aldermen of the said borough accordingly;" then follow the names of the candidates and the date, but at the end, instead of being signed by Francis Milthorp, it is signed by another voter, William Lee Sellers, so that there is here an ambiguity arising from there being two names in one voting paper. To understand how to deal with this ambiguity, we must look at sect. 60 of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), which regulates the time and mode of the election of aldermen. By subsect. 4 of sect. 60 it is enacted that, "Every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." From this section we see that it is the duty of the chairman to ascertain that the person entitled to vote does vote by signing and personally delivering at the meeting to the chairman a voting paper containing the names, places of abode, and descriptions of the persons for whom he votes. The voter must sign his voting paper, and must personally deliver it at the meeting to the chairman. All this has been done in the present case. But an objection was taken before the commissioner that the voting papers were void and invalid, and that evidence was not admissible to explain the mistake or ambiguity in them, or to show by what voters they were used. I am of opinion that the commissioner was right in receiving evidence to explain such a manifest ambiguity, and such evidence was correctly and properly received; and consequently that the eight votes in question were properly admitted and counted.

DAY, J. concurred.

*Judgment for the respondents, with costs.*

Solicitors for the petitioners, *H. B. Clarke and Son, for Harrison and Beaumont*, Wakefield.

Solicitors for the respondents, *Van Sandau and Co.*

Thursday, July 3.

(Before FIELD, MANISTY, and LOPES, JJ.)

BAINES AND CO. v. TOYE. (a)

*Infant—Necessaries—Infant sufficiently supplied when goods are ordered—Such fact not communicated to the person supplying—Admissibility of evidence as to such supply—Province of judge and jury.*

The plaintiffs, who were tailors, brought an action for 22l. 18s. 6d. for clothes supplied by them to the defendant. The defendant pleaded that, at the time the clothes were supplied, he was an infant, and the plaintiffs replied that the goods supplied were necessaries, suitable to the estate and condition in life of the defendant. On this issue was joined. At the trial evidence was given to show that the defendant was already sufficiently supplied with clothes at the time when the goods in question were ordered, but this fact was not communicated to the plaintiffs. The learned judge (following the last case on the point, viz., *Ryder v. Wombwell*, 17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90) withdrew this evidence from the jury, and left the question to them in the following terms: "Were the goods necessaries? It does not matter what amount of clothes he (the defendant) had in his box, trunk, or wardrobe, if not having been communicated to the plaintiffs." The jury found for the plaintiffs. On a motion on behalf of the defendant, for a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence:

Held (Manisty, J. doubting, but not dissenting) on the authority of *Bainbridge v. Pickering* (2 Wm. Bl. 1325), *Brayshaw v. Eaton* (7 Scott, 183), *Foster v. Redgrave* (L. Rep. 4 Ex. 35, n.), and other cases, that the evidence that the defendant was already sufficiently supplied with articles of the same kind when the clothes in question were ordered, ought to have been admitted and left to the jury, notwithstanding that the fact of such supply had not been communicated to the plaintiffs, it being for the jury to judge of the effect of that supply on the question of necessaries.

*Foster v. Redgrave* (ubi sup.) followed.

*Ryder v. Wombwell* (ubi sup.) not followed.

MOTION on behalf of the defendant for a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence.

The plaintiffs were tailors, and the action was brought for the sum of 22l. 18s. 6d. for clothes supplied to the defendant. The clothes consisted of four coats, four vests, and three pairs of trousers, and an application was made, under Order XIV., to sign judgment for the amount, but, as it appeared that the defendant was an infant, leave to defend was given. The defendant pleaded that at the time the clothes were supplied he was an infant, and the plaintiffs replied that the goods supplied were necessaries suitable to the estate, degree, and condition in life of the defendant. Upon this issue was joined, and the case was tried before Smith, J. and a jury on the 8th May.

At the trial evidence was given to show that the defendant was already sufficiently supplied with clothes at the time the goods in question were supplied, but this fact was not communicated

(a) Reported by HENRY LEIGH, Esq., Barrister-at Law.

to the plaintiffs. Smith, J. withdrew from the jury this evidence as to the sufficient supply of the defendant, and put the question to the jury in the following form: "Were the goods necessities? It does not matter what amount of clothes he had in his box, trunk, or wardrobe, it not having been communicated to the plaintiffs." The jury found that the goods were necessities, and the verdict was entered for the plaintiffs for 22l. 18s. 6d., and judgment given for that sum, with costs on the Superior Court scale.

The defendant now moved for a new trial, on the ground that the judge had misdirected the jury on the question whether the clothes supplied to the defendant were necessities or not, by directing them that it was immaterial to consider whether the defendant was already sufficiently supplied with clothes at the time he ordered the said goods, as that fact had not been communicated to the plaintiffs, and directed them to disregard the evidence to that effect already given, and on the ground that the verdict was against the evidence, the jury having disregarded the evidence that was given to the effect that the defendant was already sufficiently supplied with clothes, that evidence having been uncontradicted.

*T. Bullen* for the defendant.—Although evidence was given to show that the defendant was already sufficiently supplied, the learned judge, on the authority of *Ryder v. Wombwell* (17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90; in the Exchequer Chamber, 19 L. T. Rep. N. S. 491; L. Rep. 4 Ex. 32), withdrew this evidence, and told the jury to disregard it, as it was quite immaterial what amount of clothes the defendant had, as that fact had not been communicated to the plaintiffs. I submit that he ought to have told the jury to take into consideration the amount of clothes the defendant had at the time the goods were supplied, as, if at that time he had a sufficient supply of clothes of a similar kind, then those supplied would not be necessities. [LOPES, J.—The principle you want to establish is that, to make a contract by an infant binding, there must be a subsisting want, and that the infant's power to make himself liable is limited to his actual wants.] Yes; I submit that is the true principle in all these cases. In *Ford v. Fothergill* (1 Esp. 210) Lord Kenyon, in giving judgment, said: "A person trusting an infant did it at his peril, and, though it had been stated that a tradesman had no business to inquire into what dealings an infant had with others, that he was of opinion that the tradesman was bound to make such inquiry, and if the infant had contracted other debts at the same time for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of necessities." [MANISTY, J.—Take the case of an infant buying one hat every hour from different hatters until he had got, say, ten hats, do you contend he could not be made to pay for all of them?] Yes. In *Cook v. Deaton* (3 C. & P. 114) it was held that, if proper clothes were supplied to an infant by his father, any other clothes furnished to him in addition could not be necessities, and, further, that the plaintiff ought to make inquiries as to the defendant's supply. The cases of *Story v. Pery* (4 C. & P. 526; *Burghart v. Angerstein* (6 C. & P. 690), and *Steedman v. Rose* (Car. & Mar. 422) are to the same effect. [LOPES,

J.—*Steedman v. Rose* (*ubi sup.*) is simply this: the evidence as to sufficient supply is admissible; then the question is for the jury.] In *Brayshaw v. Eaton* (7 Scott, 163) this evidence was treated as clearly admissible. Bosanquet, J., in giving judgment in that case, says: "The tradesman acts at his own peril; he will be precluded from recovering if the infant is proved to be already sufficiently supplied elsewhere. The question, therefore, was for the jury."

*Peters v. Fleming*, 6 M. & W. 42;  
*Renauz v. Teakle*, 8 Ex. 690;  
*Dalton v. Gib*, 5 Bing. N. C. 193;  
*Coke on Littleton*, 172 a;  
*Simpson on Infants*, pp. 88, 89.

[MANISTY, J.—The last case on the point is *Ryder v. Wombwell* (*ubi sup.*) in the Court of Exchequer, and, as that is against you, my doubt is that this is not the court in which you can examine the cases cited.] The case of *Ryder v. Wombwell* (*ubi sup.*) is against me, as decided in the Court of Exchequer; but when it went to the Exchequer Chamber, as the case was decided on another point, it became unnecessary to decide whether the evidence as to sufficient supply was properly rejected or not, and the court were then of opinion that the question was an open one, in consequence of the previous decisions being conflicting. I rely on the above cases, and especially on the cases of *Bainbridge v. Pickering* (2 Wm. Bl. 1325), *Brayshaw v. Eaton* (*ubi sup.*), and *Foster v. Redgrave* (L. Rep. 4 Ex. 35, n.), as proving that the evidence tendered on the part of the defendant to show that he was sufficiently supplied ought not to have been withdrawn, but ought to have been left to the jury.

*Archibald* for the plaintiffs.—I contend that the cases cited do not cover the present case; they were all cases in which the circumstances were peculiar, in which the infant was either *in statu pupillari*, or living with his parents. In *Peters v. Fleming* (*ubi sup.*) Parke, B. says, as to what are necessities: "The true rule I take to be this, that all such articles as are purely ornamental are not necessities, and are to be rejected; but if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and condition of life in which he moved; if they were, for such articles the infant may be responsible. That must be a question for the jury, and it is for them to decide, upon due consideration, whether the articles were of that description or not, and here the jury have found that they are." My proposition is, that if an infant goes to a shop and buys something *bonâ fide* for use, which, in the nature of things, is a necessary for him, he must pay for it, though it may not be a necessary if his present supply were taken into account. [FIELD, J.—The point we have to decide now is: suppose an article is a necessary, does it cease to be so because a person does not want it in consequence of being sufficiently supplied?] *Burghart v. Hall* (4 M. & W. 727) shows that an infant may be liable for necessities, though provided with a sufficient allowance in money. [LOPES, J.—That case is a strong authority for showing that this evidence is admissible.] I rely on the reason of that judgment as being in my favour. The case of *Dalton v. Gib* (*ubi sup.*) shows that the apparent station or circumstances of an infant, and not the real,

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are to be looked at. Here the defendant was a partner in a firm with which the plaintiffs came into business relations, and he seemed to be of full age and able to contract. [FIELD, J.—If a man cannot be made liable, even if he swears he is of full age when he is not, how can he be made liable when he merely appears to others to be of full age?] The last decision on the point is *Ryder v. Wombwell* (*ubi sup.*) in the Court of Exchequer, and on this case I rely. *Foster v. Redgrave* (*ubi sup.*) is the most modern authority against me, but that is the case of an action against an under-graduate at Oxford, who was at the time *in statu pupillari*, and so presumably supplied with necessities by his father or his college. But *Ryder v. Wombwell* (*ubi sup.*) is the same case as mine, and I ask your Lordship to decide in my favour on the authority of that case.

FIELD, J.—This is an action brought by the plaintiffs, who were tailors, against the defendant, for goods sold and delivered, to which the defendant has pleaded that, at the time of contracting the alleged debt, he was an infant, and the plaintiffs have replied that the goods in question, at the time they were ordered, were necessities suitable to the estate, degree, and condition in life of the defendant. It appeared from the facts of the case that the defendant had been in partnership with a firm with whom the plaintiffs came into business relations, and that the plaintiffs had supplied a partner of the defendant with clothes, at the same time asking the defendant for an order. An order was subsequently given, and the plaintiffs supplied the clothes for the price of which this action is brought. Looking at the position of the defendant, there is nothing to show that the goods supplied were other than necessities. The defendant's case is, that they were necessities for which he had no power to bind himself, as he was already sufficiently supplied with clothes, and, consequently, that there was no necessity for him to make that contract. On this point a witness was called on the part of the defendant, who proved that the defendant was fully supplied with clothes at the time the order in question was given, but, as it was admitted that this fact had not been communicated to the plaintiffs, the matter was excluded from the jury. The learned judge held that such evidence was inadmissible, and he told the jury that it was immaterial what amount of clothes the defendant had in his box, trunk, or wardrobe, as it had not been communicated to the plaintiffs. Mr. Bullen complains of this direction to the jury that it resulted in a verdict for the plaintiffs, whereas, if the evidence had been submitted to the jury, the verdict might have been the other way. What the defendant's chance of a verdict may be I do not know. I do not think it is worth much, and it may be that in a second trial the result will be the same. In the argument of this case we have had a great number of cases discussed, and we have to decide whether we are to follow the last case on the point, viz., *Ryder v. Wombwell* (*ubi sup.*). At one part of the argument I thought our duty would be to act on that decision and to say that, if that were wrong, the defendant would have to go to the Court of Appeal; but, when that case went to the Exchequer Chamber, it was decided on another point, and the question which arises in the present case, viz., the admissibility of evi-

dence as to the sufficient supply of the defendant, was left an open question. On the whole, therefore, looking to all the authorities on the point, I consider I am not so bound by the decision of *Ryder v. Wombwell* (*ubi sup.*) in the Court of Exchequer as to prevent me giving my own judgment according to what I may think right. Now the law of England is not one which, in every case, is favourable to honesty, and the present defence, like defences under the Statutes of Limitations and some other statutes, is not a very creditable one for a person to raise; but still, when raised, we must give effect to it according to the law. So with regard to infancy; the law is that up to the age of twenty-one a person is not able to take care of himself; he is supposed to be a weak creature, no matter what he really may be. He may be capable of being a merchant, but yet he is considered to be incapable of contracting. On the other hand, to prevent his coming to a state of destitution, he is entitled to make certain contracts for necessities, to enable him to support himself. In *Peters v. Fleming* (*ubi sup.*) the law is very well explained on the question of necessities. Now the infant may contract for such things as are necessary to support him according to his station in life. Such a question is for the jury. Up to this point there is no difficulty. The next point is, whether an infant may bind himself, even though he may have a separate income of his own. The case of *Burghart v. Hall* (*ubi sup.*) shows that he can, for in that case the infant had an allowance or income of 500*l.* a year, and it was held that this did not prevent him from making any reasonable contract for necessities. Then comes another question, whether an infant can bind himself for things which are in themselves necessities for him if, in point of fact, they are not necessities in consequence of his being already sufficiently supplied with similar articles. This point was decided in the tradesman's favour by the Court of Exchequer in *Ryder v. Wombwell* (*ubi sup.*), for the court there held (Bramwell, B. dissenting) that evidence offered on behalf of the defendant to show that the infant was amply supplied was properly rejected, as it was not proposed to show that the plaintiff had knowledge of that fact. That case went to the Exchequer Chamber, where the point now in discussion did not arise and was not decided. Willes, J., in delivering the judgment of the Exchequer Chamber, said (L. Rep. 4 Ex. at p. 42): "Taking this view of the law and the facts, it follows that the judgment should be reversed and a nonsuit entered. It becomes, therefore, unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform. In *Bainbridge v. Pickering* (*ubi sup.*) the Court of Common Pleas seem to have acted on a principle which would make the evidence admissible. In *Brayshaw v. Eaton* (*ubi sup.*) Bosanquet, J. treats it as clearly admissible, and on those authorities the Court of Queen's Bench (then consisting of Blackburn and Mellor, JJ.) acted in *Foster v. Redgrave* (*ubi sup.*). There is much to be urged in support of the view taken by the majority in the court below, and we desire not to be understood as either overruling or affirming that decision. If ever the point again arises, the court before which it comes must determine it on the balance of authority and on



principle, without being fettered by a decision of this court." It is very important to decide a case according to the cases decided in courts even of co-ordinate jurisdiction, provided there have been no authorities the other way. Looking to the fact that *Foster v. Redgrave* (*ubi sup.*) had been decided the other way, the matter was somewhat in doubt, and it was urged on behalf of the plaintiffs that this court is bound by *Ryder v. Wombwell* (*ubi sup.*) as being the last decision on the point. But if there be two decisions of courts of co-ordinate jurisdiction inconsistent with each other, then I decide according to my own judgment, and not necessarily according to the last case. Now, how do the authorities stand here? In *Bainbridge v. Pickering* (*ubi sup.*) it was held that an infant who lives with and is properly maintained by her parent cannot bind herself to a stranger, even for necessities. In *Brayshaw v. Eaton* (*ubi sup.*) the defendant, an articulated clerk to an attorney, was sued by a tailor for articles of clothing, all of which were *prima facie* necessities, suitable to the defendant's position. The landlady where the defendant lodged stated that, if inquiry had been made of her, she could have informed the plaintiff that the defendant was amply supplied with clothes at his mother's charge. No such inquiry had in fact been made by the plaintiff. The judge left it to the jury to say whether the goods were necessities, thus admitting the evidence. The jury found for the plaintiff, and on a rule to enter a nonsuit or for a new trial on the ground that the judge ought to have directed the jury that to entitle the plaintiff to recover he ought to have shown that he had made due inquiry as to the defendant's circumstances, it was held that the direction was right. Tindal, C.J., in giving judgment in this case, says: "It appears to me that a part at least of the goods fell within the description of necessities, viz., the great-coat, an article with which the defendant did not appear to have been furnished elsewhere," thus pointing out the distinction between things the infant was in fact supplied with and those he was not supplied with. So, too, Bosanquet, J. says: "The great-coat at least may fairly be a necessary, and therefore the case was properly left to the jury . . . the tradesman acts at his own peril, and will be precluded from recovering if the infant is proved to be already sufficiently supplied elsewhere." In *Ford v. Fothergill* (*ubi sup.*) Lord Kenyon said the question of necessities was a relative fact, to be governed by the circumstances of the infant, that a person trusting an infant did it at his peril, and that if the infant had contracted other debts at the same time for the same sort of articles for which the action was brought, such was good evidence to rebut the presumption of necessities. That is exactly the point in the present case, for Lord Kenyon says that such evidence is a matter for the jury. So, again, in that case, as well as in some of the other cases cited, it was held that if a tradesman trusts an infant, he does so at his peril. We now come to the case of *Foster v. Redgrave* (*ubi sup.*), not cited in the Court of Exchequer in *Ryder v. Wombwell* (*ubi sup.*), but cited in the Exchequer Chamber in that case by Mr. Bulwer. That was a case where the defendant, an undergraduate at Oxford, had whilst a minor been supplied by the plaintiff, a tradesman, with a number

of articles of clothing which were admitted to be necessities *prima facie*. The defence was, that at the time the goods were ordered and supplied the defendant was already provided with an ample wardrobe, and it was not suggested that the plaintiff knew of this fact. The judge left it to the jury to say whether, under these circumstances, the goods supplied were necessities. The jury found that they were, and, on a rule to enter a nonsuit on the ground that, the defendant being already fully supplied with articles of the same kind as those sold to him by the plaintiff, those could not be necessities, and therefore the plaintiff could not recover, the Court (Blackburn and Mellor, J.J.), without calling on the defendant, made the rule absolute for a nonsuit on the authority of *Bainbridge v. Pickering* (*ubi sup.*) and *Brayshaw v. Eaton* (*ubi sup.*). I cannot distinguish the present case from *Brayshaw v. Eaton* (*ubi sup.*). That being so, we come to the case of *Ryder v. Wombwell* (*ubi sup.*). Then we have the two cases of *Foster v. Redgrave* (*ubi sup.*) and *Ryder v. Wombwell* (*ubi sup.*) opposed to each other; but it seems to me that there is a greater weight of authorities on the one side than on the other, and looking at the guarded language of Willes, J., in delivering the judgment of the court in *Ryder v. Wombwell* (*ubi sup.*) in the Exchequer Chamber, and taking all the circumstances into consideration, I am of opinion, without any hesitation, that the question ought to have been left to the jury whether these clothes were necessities, and, in deciding that, they should have been asked to consider whether the defendant was in possession of such a supply of goods of the same kind that he was not in want of those supplied to him by the plaintiffs.

MANISTY, J.—The case before my brother Smith raised the question whether the previous supply of the defendant was admissible in evidence for the purpose of showing that the goods supplied were not necessities, and acting on *Ryder v. Wombwell* (*ubi sup.*), the last case in point of date, he excluded that evidence, and sitting as he was at Nisi Prius, I do not see how he could well have done otherwise. I should have acted on the same case, and have given the same direction to the jury, if I had been trying the case. Then application is made to the court for an order for a new trial upon the ground that the learned judge ought to have admitted that evidence and left it to the jury. On the part of the plaintiffs the case of *Ryder v. Wombwell* (*ubi sup.*) is cited to us, as showing that the learned judge was right in rejecting the evidence as to a sufficient supply, as that fact had not been communicated to the plaintiffs. I should have thought that the same reasoning that applied to the judge sitting at Nisi Prius applies to us sitting in this court. My opinion is, that the last case on the subject ought to have been followed, and that if the defendant had been dissatisfied he ought to have gone to the Court of Appeal; but, as my learned brothers have come to a different conclusion, I do not dissent from them, though I cannot say I assent to this court dealing with the question at all. The case of *Brayshaw v. Eaton* (*ubi sup.*) does not seem to me to be entitled to the weight given to it by my brother Field. There the landlady of the house in which the defendant lodged stated that, if inquiry had been made of her, she could have informed the plaintiff that the defendant was amply supplied with clothes at his

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mother's charge. No inquiry had been made as to the defendant's circumstances, and this was relied on as a ground of nonsuit. The jury there found for the plaintiff, and notwithstanding the fact that the defendant was amply supplied with clothes at the time the goods were supplied by the plaintiff, the court refused to enter a nonsuit or order a new trial, and discharged the rule with costs. I do not dissent from, but I not not assent to, the conclusion arrived at by my brothers Field and Lopes.

LOPES, J.—If it had not been for what has been said by my brother Manisty, I should have said that I take a very strong view of this case, and have expressed the opinion that the learned judge had misdirected the jury. I do not propose to go through the cases that have been cited to show that the direction was wrong. A contract by an infant for goods cannot be enforced unless the articles be necessities, the policy of the law being to protect the infant. In point of fact, a tradesman dealing with an infant does so at his own peril, and he must lose his money unless he can prove that the goods supplied were necessities for the infant according to his station in life. That being the law, we come to the question what are necessities. To determine this question we must take into account what the infant had at the time of the order; for example, a watch may be *prima facie* a necessary, but if the infant were supplied with other watches, then it would cease to be a necessary. It is admitted in this case that regard must be had to the supply the infant had at the time of the order if the plaintiffs knew at that time that the infant was amply supplied; but it is contended, on behalf of the plaintiffs, that this is not so if the plaintiffs did not know of the previous supply. If this were so, the protection given to the infant would depend entirely on what might be the state of knowledge of the tradesman, which would in effect deprive the infant of the protection intended by the law. I think it is immaterial whether the plaintiffs did or did not know of the supply; it is immaterial even whether they knew or did not know that the defendant was a minor. The learned judge ought to have admitted the evidence, and the question ought to have been left to the jury whether the articles were necessities, and if so, did they cease to be so in consequence of the defendant being already amply supplied with other articles of the same kind? The learned judge did not adopt that course, but withdrew altogether from the jury the evidence as to the previous supply. Now reference has been made to the case of *Ryder v. Wombwell* (*ubi sup.*), and it has been suggested that this court is bound by the decision in that case, as being the decision of a court of co-ordinate jurisdiction, and also as being the last decision on the point. Another observation as to the case of *Ryder v. Wombwell* (*ubi sup.*); when that case was taken on appeal to the Exchequer Chamber, the judges who then decided it, carefully as it seems to me, kept open the point arising in the present case. It is therefore open to us to act upon the case of *Foster v. Redgrave* (*ubi sup.*), and previous to that case there is an unbroken chain of authorities in favour of the decision we now arrive at.

Judgment for defendant. Order for a new trial granted.

Solicitor for the plaintiffs, J. L. Blasland.

Solicitor for the defendant, T. R. Watson.

Thursday, Aug. 7.

(Before POLLOCK, B. and LOPES, J.)

LONDON LAND COMPANY LIMITED v. HARRIS AND OTHERS. (a)

*Practice*—Counter-claim for specific performance—Transfer of action to Chancery Division—Rules of Supreme Court 1883, Order XLIX., r. 3.

The plaintiffs agreed to purchase certain land from the defendants, and paid them a deposit. A dispute having arisen as to the defendants' title to the land, the plaintiffs refused to carry out the purchase, and commenced an action in the Queen's Bench Division to recover the deposit. The defendants counter-claimed for specific performance of the agreement, and applied to have the action transferred to the Chancery Division.

Held, that, as the counter-claim was admittedly a *bonâ fide* one, and as the Chancery Division alone had the requisite machinery for giving the relief claimed, the action ought to be transferred to that division.

THIS was an appeal from chambers.

The defendants agreed to sell certain land at Barnet to the plaintiffs for 21,000*l.* and the plaintiffs paid them a deposit of 500*l.* A dispute having arisen in connection with the defendants' title to the land, the plaintiffs refused to carry out the purchase, and brought an action in this division to recover the 500*l.* deposit. The defendants counter-claimed for specific performance of the agreement, and took out a summons to have the action transferred to the Chancery Division under Order XLIX., r. 3. Smith, J., at chambers, refused the application on the ground that the Queen's Bench Division had the requisite machinery for giving the relief claimed.

The defendants appealed.

Order XLIX., r. 3:

Any cause or matter may, at any stage, be transferred from one division to another by an order made by the court or any judge of the division to which the cause or matter is assigned. Provided that no such transfer shall be made without the consent of the president of the division to which the cause or matter is proposed to be transferred.

*Leeke* for the defendants.—This counter-claim is a *bonâ fide* one, and hence the Chancery Division is the division in which the case ought to be tried. There is the requisite machinery there for settling this question, which this division does not possess. Orders for transfer have been made in cases similar to the present upon the above ground:

*Hillman v. Mayhew*, 34 L. T. Rep. N. S. 256; 1 Ex. Div. 132;

*Holloway v. York*, 2 Ex. Div. 333;

*Holmes v. Harvey*, 35 L. T. Rep. N. S. 600.

In the case of *Storey v. Waddle* (4 Q. B. Div. 289) the Court refused to make the transfer, but in that case the counter-claim for specific performance was in respect of a different piece of land from that in respect of which the plaintiff made his claim. James, L. J. there said: "If such a transfer as this were allowed, any defendant might put in a counter-claim for the specific performance of some agreement, and then apply for a transfer, and thus everything might, at the will of the defendant, be brought into the Chancery Division." That case, therefore, was decided upon a ground not applicable to the present case, and as a claim

(a) Reported by W. P. EVERKLEY, Esq., Barrister-at-Law.

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for specific performance of a contract between a vendor and purchaser of real estate is, by sect. 34 of the Judicature Act 1875, specially assigned to the Chancery Division, this action ought to be transferred there.

*Blakesley* for the plaintiffs.—It is admitted that this counter-claim is a perfectly *bonâ fide* one, and if the defendants had commenced their action first the whole matter would have gone into the Chancery Division. But, as the plaintiffs have commenced their action first, and this is a claim proper to be tried in the Common Law Division, the court ought not to interfere in the matter. There is a counter-claim by the vendor for specific performance of the contract, which in reality is merely to recover the agreed purchase money, and the only question in dispute is whether the defendants can give the plaintiffs a good title to the land in question. That point can be decided as well in this court as in the Court of Chancery. No peculiar machinery is needed to settle this question, and so no case for a transfer has been made out. [LOPES, J.—The moment you admit that the counter-claim is a *bonâ fide* one, it seems to me that you are out of court. Is not the question of specific performance the governing question? It will determine everything.]

POLLOCK, B.—In this case the question for our consideration is a very short one. It is an action by the vendee of certain real property for the return of the deposit. Now this claim taken by itself is a claim fit to be tried in the common law courts, and not the less so because it may involve a question of title, and it would be no reason for transferring the claim to the Chancery Division to say that that division is more conversant with questions relating to title to real property than the Queen's Bench Division. But then the defendants counter-claim in this action, not for damages for the non-completion of the contract of sale, but for specific performance of the contract. It is conceded that if the defendants had brought their action for specific performance first, it must have been commenced in the Chancery Division. It is also conceded that the counter-claim here is a perfectly *bonâ fide* one. If my brother Smith had decided this question on the ground that the counter-claim was not a *bonâ fide* claim, that would be quite another matter. But he did not decide the case upon that ground. Now Mr. Blakesley admits that if this were a claim by defendants in the Chancery Division for specific performance, and if they were to succeed, the court would give judgment for specific performance of the contract subject to the defendants making out their title. This question would be referred to chambers to an officer of the court which the Queen's Bench Division has not got. The Chancery Division, on the other hand, is provided with such an officer, namely, the chief clerk, and this is what the judges mean when they say that the Chancery Division is the only one that has the requisite "machinery" for giving the relief asked. For this reason I think that the Chancery Division is the proper division to hear this case, and that the order of Smith, J. must be reversed, and the transfer allowed.

LOPES, J.—I am entirely of the same opinion.

*Appeal allowed.*

Solicitor for the plaintiffs, G. Fletcher Jones.

Solicitors for the defendants, Mason and Trotter.

Wednesday, March 5.

(Before DAY and SMITH, JJ.)

DAVIES v. USHER. (a)

*Bill of sale*—"In consideration of any sum under 30l."—*Bills of Sale Act* (1878) Amendment Act 1882 (45 & 46 Vict. c. 48), s. 12.

By the 12th section of the *Bills of Sale Act* (1878) Amendment Act 1882 (45 & 46 Vict. c. 43) it is provided that every bill of sale made or given in consideration of any sum under 30l. shall be void.

D. applied to U. for a loan of 15l., offering as security a bill of sale on his furniture. U. replied that, by reason of a new law, he could not lend less than 30l., but that, if D. had sufficient furniture, he would lend him 30l. if he would agree to pay 15l. on demand and 15l. by instalments. D. agreed to the terms and gave U. a bill of sale in accordance therewith, and the sum of 30l., the consideration expressed to be paid by U. to D. on the execution thereof, was so paid in gold without any deduction. Immediately afterwards U., at the request of D., demanded payment of the 15l. due on demand, which D. paid and received a receipt for it. D. having made default in the payment of the instalments, U. seized under the bill of sale.

Held, on special case stated by agreement in an action by D. against U. for damages for trespass, that the bill of sale was not void by reason of the 12th section of the *Bills of Sale Act* (1878) Amendment Act 1882.

THIS was a special case stated by agreement between the parties in an action brought by John Griffiths Davies against William Usher to recover 100l. damages for trespass upon his premises and for illegal seizure of his goods and chattels. The opinion of the court being sought as to the validity of a bill of sale executed under the circumstances therein stated.

The facts set out in the special case were, so far as material, as follows:—

The plaintiff was a joiner and builder, carrying on business at Swansea, in the county of Glamorgan, and the defendant a money-lender and bill discounter, also carrying on business at Swansea.

The plaintiff in July 1881 gave the defendant a bill of sale for 20l. on his furniture, which has since been satisfied.

On the 22nd Oct. 1883 the plaintiff applied to the defendant for a loan of 15l., and offered as security a bill of sale on his furniture, when the defendant replied that he could not lend so small a sum as 15l. now on a bill of sale, as a new law had come into force, and he could not lend less than 30l.; but if the plaintiff had sufficient furniture he would lend him 30l., if he agreed to repay 15l. on demand and 15l. by instalments. The plaintiff replied that he did not want as much as 30l., yet, if the defendant would not lend less than 30l., he would borrow that amount, and the plaintiff inquired when demand would be made for the 15l. The defendant replied that he could not say when he would make the demand for the 15l., perhaps soon after the loan was granted, perhaps in a month, and perhaps not for three or six months, or longer.

The plaintiff having agreed upon the terms of

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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the loan, the defendant took an inventory of the plaintiff's furniture, which was valued at 40*l*.

On the said 22nd Oct. 1883, and in accordance with the arrangement already made, the plaintiff gave the defendant a bill of sale.

The bill of sale, a copy of which was set out in the case, was in the form prescribed in the schedule to the Bills of Sale Act (1878) Amendment Act 1882, the consideration being stated as 30*l*., the rate of interest as 67 per cent. per annum payable monthly, and the clause as to payment being:

And the grantor doth further agree and declare that he will duly pay to the grantee the aforesaid principal sum, together with the interest then due, as follows: 15*l*. on demand, and the balance by equal monthly payments of 2*l*. each, payable on the 22nd day of each and every month, commencing on the 22nd Nov. 1883.

The sum of 30*l*., the consideration expressed to be paid to the plaintiff by the defendant on the execution of the said bill of sale, was so paid in gold without any deduction, and the plaintiff put the same into his pocket.

At the time of paying the said sum of 30*l*. to the plaintiff, a card showing the amount of the loan and the terms of repayment was given to the plaintiff by the defendant.

After the plaintiff received the said sum of 30*l*., and as he was leaving the office of the defendant, the plaintiff said to the defendant, "You had better demand the money now and not bother me again about it, as I don't want it all." The defendant replied, "Very well, I demand payment of 15*l*. due on demand in accordance with the bill of sale." The plaintiff thereupon paid 15*l*. to the defendant's clerk, and at the same time handed the defendant's clerk the said card, and he then gave a receipt for the same to the plaintiff on the inside of the said card.

The plaintiff made default in payment of the instalments due under the said bill of sale, and on the 8th Jan. 1884 the defendant seized and took possession under the powers of the said bill of sale of the goods and chattels assigned to him by the said bill of sale for the balance and interest then due, which said goods and chattels were then upon the premises of and in the use of the plaintiff.

On the 11th Jan. 1884 the plaintiff paid under protest to the defendant, who threatened to sell the said goods and chattels, the sum then due for principal, interest, and costs.

On the 12th Jan. 1884 the plaintiff issued his writ of summons out of Her Majesty's High Court of Justice, Queen's Bench Division, against the defendant, to recover 100*l*. damages for trespass upon his premises, 20, Rosehill-terrace, Constitution Hill, Swansea, aforesaid, and for an illegal seizure of his said goods and chattels.

The plaintiff contended that the said bill of sale was void under, and nothing more than an evasion of, sect. 12 of the Bills of Sale Act (1878) Amendment Act 1882.

The defendant contended that the said bill of sale was valid and good at law, the same having been given for a sum of 30*l*., which was actually paid to and remained in the possession and under the control and subject to the disposition of the plaintiff.

The plaintiff and defendant were agreed upon the facts, and had entered into an agreement to stay the action and to state a special case for the opinion of the court.

If the said bill of sale was declared void, it was agreed that a sum of 25*l*., with the taxed costs of the action, should be paid to the plaintiff, and that judgment should be entered accordingly; and if the said bill of sale was declared valid, judgment was to be entered for the defendant with costs, to be taxed and paid him by the plaintiff, the opinion of the court being sought as to the validity of the bill of sale on the facts therein stated.

The 12th section of the Bills of Sale Act (1878) Amendment Act 1882 (45 & 46 Viet. c. 43) is as follows:

Every bill of sale made or given in consideration of any sum under 30*l*. shall be void.

*Fletcher* for the plaintiff.—This bill of sale is void, being clearly an evasion of the 12th section of the Bills of Sale Act (1878) Amendment Act 1882. [DAY, J.—To make it an evasion you must show an understanding between the parties to defeat the Act.] The intention of the parties was to borrow and lend respectively 15*l*., and not 30*l*. The 7th section of the Act provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the causes therein specified, the first being if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment. This does not contemplate a payment on demand. [DAY, J.—Does not *Melville v. Stringer* (50 L. T. Rep. N. S. 531; 12 Q. B. Div. 132) dispose of this point?] The point was not argued there. Further, by the 9th section a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to the Act annexed, and the schedule obviously does not contemplate a payment on demand, the direction in italics being "or whatever else may be the stipulated times or time of payment." Generally, therefore, this bill of sale is void for uncertainty on the principle of *Davis v. Burton* (48 L. T. Rep. N. S. 433; 11 Q. B. Div. 414), for no creditor of the grantor could know whether the sum payable on demand had been already demanded and paid, or still remained due.

*Upjohn*, for the defendant.—The case of *Melville v. Stringer* (*ubi sup.*) is conclusive that the bill of sale is not void by reason of the 15*l*. being payable on demand. Then, even supposing it was an evasion of the Act, an Act evaded is an Act not broken, and the transaction was not illegal. In *Ramaden v. Lupton* (29 L. T. Rep. N. S. 510; L. Rep. 9 Q. B. 17) Coleridge, C.J. lays down this principle distinctly. "Here," he says, "we have a bill of sale, perfectly good on its face, registered in good time, and the words therefore of the Act of Parliament have been complied with. But it is said, nevertheless, that the mischief intended to be prevented by the Act of Parliament has not been prevented, and that, therefore, this bill of sale is void, and that the registration of it is of no avail. If the terms of the Act of Parliament had been contravened, I can perfectly understand that any arrangement intended in contravention of the Act of Parliament would be illegal; but if the terms of the Act of Parliament have been observed, all we can say is, that if transactions of this kind, not forbidden by the Act of Parliament, are

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nevertheless thought by Parliament to be contrary to public policy, they must pass an Act making such things illegal." Lord Selborne also, in *Macbeth v. Ashley* (30 L. T. Rep. N. S. 310, 313; L. Rep. 2 H. L. Sc. 359), says explicitly clearly: "I cannot but think that their Lordships may have lost sight of a distinction which exists between the evasion of an Act of Parliament passed in derogation or restriction of the legal rights and liberties of the subject, and the evasion of an Act which confers, for public purposes, powers that would not otherwise exist. It has been said, in this House and elsewhere, with regard to the Mortmain Acts and others of that kind, which restrict previously existing legal powers, that a man is at liberty to evade them by keeping outside of them." There is nothing therefore illegal in the evasion of this Act, the courts having definitely refused to interfere in the case of the old Bills of Sale Act (*Ramaden v. Lupton* (*ubi sup.*)). Here, however, there was no evasion, since it was competent for the plaintiff to have left the office with the 30*l.*, and the defendant to his remedy.

*Fletcher* in reply.

DAY, J.—I think that the defendant is entitled to judgment on the facts stated in the special case, for I do not see there anything justifying us in saying that the whole transaction was a sham. It may have been a sham, but on the other hand it may not have been so. It may have been that the money-lender did not wish to have 30*l.* out at stake at once, and so wished to have reasonable security, and with this view desired to lend a part on demand, so that if he saw that the money was at risk he could call that part in at once. Then again it is not the money-lender who suggests to the borrower that the 15*l.* lent on demand should be returned at once, but the borrower who suggests it to the money-lender. "You had better," he said, "demand the money now, and not bother me again about it, as I don't want it all." How can I then, on the facts stated in this special case, infer that this is a sham? I cannot say so, because on the facts before me I am not satisfied but that the whole transaction was perfectly *bonâ fide*. I see nothing to convince me that the consideration given for this bill of sale was under 30*l.*, and I think, therefore, that the objection to its validity founded on the 9th section of the Bills of Sale Act 1882 falls through, and that the defendant is entitled to judgment.

SMITH, J.—This is an action brought by the plaintiff against a money-lender to recover damages for trespass, the defendant having, as he alleges, unlawfully seized his goods. The defendant says that the seizure was justified under a bill of sale granted to him by the plaintiff, which bill of sale the plaintiff, on the other hand, contends is void under the 9th section of the Bills of Sale Act (1878) Amendment Act 1882, because the consideration in respect of which it was granted was less than 30*l.* This is the way the case arises, but for the defendant to succeed in establishing his contention he must necessarily get rid of the facts stated in the special case, and I do not see how he is to get rid of them. We are necessarily asked to say that the consideration given was less than 30*l.*, the real point being whether the bill of sale was given in consideration of 15*l.* or of 30*l.* Did the plaintiff receive a loan of 15*l.* or a loan of 30*l.*? would have been

the question for a jury, and if this case had been tried by a jury the plaintiff might have said a great deal as to whether the facts set out on the special case were the existing facts or not, but we are not at liberty to deal with the facts in this way, and on looking at the special case I find that the facts were these. In the first place, the plaintiff applied for a loan of 15*l.*, and the money-lender then told him that he could not lend so small a sum as 15*l.* on a bill of sale, as a new law had come into force, and he could not lend less than 30*l.*, and offered to lend him 30*l.* if he would agree to pay 15*l.* on demand, whereupon a bill of sale is drawn, and the sum of 30*l.* was handed over, and then next the borrower, not the lender, after having the 30*l.* in his pocket for some period of time, as he is leaving the office, says, "You had better demand the money now, and not bother me again about it, as I don't want it all," and thereupon the demand is made, and the 15*l.* repaid. Now it is quite natural that the borrower should not wish to pay 67 per cent. on money that he did not want, and that he should therefore ask the lender to demand it at once; and, taking these facts as they are stated, we cannot say that the proper inference from them is that all this was a sham. If this case had gone to a jury they could have said so, but it is impossible for us to do it. Therefore I do not think that this bill of sale was given for a consideration less than 30*l.*, for the lender did in fact lend 30*l.*, and I think, therefore, that judgment must in this case be entered for the defendant.

Solicitor for the plaintiff, *H. D. Henderson*.

Solicitor for the defendant, *Horcell Thomas*.

Monday, March 31.

(Before MANISTY and WILLIAMS, JJ.)

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*Local government—Landlord and tenant—Covenant to pay "all rates, taxes, and assessments payable in respect of the premises during the tenancy"—Apportionment of expense of paving street—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120)—Metropolis Local Management Acts Amendment Act 1862 (25 & 26 Vict. c. 102).*

*By the 96th section of the Metropolis Local Management Acts Amendment Act 1862 (25 & 26 Vict. c. 102) it is enacted that it shall be lawful for any vestry at their discretion to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), or that Act, either from the owner or from any person who then or at any time thereafter occupies such premises . . . and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent becoming due in respect of the said premises . . . provided always that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him . . . provided also that nothing therein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant.

By an agreement for the lease of a house situate within the operation of the Metropolis Local Management Acts 1855 and 1862, a tenant agreed "to pay all rates, taxes, and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax)." The vestry having during the tenancy paved the street in which the house was situate, the owner was compelled, under the 96th section of the Metropolis Local Management Acts Amendment Act 1862 (25 & 26 Vict. c. 102), to pay the amount of the expenses of such paving apportioned in respect of the house.

Held, in an action by him against the tenant to recover the amount so paid, that such amount was not "a rate, tax, or assessment payable in respect of the premises" within the meaning of the agreement.

THIS was a motion on the part of the plaintiffs under Order XXXII., r. 6, applying for judgment in the action on the admissions of fact contained in the defendant's statement of defence.

The action was brought by Alfred Ayscough Wilkinson, Walter Meacock Wilkinson, and Josiah Wilkinson the younger, against James William Collyer; the plaintiffs' statement of claim being as follows:

The plaintiffs' claim is as landlords of a house known as Gothic Lodge, Rye Hill Park, Peckham, Surrey, against the defendant, as tenant thereof under them, for 26l. 17s. The defendant by an agreement for lease of the said house, dated 23rd Oct. 1883, and made between the plaintiffs and the defendants, agreed to pay all rates, taxes, and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax). The sum claimed is the amount apportioned by the vestry of St. Giles, Camberwell, in respect of the said premises, of the expense of paving the said street called Rye Hill Park. The plaintiffs applied to the defendant to pay this sum, but he refused, and the plaintiffs were compelled to pay, and did pay, the said sum.

#### Particulars.

1884. { Amount paid to the vestry of St.  
23rd Feb. { Giles, Camberwell, towards  
cost of paving as per receipt ... £26 17 0

The defendant's statement of defence was:

The defendant admits the several allegations of fact in the statement of claim, and says that the agreement for lease of 23rd Oct. 1883 was for a tenancy of the premises therein comprised for three years at the yearly rent of 38l.

The defendant says that under the Metropolis Management Acts 1855 and 1862 (18 & 19 Vict. c. 120 and 25 & 26 Vict. c. 102), the amount apportioned in respect of the said premises of the expense of paving the said street is payable by the plaintiffs as the owners of the said premises, and denies that under the said agreement or otherwise he has contracted or agreed to repay them the amount paid by them.

The plaintiffs thereupon moved for judgment for the amount claimed by them on the admissions by the defendant in his defence of the facts alleged in the plaintiffs' statement of claim, and this was the motion which now came on for hearing.

The 105th section of the Metropolis Local Management Act 1855 (18 & 19 Vict. 120) is:

In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or dis-

trict in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board), and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses.

The 96th section of the Metropolis Local Management Acts Amendment Act 1862 (25 & 26 Vict. c. 102) is as follows:

96. The 217th, 218th, and 219th sections of the firstly-recited Act, the Metropolis Local Management Act (18 & 19 Vict. c. 120) are hereby repealed, and in lieu thereof be it enacted, that it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act or this Act either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent: Provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable: but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall lie upon such occupier: Provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant.

A. P. Lawrence for the plaintiffs.—The Metropolitan Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 96), it is admitted, cast upon the owners of property the duty of repaying to the vestry the sums spent on paving the streets in which their property is situate, but the words of the agreement for the lease in this case throw that duty upon the tenant, and the plaintiffs are therefore entitled to recover this amount from him. The defendant has agreed to pay "all rates, taxes, and assessments payable in respect of the premises during his tenancy," and this sum is clearly an assessment payable in respect of the premises during his tenancy. No valid distinction can be drawn between this case and that of *Thompson v. Lapworth* (17 L. T. Rep. N. S. 507; L. Rep. 3 C. P. 149, 491), in which the lessee, having covenanted



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by indenture of lease that he would, during the continuance of the term, pay and discharge "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," and the vestry of the parish having, under the provisions of the Metropolitan Management Acts, paved the street upon which the demised premises abutted, it was held that the sum assessed by them as payable by the owner as his proportion of the estimated expenses was a "duty" or "assessment" assessed or imposed upon the owner in respect of the premises within the covenant. It is true that in *Allum and another v. Dickinson* (47 L. T. Rep. N. S. 493; 9 Q. B. Div. 632), which is the latest case of the kind, it was held that the proportion of the expense of paving the street assessed upon the demised house was not payable by the tenant under his covenant, but the words of the covenant in that case are not analogous to the present, being "and also will pay the sewers and main drainage rates, tithe rentcharges, board of health, metropolitan, and other district rates and assessments which, whether parliamentary, parochial, or otherwise, now are or at any time during the said term shall be, taxed, rated, charged, assessed, or imposed upon the said demised premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof (except the property or income tax)." In *Tidsell v. Whitworth* (15 L. T. Rep. N. S. 574; L. Rep. 2 C. P. 326) the court were clearly pressed by the form of the covenant there, which was "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property tax) which during the term should become payable in respect of the demised premises," and were driven to base their decision on another ground, namely, that the payment in that case was in respect of the breach of a duty imposed upon him, he having been required by the proper authority to do the work himself, and having neglected to do so, whereupon they under parliamentary powers did the work themselves, and assessed upon him his due proportion of the expense. In *Budd v. Marshall* (42 L. T. Rep. N. S. 149, 793; 5 C. P. 481) it was held that, under a covenant to "bear, pay, and discharge the land tax (if any), sewers rate, borough rate, improvement rate, tithes, and tithe rentcharge in lieu of tithes, and all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise, which then were, or which at any time or times thereafter during the said term, should be taxed, charged, rated, assessed, or imposed on the said premises or any part thereof," an action was maintainable by the lessor to recover from the lessee the cost of works necessary to amend defective drainage, so as to abate a nuisance in accordance with the requirement of the local sanitary authority. [WILLIAMS, J.—Did not that case turn upon the word "duty?"] The sum at issue in the present case is clearly rather an "assessment" than a duty." In *Hartley v. Hudson* (4 C. P. Div. 367), again, the covenant being to pay "all rates, taxes, charges, and assessments whatsoever which now are or may be charged or assessed upon the said premises, or any part thereof, or upon any person or persons in respect thereof," it was held that the

expense of sewerage, levelling, and paving the street was a charge from which by his covenant the lessee undertook to relieve the lessor. On the authority of these two cases and of *Thompson v. Lapworth* (*ubi sup.*) the plaintiffs are entitled to succeed.

*H. Terrell* for the defendant.—The material word "duty," which is not in the agreement in this case, is to be found both in *Thompson v. Lapworth* (*ubi sup.*) and *Budd v. Marshall* (*ubi sup.*), and the decision in both cases is founded on that word. In the same way the general word "charge" is inserted in the covenant in *Hartley v. Hudson* (*ubi sup.*). The statute imposes on the landlord the duty of paying for these improvements, and gives the tenant, if he pays it, the right to recover it from him. There is nothing in this covenant to change the statutory position of the parties. Besides, on the authority of *Tidsell v. Whitworth* (*ubi sup.*) and *Allum v. Dickinson* (*ubi sup.*), the defendant is clearly not liable to the payment of this charge. In *Hartley v. Hudson* (*ubi sup.*) Lindley, J. says without hesitation in his judgment: "The question here is upon the construction of the covenants in the lease. The expense of paving, &c. can scarcely be said to be a rate, tax, or assessment, and hence it only remains to consider whether it was a charge;" and this case therefore is also in favour of the defendant.

*Laurence* in reply.—The decision in *Hartley v. Hudson* (*ubi sup.*) did not turn upon the word "duties" only. Both that case and the case of *Payne v. Burridge* (12 M. & W. 727), which it followed, turned upon the word "assessments." Willes, J., in his judgment in *Thompson v. Lapworth*, says (17 L. T. Rep. N. S. 503; L. Rep. 3 C. P. 158), "the word 'assessments' occurs in this lease," obviously relying upon that word. In *Payne v. Burridge* also, the Lord Chief Baron says (12 M. & W. 729), "It cannot be doubted that the charge in question is an assessment or payment which, according to the terms of his contract, is to be borne by the tenant." [WILLIAMS, J.—You have to show that it was the intention of the tenant when he entered into this agreement to take upon himself this unlikely burden, which might possibly amount to four or five times his rent.] The answer to that is summarised by Bramwell, L.J. in *Budd v. Marshall* (42 L. T. Rep. N. S. 793; 5 C. P. 486). He there says: "Wilkes, J., in *Thompson v. Lapworth*, spoke of the argument as captivating, that it was an injustice to the tenant, who has only a limited interest, to be compelled to bear the whole expense for his landlord's benefit; but the answer is, that under a lease for ninety-nine years the tenant would gain substantially the whole benefit." It is impossible for the court to base its decision on the length of the lease, and on considerations of which party is to get the most benefit from the money paid, since what is fair in one case would be a hardship in another, and it does not appear but that the house was let at a reduced rate to allow for these charges.

MANISTY, J.—This case is not free from difficulty owing to the numerous decisions called to our attention; but when the facts of these cases and of the present are once known, the difficulty to a great extent disappears. The plaintiffs' claim is as landlords of a house known as Gothic



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Lodge, Rye Hill Park, Peckham, leased to the defendant for three years from the 23rd Oct. 1883, at a rent of 38l., and by the agreement the tenant agrees to pay "all rates, taxes, and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax)," the words being different from those used in any of the cases cited. The claim is for 26l. 17s., being the amount apportioned by the vestry of St. Giles, Camberwell, in respect of the said premises, of the expenses of paving the street called Rye Hill Park, in which the house was situate, and the defence set up is, that the defendant admits the agreement of lease, but says that under the Metropolis Management Acts 1855 and 1862 (18 & 19 Vict. c. 120 and 25 & 26 Vict. c. 102) the amount apportioned in respect of the said premises of the expenses of paving the said street is payable by the plaintiffs as the owners of the said premises, and denies that under the said agreement or otherwise he has contracted or agreed to repay them the amount so paid by them. The question, therefore, is whether this sum of 26l. 17s., which was apportioned in respect of these premises under these Acts, is a rate, tax, or assessment payable in respect of these premises during the tenancy. In order to arrive at a correct conclusion, we must look at the statutes on which the question turns. The first is the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), and in the 105th section, which applies to this case, we find it provided that, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor, for the time being, of the vestry or board); and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses." Then I pass to the next Act, which is the Metropolis Management Act 1862 (25 & 26 Vict. c. 102), the 96th being the material section. This section, after repealing certain sections of the earlier Act, proceeds to enact that "it shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act (that is, the Act of 1855), or this Act, either from the owner or from any person

who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent; provided always that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable, but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier; provided also, that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant." The question, therefore, which arises is, whether these expenses which have been incurred by the vestry in pursuance of the powers conferred upon them by these sections, and which were under their provisions recoverable either from the owner or from the occupier, are "a rate, tax, or assessment payable in respect of the premises." It is not in terms either a rate, or a tax, or an assessment. It is a sum of money paid by the vestry for improving the street in which the house is situate, which under the Act empowering them to make the improvement the owner is bound, if the occupier pays it to the vestry, to repay to him. If, therefore, there is no authority to show that this sum is a rate, or tax, or assessment, I should certainly hold that it is not such a charge as is payable by the tenant under this covenant. It is a charge giving a permanent value to the premises, and in some cases gives rise to a very large liability; it may be as large as or larger than the rent itself. In ordinary cases, however, where there is no special agreement, it is provided that the tenant shall not be liable beyond the amount of rent for the time being due from him, although that provision is no doubt inserted because the tenant is entitled to recover the amount he so pays from the landlord. Here the question is whether the defendant has promised to take upon himself all this liability, and of course, if he has done so, he must pay this sum. I do not propose to go all through the cases bearing on this point; but it has been impressed upon us very strenuously that the case of *Budd v. Marshall* (42 L. T. Rep. N. S. 149, 793; 5 C. P. 481), decided in 1890, is binding upon us in favour of the plaintiffs; but the covenant in that case has words in it which are very different from those used in the agreement

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in the present case. There the tenant was to "bear, pay, and discharge the land tax (if any), sewers rate, borough rate, improvement rates, tithes, and tithe rentcharge in lieu of tithes, and all other taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial, or otherwise." The case, too, is different; the drainage of the premises had become defective, and the sanitary authority had caused a notice to be served upon the owners requiring them, as owners, to abate the nuisance, and the notice not having been complied with, obtained an order from a justice to the like effect, and they having executed the works necessary to enable them to obey the order, sought to recover the cost of them from the tenant under the covenant just mentioned. The important words in it are, "All other taxes, rates, duties, and assessments whatsoever," and it was held by the majority of the court that the action was maintainable. But why? The decision seems to me to have turned upon the word "duties." Brett, L.J. thought that the tenant was not liable under these words; but Bramwell and Baggallay, L.J.J. thought otherwise. Bramwell, L.J. puts his view in this way: "The drainage upon the premises demised to the defendant was defective, and the local authority obtained an order from a justice of the peace that the nuisance should be abated. The plaintiffs, as owners, did the work, but they claimed to be reimbursed the cost by the defendant. The question turns upon the language of the lease entered into between the parties. I do not think that the cost of executing the work is a deduction from the rent; the rights of the parties must be governed by the covenant. A great many words have been used, apparently with the intention of including every possible case that may arise. The tenant is to bear, pay, and discharge all 'taxes, rates, duties, and assessments.' Why should not that include the duty of making good the defective drainage? Why should not the tenant bear the cost? I cannot give an answer to this which is satisfactory to myself. It has been said that this covenant is applicable only to rates, taxes, and charges of a similar kind. I think that a sufficient answer to that is to be found in the circumstance that the word 'duties' itself is used. It is said that the covenant is applicable only to charges which are recurrent in their nature; but it extends to improvement rates, which are not of that description. It has been said, why should not this expense be borne by the landlord? but the question is, whether words sufficiently wide have been used to cast the burden upon the tenant. I am at a loss to see what other words can be put in. It seems to me that the parties intended to specify every kind of disbursement which they could think of. Suppose that the local authority were to do the work in the first instance, could it be contended that in that case there would not be a "duty" cast upon the landlord which the tenant would be bound to discharge by force of this covenant? Will it not be strange if the landlord cannot recover it from the tenant because he has himself done what is necessary? In other words, will it not be unreasonable if the liability depends upon the circumstance whether the local authority itself has done the work." Baggallay, L.J. also takes the same view. He says: "The terms of the covenant which we have now under con-

sideration are at least as comprehensive as were those in *Thompson v. Lapworth*." Now the covenant in *Thompson v. Lapworth* contained many words which are not present in the covenant here, since the tenant there undertook to "pay and discharge all taxes, rates, duties, and assessments whatsoever which should be taxed, assessed, or imposed upon the tenant or landlord of the premises in respect thereof." Then, after further discussing this case in its relation to other cases on the point, the learned Lord Justice proceeds: "The defendant has also relied upon the case of *Rawlings v. Briggs* (47 L. J. 487, C. P.; 3 C. P. Div. 368), in which the covenant was to 'pay and discharge all taxes, and all manner of rates, charges, assessments, and impositions whatsoever, to be charged, assessed, or imposed upon the premises thereby demised, or in respect thereof, or in respect of the said rent, by authority of Parliament, or otherwise howsoever;' and Lindley, J. held upon demurrer that the tenant was not liable to repay to the landlord the amount expended by him in abating a nuisance pursuant to the requirements of the local sanitary authority of Reading. In so deciding, Lindley, J. expressed his opinion that the terms of the covenant did not substantially differ from those in *Tidswell v. Whitworth* (*ubi sup.*) by the decision in which case he considered himself bound; but in *Hartley v. Hudson* (*ubi sup.*) the same learned judge held that under a covenant to pay and discharge 'all rates, taxes, charges, and assessments whatsoever, which now are or may be charged or assessed upon the said premises, or upon any person or persons in respect thereof,' the tenant was liable to repay to the landlord the amount which he had been compelled to pay to the sanitary authority in respect of certain sewerage and paving works executed by them under the provisions of the Public Health Acts after failure by him to obey an order to that effect. Lindley, J. treated the covenant in *Hartley v. Hudson* as equivalent to that in *Thompson v. Lapworth*, and particularly directed attention to the words 'taxed, assessed, or imposed on the tenant or landlord of the demised premises in respect thereof' in the covenant in *Thompson v. Lapworth*, and to the words 'charged or assessed upon the said premises, or upon any person or persons in respect thereof,' in the covenant which he had under consideration. In the present case we have the equivalent words, 'taxed, charged, rated, assessed, or imposed on the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof.' We have also, as in *Thompson v. Lapworth*, the word 'duties' in addition to 'rates, taxes, and assessments' in the enumeration of the charges and impositions to which the covenant is made applicable." That judgment, therefore, is founded on the word "duties." But then we have further a case which goes a long way to support the view I have taken that this is not a rate, tax, or assessment. This is the case of *Allum v. Dickinson* (47 L. T. Rep. N. S. 493; 9 Q. B. Div. 632) decided in 1882. There the tenant covenanted to pay "all rates and assessments taxed, rated, charged, assessed, or imposed upon the demised premises, or upon or payable by the occupier or tenant in respect thereof." The case was argued before the Court of Appeal, and in the result that court gave judgment in favour of the tenant,

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holding that the proportion of the expense of paving the street in which the demised house stood assessed upon it under 25 & 26 Vict. c. 102, s. 96, was not a rate payable by the tenant under the covenant. Lindley, L.J. there said: "It is plain that when the statute is looked at the payment is not charged or imposed upon the premises. But is it charged or imposed on the occupier in respect of the premises? I am of opinion that that is not the true construction of the section. I think that it is imposed upon the landlord, although power is given to recover it against the occupier." No doubt the case of *Hartley v. Hudson* is a very important case, but there the material word on which the decision turned was "charges," the tenant covenanting to pay "all rates, taxes, charges, and assessments whatsoever." The sum claimed in the present case was probably a charge upon these premises, but it was not, in my opinion, a rate, tax, or assessment. I think there is no case in which any court has gone the length of saying that such a payment as this is a rate, tax, or assessment. In other words, the cases which at first sight seem to militate against this view, I take it, do not really do so, and I think therefore that the defendant in the action is not liable under the covenant to repay this sum to the plaintiffs, but is, on the contrary, entitled to our judgment.

WILLIAMS, J.—I am of the same opinion. The question whether the plaintiffs are entitled to recover in this case depends on what was the true meaning of the parties as expressed in this covenant in their agreement which we have to consider, and whether it includes an apportionment of the expense of paving the street. The passage is to the effect that the defendant agreed to pay "all rates, taxes, and assessments payable in respect of the premises during the tenancy (except land tax and the landlord's property tax)," and the question is, is this charge a rate, tax, or assessment payable in respect of the premises during the tenancy? The conclusion I come to is, that it was not the true meaning and intention of these words that the defendant should pay an apportionment of the expense of paving the street in which the house was situate. This is merely an expression of opinion, and I can well understand that different people might, on such a point, come to different conclusions; but I am content to base my view on that taken by Lindley, J. in giving judgment in *Hartley v. Hudson* (*ubi sup.*), and I also think that *Tidwell v. Whitworth* (15 L. T. Rep. N. S. 574; L. Rep. 2 C. P. 326) covers the ground. But, moreover, the question is one of substance. Is this impost a burden which comes within the meaning of these words, is a question which depends on another question, namely, is it likely that a tenant who was taking the house for three years at 38l. a year would undertake to pay it? I do not think that it is. On these short grounds I think that our judgment must be for the defendant, with costs.

*Judgment for defendant.*

Solicitors for the plaintiffs, *Harries, Wilkinson, and Raikes*.

Solicitor for the defendant, *F. Fitz-Payne*.

Wednesday, April 2.

(Before Lord COLERIDGE, C.J. and CAVE, J.)

BEATY AND OTHERS (apps.) v. GLENISTER (resp.). (a)

*Public peace—Disturbance of—Salvation Army—Singing, shouting, and cornet playing in public streets—Hastings local Act (2 Will. 4, c. xci. s. 61).*

By the 61st section of the *Hastings local Act* (2 Will. 4, c. xci.) it is provided that if any person shall make, excite, or join in any brawl, or otherwise disturb the public peace, every person so offending shall for every such offence forfeit and pay any sum not exceeding forty shillings.

A., B., and S., members of the *Salvation Army*, led a crowd by a circuitous route through certain of the streets of the town of H. to the meeting-house of the army, S. during the march blowing a cornet loudly and in a discordant manner, and A. and B. marching with him singing hymns, beating time, and shouting loudly "Alleluia" and other expressions. Several of the inhabitants of the streets through which they passed were disturbed by the loud and discordant noises, but there were not more than fifteen members of the *Salvation Army* present, much of the noise being caused by a mob of 400 or 500 persons following them, and hostile to their proceedings.

Informations having been preferred against A., B., and S. under the local Act for disturbing the public peace, it was found as a fact that A., B., and S. disturbed the public peace within the meaning of the statute, and they were convicted.

Held, on case stated, that there was no evidence of the offence charged upon which the defendants could be rightly convicted under the Act of disturbing the public peace, and that the conviction must be quashed.

THIS was a case stated by justices of the borough of Hastings under 42 & 43 Vict. c. 49.

The material parts of the case were as follows:—

At a petty session, held at the town hall in the said borough on Thursday, the 13th Dec. 1883, two informations, preferred by the said William Glenister, superintendent of police, hereinafter called the respondent, against William Beaty and John Blandy, respectively hereinafter (with Frank Smith) called the appellants, under sect. 61 of 2 Will. 4, c. xci., charging that they, the said appellants, on the 2nd Dec. then instant, at the parishes of St. Mary in the Castle and the Holy Trinity in the said borough, and within the district of the Hastings urban sanitary authority, in certain public places there situate, called respectively Marine-parade, Castle-street, Devonshire-road, and Wellington-place, did disturb the public peace by singing and shouting, contrary to the said statute, were heard and determined by us, the said parties respectively being then present; and upon such hearing we convicted each of the said appellants in the penalty of 1s. and costs.

At the same sessions an information, preferred by the respondent against Frank Smith, one of the above-named appellants, under the same section of the same Act of Parliament, charging that he, on the 2nd Dec. then instant, at the same places named in the other informations, did disturb the public peace by playing a cornet, contrary to the said statute, was heard and determined by us, the said parties respectively being

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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then present, and upon such hearing we convicted the said Frank Smith in the penalty of 1s. and costs.

Upon the hearing of the said informations it was proved: (a) that on Sunday, the 2nd Dec. last, shortly before 11 a.m., the defendants, with a number of other people, had assembled on the beach, and that the appellant Beaty was preaching there, and that shortly afterwards all the appellants, who are members of the Salvation Army, headed the crowd into the street, and by a circuitous route led it through the several streets mentioned in the information to the meeting-house or "fort," as it is called, of the Salvation Army in St. Andrew's-square; (b) that during the march the defendant Smith, a major in the Salvation Army, blew a cornet loudly and in a discordant manner, Beaty and Blandy marching with him, giving out and singing Salvation Army hymns or songs, beating time and shouting loudly "Alleluia" and other expressions; (c) that a crowd, which continued to increase and ultimately amounted in number to 400 or 500, accompanied or followed the defendants, and that there was a great noise caused by the cornet, and also by shouting and singing through the several streets, which could be heard at a distance of 400 or 500 yards, of which noise complaint was made to a police officer on duty in one of the streets; (d) that a sergeant of police remonstrated with Smith, and told him to leave off playing the cornet, but that Smith turned the cornet towards him and continued to blow it; (e) that several of the inhabitants of the streets through which the crowd passed were disturbed by the loud and discordant noises.

The appellants proved that the actual members of the Salvation Army present did not exceed fourteen or fifteen in number, and that much of the noise which was made was caused by the mob which followed, and who were hostile to their proceedings.

It was contended by counsel for the appellants that there had not been any disturbance of the public peace by them or by those who acted with them, but that any noise or disturbance that occurred was occasioned by the persons in the crowd who were hostile to the appellants, and that the fact that such other persons committed unlawful acts could not constitute an offence by the appellants, who were only acting within their legal rights; that the statute 2 Will. 4, c. xci., under which the informations were laid, could not abrogate or annul the common law with reference to the offence with which the appellants were charged, and that the informations should therefore be dismissed.

We found as a fact that the appellants disturbed the public peace within the meaning of the statute under which they were charged.

The question of law for the opinion of the court is, whether there was any evidence of the offence charged having been committed by the appellants upon which we could convict them of disturbing the public peace under the aforesaid statute.

The local and personal Act (2 Will. 4, c. xci.) is entitled "An Act for paving, lighting, watching, cleansing, and improving the town and port of Hastings, in the county of Sussex, and for establishing and regulating markets therein, and supplying the inhabitants thereof with water, and for other purposes;" and the 61st section, after

enumerating a great number of obstructions and nuisances in the streets, provides that

If any person shall make, excite, or join in any brawl, or otherwise disturb the public peace, or use any obscene, profane, or abusive language in any of the said streets or places, or commit any public nuisance or annoyance whatsoever within the said town and port; every person so offending shall for every such offence forfeit and pay any sum not exceeding forty shillings.

*Sutherland* for the appellants.—There was no evidence before the magistrates on which the appellants could rightly be convicted of this offence, and the convictions ought therefore to be quashed. The appellants were acting strictly within their legal rights in what they did. The mere making of a noise in a public place so as slightly to interfere with the comfort of the inhabitants is not a disturbance of the public peace within the legal meaning of that term.

*Prosser* for the respondents.

Lord COLERIDGE, C.J.—I am of opinion on the facts stated in this case that there was no evidence of any disturbance of the public peace having been committed by the appellants within the meaning of this Act, on which they could rightly be convicted of an offence against its provisions.

CAVE, J. concurred.

Solicitor for the appellants, *Bennett*.

Solicitors for the respondents, *Meadows and Elliott*, Hastings.

## Judicial Committee of the Privy Council.

Tuesday, March 25.

(Present: The Right Hons. the LORD CHANCELLOR (Selborne), Sir B. PEACOCK, Sir ROBERT COLLIER, and Sir RICHARD COUCH.)

Re THE PAROCHIAL SCHOOLS OF ST. LEONARD'S, SHOREDITCH. (a)

*Endowed Schools Act 1869, ss. 9 and 19—Powers of commissioners—Denominational school—Evidence—Founder.*

*The Charity Commissioners have power under sect. 9 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56) to direct by a scheme that endowments should be no longer applied in carrying on a particular school, but in exhibitions for the benefit of a larger area of schools.*

*A school was founded by subscriptions in 1705, other benefactions being subsequently added. The original subscribers did not frame any express agreement in writing that the school was to be connected with any particular denomination, but as a matter of fact the children were, from the time of the foundation, regularly taken to the parish church and instructed in the Church Catechism. In 1774 express regulations on these points were made.*

*Held, that the original subscribers in 1705 must be taken to be the founders of the school, and in the absence of evidence of any express regulations made by them, or that any of them were living within fifty years before the making of the regulations of 1774, and had authorised such regulations, the school could not be considered as a denominational school within exception 21 in*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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*sect. 19 of the Endowed Schools Act 1869 (32 & 33 Vict. c. 56).*

THIS was a petition against a scheme framed by the Charity Commissioners under the Endowed Schools Acts 1869 (32 & 33 Vict. c. 56), 1873 (36 & 37 Vict. c. 87), and 1874 (37 & 38 Vict. c. 87).

The petitioners were Dr. Burchell, Mr. Alabaster, and Mr. Joseph Wilkinson, three of the trustees of the charity schools of St. Leonard's, Shoreditch, and the Rev. Septimus Buss, the vicar of the parish. They stated in their petition that the 19th section of the Endowed Schools Act 1869, provided "that a scheme relating to any educational endowment, the scholars educated by which are, in the opinion of the commissioners (subject to appeal to Her Majesty in Council), required by the express terms of the original instrument of foundation, or of the statutes or regulations made by the founder or under his authority in his lifetime, or within fifty years after his death (which terms have been observed down to the commencement of this Act), to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination, is excepted from the foregoing provisions respecting religious instruction and attendance at religious worship (other than the provisions for the exemption of day scholars from attending prayer or religious worship, or lessons on a religious subject, when such exemption has been claimed on their behalf), and respecting the qualification of the governing body and masters (unless the governing body, constituted as it would have been if no scheme under this Act had been made, assents to such scheme)."

In 1705 a boys' school was founded in the parish of St. Leonard's, Shoreditch, and a girls' school in 1709. The schools from their foundation had been denominational and attached to the parish church, and the teaching had been always religious. Baptism was required, and the Church Catechism was taught. Attendance at church was insisted upon, and the children were publicly catechised from time to time. In 1882 the Charity Commissioners submitted to the trustees of the girls' school a scheme for their consideration. The trustees, in reply, argued that in any scheme for the amalgamation of the charities the schools must be held to be denominational of the Church of England in connection with the parish church of St. Leonard's, Shoreditch, and that by the 19th section, already quoted, the school was exempted from the provisions of the Act. The commissioners intimated their opinion that none of the endowments were entitled to special treatment as being denominational within the view of the Act, and their scheme had since then been approved by the Committee of the Council of Education. By that scheme no provisions were made, in the establishment of either the senior or the junior exhibitions thereby created, for religious education in the principles of the Church of England, or for attendance at the public worship at the services of the church of St. Leonard's, Shoreditch. A provision for the expenditure of 20*l.* in prizes for religious knowledge was not, the petitioners urged, a due or sufficient compliance with the spirit and wishes of the founders and early supporters of the school. They also contended that clauses which provided that religious opinion or attend-

ance or non-attendance at any particular form of religious worship, or exemption from attending prayer or religious worship, in either the qualification of the governors or the holders of the exhibitions, were not in accordance with the 19th section of the Endowed Schools Acts with regard to such endowments, and that no provision was made for the religious education of the holders of the exhibitions at schools in connection with the Church of England, or for attendance at public worship at the parish church on the Lord's day, or for further religious and catechetical training, except in the granting of prizes of the value of 20*l.*, which provision did not extend to the learning and study of the catechism and teaching of the Church of England. For these reasons, among others, the petitioners prayed Her Majesty in Council to withhold approval from the scheme, or in any case from those parts of it which were inconsistent with their contentions, or which injuriously affected the petitioners and their vested interests.

The basis of the scheme of the commissioners was the principle of converting the schools into a system of exhibitions for public elementary scholars, and the reasons which had moved the commissioners to propound it were briefly as follow: The space occupied by the schools was cramped and incapable of adequate expansion, except at an undue cost to the endowment. The elementary education of the neighbourhood was sufficiently guaranteed by the existing supply of board and other schools, a condition of things under which it was proper that educational endowments should be utilised for the promotion of more advanced education. The united endowments would not suffice for the establishment and maintenance of a suitably equipped secondary school, whether for boys or girls; still less would they support such a school for children of each sex, and it was clear that in this case the claims of neither sex could be disregarded. On the other hand, a system of exhibitions such as that proposed in the draft would be of very great value as supplying to meritorious children of the poorer class an opportunity of carrying their education beyond the ordinary limit, and so entering upon a successful career. There was in the neighbourhood itself no lack of places of higher than elementary education at which the exhibitions might conveniently be held.

Dr. Phillimore and H. C. Richards appeared for the petitioners.

Davey, Q.C. and Vaughan Hawkins, for the respondents, the Charity Commissioners, took the preliminary objection that no resolution of the governing body as such to oppose the scheme was proved, or alleged in the petition.

Their Lordships decided to hear the counsel for the petitioners upon the merits of the case, and, on the conclusion of their arguments, the counsel for the respondents were not called upon.

Judgment was delivered by

The LORD CHANCELLOR (Selborne).—Their Lordships have considered the arguments which they have heard, and they do not think it necessary to call upon counsel to reply to them. It may be convenient, first, to notice the last point suggested by Dr. Phillimore upon the 9th clause of the Act of 1869, which gives power in very large and general terms to the commissioners, "by the

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scheme, in such manner as may render any educational endowment most conducive to the advancement of the education of boys and girls, or either of them, to alter and add to any existing and to make new trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions which affect such endowment and the education promoted thereby, including the consolidation of two or more such endowments, or the division of one endowment into two or more endowments;" the words "educational endowments" having a very large interpretation, which includes education at school of boys and girls, or either of them, and exhibitions tenable at a school or university or elsewhere. In this case the endowments appear to have been used till the scheme was made for the purpose of the education at school of boys and girls; and the commissioners, for whatever reason, have thought that those endowments may be made useful if they are not any longer applied in carrying on the particular schools in the parish of St. Leonard, Shoreditch, but are applied in exhibitions for the benefit of a larger area of schools for boys and for girls. Their Lordships are unable to find any solid reason for saying that this was not within the powers of the commissioners. Taking it to have been within their powers, no question is or can be raised as to the way in which they have exercised them; and that is not a proper subject of appeal if the scheme was not in that respect unauthorised by the Act. Having disposed of that particular objection, there remains the principal one, which is, that this is a denominational charity within the meaning of the 19th clause of the Act of 1869, and the 7th clause of the Act of 1873. Now, it is impossible to read the 19th clause of the Act of 1869 without being struck by the care and anxiety which the Legislature has exhibited there, to prevent denominational restrictions from being applied to any school as to which there was not demonstrative evidence that the original founders of the school had not only formed, but expressed, an intention that the children should be instructed according to the doctrines or formularies of a particular church, sect, or denomination, or, in the added words of the later Act, should be members of a particular church, sect, or denomination. It is impossible not to be struck by the anxiety which the Legislature has displayed to exclude, not only every uncertain, but also every merely probable implication from practice alone of such an intention; for it is required, first of all, that the denominational purpose should be manifested by the express terms, either of the original instrument of foundation, or of some statutes or regulations. Perhaps it is not absolutely necessary to say that regulations within the meaning of the clause could not have been oral, but it is tolerably plain there would be great difficulty in the proof of any such oral regulations, even if binding; and certainly the other words, "instrument of foundation or statutes," point with great distinctness to written instruments. The Legislature, by requiring "express terms," going for the present no further, has manifested a clear intention to exclude mere implication. It is not that only. Not only must it be done by the express terms of that which, in two cases at all events, must necessarily be an instrument in writing, and in the third case could scarcely be otherwise; but the

instrument of foundation, statutes, or regulations, must in the next place have been made by the founder or by his authority, and if by the founder of course in his lifetime. What is meant by founder, and what is meant by authority? Now, in the ordinary case of a foundation by one or more individual persons who created the endowment, there is of course no difficulty in the application of those words. But their Lordships have here to deal with a charity not so founded, but commenced by subscriptions in Michaelmas 1705. The Bishop of Salisbury was asked at that time to preach a charity sermon for the school; and in the list of benefactions the first benefaction appears to have been given in 1706, and it goes on at different dates; a collection being made for building in 1722. Now let us consider what is the reasonable manner of applying to such a charity the word "founder." It is reasonably clear that not every subscriber or contributor could be a founder, having control over the school, or capable within the meaning of the Act of Parliament of impressing on it, by his own act, or by his own authority, a denominational character. It is also reasonably plain, when you have once started with a foundation in 1705, though by small beginnings, yet that everything afterwards added, every accretion to the original subscriptions, which was not an endowment for any new and special purpose, must be taken to be upon the footing of the original foundation; not a new foundation, but something contributed for the purpose of the original foundation. You are carried back, therefore, in considering who ought to be regarded as the founder or founders, to the very inception of the charity, to the very first subscriptions, in this case to the years 1705 or 1706. Now it is quite conceivable that a number of persons might have met at that time, and might have come to a common agreement as to the purposes for which they should subscribe and solicit subscriptions; and if that had been embodied in writing, and if they had solicited subscriptions on the footing that either they themselves were to make a law for the charity and give it statutes, or that this was to be done by others in a particular manner, or if in any original documents soliciting subscriptions there had been a written law laid down for the charity expressing the purposes for which it was to be founded, those persons so initiating the subscriptions, and so declaring the purpose for which they were made and solicited, might be regarded as founders within the meaning of this clause. But it appears to their Lordships to be quite impossible to attribute that character to those who come after them—whether they contributed to the building fund or any other fund in aid of the existing charity or not. They did not found the charity; they found it existing; they merely aided and assisted it. The question in this case is, whether the conditions of this clause of the statute are shown to have been fulfilled as to the charity which had its foundation or inception in the only sense which can bring the words of the clause into play at all, as early as 1705 or 1706. The clause says that there must be express terms. Here it is admitted there is no original instrument of foundation at all; there are no statutes, therefore they may be laid aside. Then we come to the other word, "regulations," and we must find by proper evidence the express terms of some regulations which were made by



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the founder, or by his authority; and it is clear that there are no regulations of which the express terms appear, directly or indirectly, made by the original founder or by his authority; and that last term, "by his authority," is not without any limit of time, but must be either in his lifetime or within fifty years after his death. If it is sound reason that the original founders must be taken to be those persons who first subscribed to and collected subscriptions for this charity in the years 1705 and 1706, what is there upon which the conclusion can possibly be founded, that any regulations requiring in express terms that the scholars should be instructed according to the doctrine or formularies of the Church of England, or should be members of that Church—what is there from which it can be inferred that any such regulations were ever made, and still more that they were made within fifty years after the death of the original founders, and by their authority? The only thing brought forward in support of the conclusion that there were any such regulations consists of certain entries in books, which show that as a matter of fact the children were taken to church, and probably that they were instructed in the Catechism. Suppose it to be so, there is all the difference in the world between a practice for the time being and statutes or regulations expressly requiring that such a practice should always be observed. The clause in the Act would not be satisfied without statutes or regulations in express terms; and the manifest purpose of the clause would be defeated as to almost every school in the kingdom, not of very recent origin indeed, if it were held that mere practice should be taken as sufficient evidence of there having been at some time or other regulations made under the authority of the founder, expressly requiring that practice always to be observed. That disposes of everything except the regulations of 1774. Now, if their Lordships had thought it necessary to hear counsel for the commissioners, it is probable that some argument might have been addressed to them as to the effect of those regulations, and whether they would be sufficient, even if made within fifty years, or by the founder, to establish the denominational character of these schools. But, not having heard the counsel on the other side, their Lordships are ready to assume, for the present purpose, that what appears upon the face of those regulations, if they had been made by the original founders, might have been enough. They do not, of course, decide that it would have been so. But what is the evidence that those regulations were made by the authority of the original founders, or were made within fifty years after their deaths, which may also be assumed for this purpose to mean the death of the last survivor. The original foundation was nearly seventy years before the date of those regulations—of those orders. It is more probable than not, at all events, that the original founders were in 1705 at least persons of full age,—twenty-one years of age. They might have been living within the fifty years before 1774. The burden of proof as to this is upon those who allege that the case is brought within the clause of the statute, and no attempt has been made to prove that any one of the original founders was living within fifty years before 1774, which would be necessary to make it come within the limit of time, unless we are to assume that Mr. Collman was one of

the original founders. All, however, that we know about Mr. Collman is, that at a date considerably later than the original foundation, 1718, he appears as a trustee and as *de facto* treasurer, and taking an active part in the management of the charity. His name does not appear in the list of benefactors as an original contributor; and if he was not, he was not a founder who could himself have made statutes or given any authority to do so. Then there is an equal defect of the necessary evidence of the authority, even if it were known that some of the original founders were living within fifty years of 1774. What is the evidence that the rules and orders of that date were made by the authority of those original founders? The authority of some of those original founders might not have been enough—it must have been that of all the original founders. Is the mere fact that the management of the charity was carried on by certain trustees enough to lead to an inference of law that they might at any time make rules impressing a new character, a more definitely denominational character than it had before, upon the foundation. They might, if that doctrine were tenable, have in many other respects altered the conditions of the charity, and might have made it more or less beneficial according to their mere will and pleasure. It was admitted—no other answer could have been given to the question—that if they had changed its character, and made it denominational in any new or different way, as, for instance, a Roman Catholic school or a Jews' school, in 1774, they would have been guilty of a gross breach of trust, for which no authority whatever could have been presumed, and which the Court of Chancery of that day would most undoubtedly have corrected. If they could not impress upon it any new denominational character, could they impress upon it any denominational character of a binding nature different from that which it originally had? Could they do that which this clause contemplates—exclude from the school, if otherwise admissible to it, any persons who were not willing to learn or to be instructed according to the doctrine or formularies of any particular church, sect, or denomination—not merely exclude them by way of management or discipline from year to year, but as by statute and regulation for ever? It would be impossible to infer that the original founders intended, under mere ordinary powers of management, to give any such authority to the managers for the time being. The result is, that the case is not brought within this clause of the statute, either by the orders of 1774 or by any other means; and that the petition fails. Their Lordships will therefore humbly recommend Her Majesty that the scheme of the Charity Commissioners relating to these foundations should be approved.

Solicitors for the petitioners, *Funston and Hooper*.

Solicitors for the respondents, *Farrer and Co*.



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*Ex parte OASTLER; Re FRIEDLAENDER.*

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# Supreme Court of Judicature.

## COURT OF APPEAL.

Friday, July 4.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte OASTLER; Re FRIEDLAENDER. (a)*

*Bankruptcy—Appeal from registrar at chambers—Act of bankruptcy—Notice of suspension of payment—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), ss. 4, 48, 99, 104—Bankruptcy Rules 1883, 116, rr. 116A.*

*All appeals from decisions of the High Court of Justice in bankruptcy matters, whether given in court or in chambers, lie to Her Majesty's Court of Appeal and not to a divisional court of the High Court.*

*Although notice by a debtor to his creditors that he has suspended or is about to suspend payment, need not be in writing to constitute an act of bankruptcy within sub-sect. 1 (h.) of sect. 4 of the Bankruptcy Act 1883, such notice, to be an act of bankruptcy, must be formally and deliberately given; mere casual talk is not sufficient.*

*An offer made by the debtor to a creditor to pay him a dividend of 20 per cent. is not a sufficient notice within the section.*

The debtors in this case were Berthold Friedlaender, Arthur Massey Elsdale, and Emil Roth, of Tyer's-gateway, Bermondsey, and of Paris, trading as Friedlaender and Co., leather merchants, and their firm had been adjudicated bankrupts in Paris prior to the petition for a receiving order, and the French bankruptcy proceedings were pending when the petition was filed.

On the 19th April 1884 Messrs. Oastler, Palmer, and Co. filed a petition in the High Court of Justice for a receiving order, one of the acts of bankruptcy alleged being "that the said Berthold Friedlaender, Arthur Massey Elsdale, and Emil Roth, trading as Friedlaender and Co., did, on or about the 17th day of March last, give notice to all or some of their creditors that they had suspended or were about to suspend payment of their debts."

In support of the petition an affidavit was filed, in which Mr. Foster Mortimer, one of the creditors of the firm, alleged

That having been instructed by the English creditors to proceed to Paris, I, in company with Mr. Herbert George Lousada, of the firm of Lousada and Emanuel, the solicitors for such English creditors, proceeded to Paris. On the 16th day of April, at the request of Messrs. Friedlaender and Elsdale, who were then residing there, I and the said Herbert George Lousada had a conversation at the Hotel Westminster with those gentlemen, when Mr. Friedlaender stated in the presence of the said Arthur Massey Elsdale that he had started in business six or seven years ago without any capital; that he was unable to pay the debts of the firm; and he offered 20 per cent. dividend, 6s at the concordat of the syndie, 6s in twelve months, and the balance in eighteen months.

The affidavit continued as follows:

No security was offered. The said Berthold Friedlaender at the time stated that he could obtain assistance from his brother-in-law, who, however, would not assist him until he, Friedlaender, had made some arrangement with his creditors, and after he had obtained his dis-

charge. He also stated that, if the creditors would accept the amount of the composition he offered, the balance was to be a debt of honour, and they would pay the creditors the balance in full.

The debtors had had a place of business in England within a year of the filing of the petition.

On the 14th May Mr. Registrar Brougham, the debtors not appearing or opposing, made a receiving order against them, but on the 24th June his Honour, sitting in chambers, rescinded the order, stayed all proceedings thereunder, and dismissed the petition with costs.

The petitioning creditors appealed.

*R. Vaughan Williams* for the appellants.

*E. Cooper Willis, Q.C.* and *Israel Davis* for the debtors.—There is a preliminary objection to the appeal. No appeal lies to this court from the decision of a registrar at chambers, but the appeal ought to have been brought to a divisional court of the Queen's Bench Division. By sub-sect. 2 (b.) of sect. 104 of the Bankruptcy Act 1883, "an appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal," and by sub-sect. 2 (d.), "no appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal." By sect. 99, sub-sect. 1, "the registrar in bankruptcy of the High Court shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the court." By sub-sect. 2 a registrar may "make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers." The only appeal to this court, however, is such as is in conformity with general rules. The rules relating to appeals are the Bankruptcy Rules 1883, rr. 111-116. Rules 111-115 do not relate to an appeal from a decision of the registrar at chambers, but by rule 116, "subject to the foregoing rules appeals to the Court of Appeal shall be regulated by the rules of the Supreme Court for the time being in force in relation to such appeals." This order is an order of the High Court made in chambers, and is therefore governed by the Judicature Act and the rules thereunder. By sect. 50 of the Judicature Act 1873, orders made by a judge of the High Court at chambers may be set aside or discharged by a divisional court or by the judge sitting in court. [COTTON, L.J.—That refers to a judge in chambers, but sect. 99 of the Bankruptcy Act 1883 says any order of the registrar is to be deemed the order of the court, i.e., the court in chambers.] Rule 23 of R. S. C. 1883, Order LIV., carries it further by providing that "in the Queen's Bench Division the appeal from a decision of a judge at chambers shall be to a divisional court." [BAGGALLAY, L.J.—Sect. 104, sub-sect. 2 (b.) of the Bankruptcy Act 1883 says the appeal is to be to "Her Majesty's Court of Appeal."] Only subject to the rules, and rule 116 refers to the rules of the Supreme Court as to appeals from chambers. [COTTON L.J.—It refers to the rules as to the Court of Appeal. LINDLEY, L.J.—Order LVIII. of the R. S. C. 1883 is referred to.]

*R. Vaughan Williams, contra.*—Rule 116 is

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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annulled by rule 116A, issued on the 11th April 1884, which provides that, subject to the foregoing rules, appeals to the Court of Appeal shall be regulated by Order LVIII. of the Rules of the Supreme Court.

BAGGALLAY, L.J.—In my opinion the objection fails. The provisions of the Act of Parliament are too clear for us to allow it to prevail.

COTTON, L.J.—Appeals from all orders of the High Court in bankruptcy are to be brought to this court.

LINDLEY, L.J.—I am of the same opinion.

*R. Vaughan Williams* in support of the appeal.—By sub-sect. 1 (h.) of sect. 4 of the Bankruptcy Act 1883 an act of bankruptcy is committed "if the debtor gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts." The notice need not be in writing, but verbal notice is sufficient:

*Ex parte Nickoll; Re Walker*, 13 Q. B. Div. 469.

[COTTON, L.J.—There is no doubt about that.] It is not necessary, in order to constitute an act of bankruptcy, that the debtor should use the exact words of the sub-section. It is sufficient if in substance he tells his creditors that he has suspended or is about to suspend payment; and an offer to pay 20 per cent. is an intimation that he cannot pay 100 per cent., and that he has therefore suspended payment, or will do so. Under sect. 6 of the Act of 1869 it was necessary that a declaration of inability to pay debts should be delivered to the proper officer, with intent that it should be filed; but a notice of suspension is an act of bankruptcy, irrespective of the intention with which it was made, the object of the Legislature being an equal division of the assets among the creditors. He also referred to the Bankruptcy Act 1883, s. 48.

*Willis and Davis*, for the debtors, were not called upon.

BAGGALLAY, L.J.—This is an appeal from the rescission of a receiving order made by Mr. Registrar Brougham. The alleged act of bankruptcy on which the order was made was that the debtors gave notice to a creditor that they had suspended payment, or were about to suspend payment, of their debts. Is the conversation relied on such a notice of an intention to suspend payment as is contemplated by sub-sect. 1 (h.) of sect. 4 of the Bankruptcy Act 1883? In my opinion it is not. It is urged that one of the debtors said, in effect, "I am unable to pay my debts," and that this is equivalent to saying, "I am about to suspend payment of my debts." I cannot so regard it. Looking at sub-sect. 1 (f.), I do not think that a debtor's statement that he is unable to pay his debts can be looked upon as equivalent to a notice that he is about to suspend payment. A declaration of inability to pay debts must, in order to constitute an act of bankruptcy, be filed in the court. Actual filing would probably be unnecessary if the declaration were delivered to the officer of the court for the purpose of being filed. But, as formality is required in order to constitute an act of bankruptcy under sub-sect. 1 (f.), a mere informal declaration of inability to pay debts cannot be sufficient to constitute an act of bankruptcy under sub-sect. 1 (n.). In my opinion, the informal statement made in this case was not a notice

within that sub-section of an intention to suspend payment.

COTTON, L.J.—I am of the same opinion. Of course all the circumstances must be taken into consideration as well as the words used by the debtor. Sub-sect. 1 (h.) of sect. 4 requires that the debtor, to commit an act of bankruptcy, shall give "notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts." But even if the words "suspend payment" had been used in this case, it would, in my opinion, be doubtful whether, under the circumstances, there had been such a notice as is contemplated by sub-sect. 1 (h.). There was an interview between the debtor and a creditor, and the debtor did not say that he had stopped or must stop payment, but that the assets were insufficient to pay the debts in full, but if the creditors would come in and make an arrangement, assistance would be obtained from friends. This was not an intimation that payment had been, or would be, suspended; it was only a proposal of certain means by which the creditors would obtain more than they would otherwise. In my opinion there is a great difference between the case of a man saying that if his assets are distributed the creditors will get less than 20s. in the pound, and a statement that he must suspend payment, or telling a creditor who wants payment that he can take what steps he likes. A man may, in paying his debts, so fraudulently prefer a creditor that the money paid cannot be retained, but that is not suspending payment.

LINDLEY, L.J.—I am of the same opinion. What is the meaning of giving "notice that he has suspended or that he is about to suspend payment?" "Notice" does not mean mere casual talk, but something formal and deliberate—something done by the debtor with a consciousness that he is giving notice, and intended to be understood in that sense. If the notice here had been formally given it would not have been an act of bankruptcy, as the words used are not sufficient; it was not a notice of suspension, or intended suspension, but a notice that the debtors might have to pay a composition. An act of bankruptcy is a serious matter, and not to be got at by talk like this.

*Appeal dismissed.*

Solicitors for the appellants, *Lousada and Emanuel*.

Solicitors for the debtors, *Atkinson and Dresser*.

*Saturday, July 5.*

(Before BAGGALLAY and COTTON, L.JJ.)

*Re TARRATT. (a)*

*Lunacy—Appointment of curator by Scotch court—Omission from order of declaration as to unsoundness of mind—Transfer of stock—Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70), s. 141.*

*On an application by the curator of T., a person resident in Scotland, for the transfer of stock standing in his name to the curator, it appeared that the petition on which the Scotch court had appointed the curator stated that T. had been for several years of unsound mind, and was at that time incapable of managing his affairs. The only*

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

ground for the petition stated in the affidavits annexed was that T. was of unsound mind. By a memorandum indorsed on the petition the Scotch court appointed the curator, but the order contained no express declaration that T. was of unsound mind. It was shown that curators were appointed in Scotland, not only in cases of unsoundness of mind, but also when persons were, by illness or absence abroad, incapable of managing their affairs.

Held, that the memorandum indorsed on the petition amounted to a declaration, within the meaning of sect. 141 of the Lunacy Regulation Act 1853, that T. was of unsound mind.

A SUMMONS was taken out in this case by Dugald MacLachlan, the curator bonis of D. F. Tarratt, a lunatic residing in Scotland, asking that 1933l. debenture stock of the Great Western Railway Company, standing in the name of the lunatic, might be transferred into the name of the curator bonis.

The summons was required to be argued in court on the question whether the evidence was sufficient that D. F. Tarratt had been declared lunatic by the Scotch court, within the meaning of the Lunacy Regulation Act 1853, s. 141. (a)

The certificate of the master in lunacy found that the wife of D. F. Tarratt presented a petition on the 18th July 1882 to the Lords of Council and Session, stating, amongst other things, that D. F. Tarratt had, for several years, been of unsound mind, and was incapable of managing his own affairs, as was shown by the affidavits of two medical men, printed in the appendix to the petition, and suggesting the appointment of D. MacLachlan as his curator bonis. Two medical certificates were printed in the appendix, stating in distinct terms that Tarratt was of unsound mind. No evidence was appended to the petition except those two affidavits. On the petition was indorsed the following memorandum, signed by one of the judges of the Court of Session:

At Edinburgh, 16th Aug. 1882. The Lord Ordinary officiating on bills having considered the petition and productions, nominates and appoints D. MacLachlan, of, &c., to be curator bonis to D. F. Tarratt, designed in the petition, with the usual powers, he finding caution before extract and decrees.—A. B. SHAND.

The master's certificate further found that an affidavit had been filed by Colin MacLachlan, a Scotch advocate, in which he said that since the abolition of the Scottish Privy Council, and for the last 150 years at least, the Court of Session had been in the practice, on the application of parties interested, of appointing a curator bonis to persons who had fallen into a state of mental

incapacity, and that such appointment was in such cases equivalent to a declaration that such person is a lunatic.

R. F. Norton, in support of the summons, cited *Re Mitchell*, 45 L. T. Rep. N. S. 60; 17 Ch. Div. 515; *Bryce v. Grahame*, 6 Shaw's Ct. of Sess. Cas. 425; Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70), s. 141.

BAGGALLAY, L.J.—Having regard to the language of the Lunacy Regulation Act 1853, s. 141, it has been proved to my satisfaction that David Fox Tarratt has been declared a lunatic by the Court of Session in Scotland. I think that, under the particular circumstances of this case, the memorandum indorsed on the petition amounts to such a declaration, being made on a petition having affidavits proving the fact of insanity, and no other affidavit, annexed to it. The memorandum was: "The Lord Ordinary officiating on bills having considered the petition and productions, nominates and appoints D. MacLachlan to be curator bonis." He could have proceeded on no other ground than the alleged insanity. How I should decide in the case of another petition where the affidavits were different I cannot say. It is necessary for us to be very careful in such cases, as curators are appointed on account of physical incapacity, and other reasons besides insanity, and therefore the fact of such appointment is not in itself equivalent to a declaration of insanity.

COTTON, L.J.—I am of the same opinion. I take it that in this case the memorandum of the judge is shown, by the affidavits on which he acted, to be equivalent to a declaration that in his opinion the person in question was of unsound mind. In former days the Court of Chancery never made a declaration on a petitioner, but did what was equivalent by expressing its opinion on a particular point. And the same course is still often pursued in orders under the Trustee Act when the order is prefaced by these words: "The judge being of opinion that the person is of unsound mind," which is equivalent to a declaration to that effect. But it would be very convenient if in the same manner the orders of the Court of Session appointing a curator expressed the grounds on which the order was made. But that is not necessary in this particular case, for I think the memorandum is a sufficient declaration.

Solicitors, Ullithorne, Currie, and Villiers, for Neve and Cresswell, Wolverhampton.

July 9 and 10.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

PEARSON v. PEARSON. (a)

Partnership—Business and goodwill—Sale of share to copartner—Vendor setting up new business—Soliciting customers of old firm.

J. P. and T. P. carried on together in partnership the business of potters and earthenware manufacturers.

Disputes arose between them which resulted in litigation, and ultimately an agreement was entered into by which J. P. agreed to sell to T. P. his estate and interest in the property and businesses to which the litigation related for the sum of

(a) Reported by E. A. SCRATCHLEY and W. C. BISS, Esqrs., Barristers-at-Law.

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2000*l.* It was, however, stipulated that nothing in the agreement should be deemed to restrict or prevent J. P. from carrying on the business of a potter and earthenware manufacturer at such place as he should think fit, and under the name of J. P. This agreement was embodied in an order of the court, which was made by the consent of the parties.

J. P., having commenced a pottery business on his own account, issued a circular to the customers of the old firm, in which he stated that he had discontinued his connection with that firm, but that he solicited their custom.

Held (reversing the decision of Kay, J.), that, on the construction of the agreement, J. P. was entitled to solicit the customers of the old firm.

Labouchere v. Dawson (25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322) overruled.

JAMES PEARSON and Theophilus Pearson carried on together in partnership, near Chesterfield, the business of potters and earthenware manufacturers. Disputes arose between them which resulted in litigation, and ultimately, on the 27th March 1884, an agreement was entered into by them for the settlement of the actions and all claims therein.

The material clauses of the agreement were as follows:

1. Theophilus Pearson shall pay to James Pearson 2000*l.* for the purchase of his estate and interest in the property and businesses to which these actions relate, 500*l.* to be paid on the signing hereof, and 1500*l.* on completion.

2. James Pearson shall execute a conveyance or assurance of his said estate and interest to Theophilus Pearson, and shall release all claims against the same, and the said Theophilus Pearson shall covenant to indemnify James Pearson against all existing liabilities in connection with the said property and businesses; in case of dispute the conveyance or assurance to be settled by the judge.

3. Nothing in the agreement shall be deemed to restrict or prevent the said James Pearson carrying on and exercising the trade or business of a potter and earthenware manufacturer, or any other businesses, at such place as he thinks fit, and under the name of James Pearson.

4. Theophilus Pearson shall forthwith discontinue carrying on business under the name of James Pearson, and intimate the same by circular to the customers within a week. All letters addressed to James Pearson, Chesterfield, or Whittington Moor, shall for the period of two months from the date hereof be delivered in the first instance to Theophilus Pearson, and after that time to James Pearson.

7. Each party shall forthwith consent to an order of the court staying the said actions on the above terms, except so far as it may be necessary to carry into effect or enforce such terms.

This agreement was embodied in an order of the court, which was made by the consent of the parties.

James Pearson having commenced a pottery business on his own account near Chesterfield, issued a circular to the customers of the old firm. The circular was as follows:

Potteries, Chesterfield, March 31, 1884.

Dear Sir,—I beg to inform you that I have discontinued my connection with the business carried on for many years by my late father previous to his death in 1864, and subsequently by his trustee, under the title of James Pearson, Whittington Moor Potteries, near Chesterfield. Although I am the eldest son, and have been engaged in the active management of the business for the past fifteen years, I have now been compelled, owing to disputes with the trustee under my father's will, to withdraw from the above-mentioned business. I have commenced business on my own account, and

having every requisite appliance for the prompt execution of orders, I do not hesitate to solicit, under the above circumstances, a continuance of the favours granted by you to the late firm, and hope that the care and attention which have secured your support in the past may continue to be exerted on your behalf in the future.—I remain, yours faithfully, JAMES PEARSON.

Theophilus Pearson contended that the issuing of such circular was a breach of faith, and in derogation of the assignment of the goodwill of the partnership contained in the above-mentioned agreement and order.

On the 9th April 1884 an application was made to the court *ex parte* to restrain James Pearson from dealing with the letters of the business in contravention of clause 4 of the agreement, and from issuing the above circular, and an interim injunction was granted, upon the usual undertaking as to damages being given by Theophilus Pearson.

May 1, 1884. — A motion was now made to continue that injunction.

Robinson, Q.C. and Mulligan, for Theophilus Pearson, in support of the motion, submitted that the case was governed by

Labouchere v. Dawson, 25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322.

Graham Hastings, Q.C. and William Baker, for James Pearson, argued that *Labouchere v. Dawson* was contrary to principle, and ought not to be carried further; that that decision did not apply to the case of a sale to a copartner, but only to the case of a sale to a stranger, and, moreover, that it applied only where the goodwill was expressly sold; and that the clause of the agreement providing that nothing therein should be deemed to restrict James Pearson from carrying on the business of an earthenware manufacturer must mean to include that he should be at liberty to solicit the customers of the old firm. They also sought to adduce evidence to show that in the negotiation for the agreement it was proposed that an express covenant should be inserted therein that James Pearson should not solicit the customers of the old firm, and that he declined to enter into such covenant. They referred also to

*Ginesi v. Cooper and Co.*, 42 L. T. Rep. N. S. 751

14 Ch. Div. 596;

*Leggett v. Barrett*, 43 L. T. Rep. N. S. 641; 15 Ch. Div. 306;

*Walker v. Mottram*, 45 L. T. Rep. N. S. 659; 19 Ch. Div. 355;

*Dawson v. Bosson*, 48 L. T. Rep. N. S. 407; 22 Ch. Div. 504;

*Mogford v. Courtenay*, 45 L. T. Rep. N. S. 303.

KAY, J.—This argument raises some very interesting questions, and I need not say that it has been extremely well conducted on both sides. The matter arises in this way: In this year (1884), there being certain litigations going on between James Pearson and Theophilus Pearson, and between Theophilus Pearson and James Pearson (an action and a cross-action), an agreement was come to between these two persons which stipulated as follows: [His Lordship read the clauses of the agreement above set out, and continued:] Thereupon an order was obtained, which order, in effect, embodied this agreement, the order being so worded that it was by consent, "This court doth by consent order," and then follow the very terms of the agreement as far as material, it being an order, in fact, to carry out that agreement in the way that the agreement contem-

plated. Now after this was done an application was made to the court to restrain James Pearson from issuing a certain circular and from dealing, as it was alleged he did, with the letters of the business in contravention of that agreement, viz., that for two months they shall be sent to Theophilus Pearson. The application was *ex parte*, and it was made on the last day before the Easter vacation. It was made upon affidavits which stated that James Pearson had been interfering with the letters, and upon proof of a circular which was in these terms: [His Lordship read the circular, and continued:] That circular was sent to the customers of the old business, which, as appears from the terms of it, had been carried on by the father of these two litigant parties at Whittington Moor Potteries, near Chesterfield. His name was James Pearson, the same name as that of the person who issued this circular. That was distinctly a soliciting by James Pearson of the customers of the old firm after he had sold to Theophilus Pearson all his interest in that business, and, following the decision in *Labouchere v. Dawson* (25 L. T. Rep. N. S. 894; 13 L. Rep. 13 Eq. 323), an interim injunction was granted upon the usual terms, namely, the undertaking as to damages being given. One of the motions which I have to deal with now is a motion to continue that injunction, and the first question is, where a man has sold all his interest in a business, what is the law upon the question whether he may or may not solicit the customers of that business to give their custom to him in a new business of his own of the same character, which he has subsequently set up. The authorities perhaps are not in the most satisfactory state upon that question. In *Labouchere v. Dawson* (*ubi sup.*) Lord Romilly held that a person, the vendor in such a case, being a voluntary vendor, "is entitled to publish any circulars to all the world to say that he is carrying on such a business"—that is to say, the same kind of business in which he has been concerned; "but he is not entitled, either by private letter or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill." The same point came, in March 1880, before the late Master of the Rolls in the case of *Ginesi v. Cooper and Co.* (42 L. T. Rep. N. S. 751; 14 Ch. Div. 596). He, beginning by a statement of James, L.J., which in fact he adopted, said that "The commandment 'Thou shalt not steal' is as much a portion of the law of courts of equity as it is of courts of law;" and he extended the order far beyond that which was made in *Labouchere v. Dawson* (*ubi sup.*). He actually restrained the vendor, not merely from soliciting the custom of the old firm, but from dealing with those customers at all. The question came also before the Court of Appeal in the case of *Leggott v. Barrett* (43 L. T. Rep. N. S. 641; 15 Ch. Div. 306). That part of the order which restrained the dealing with customers of the old firm, and which had been repeated in *Leggott v. Barrett* by the same learned judge, the late Master of the Rolls, was discharged. It has been quite properly and quite correctly pointed out that nothing more was asked, on the appeal in that case, than the

discharge of that part of the order. The rest of the order which followed *Labouchere v. Dawson* (*ubi sup.*) was not appealed against, except in this sense, that the Court of Appeal certainly was not asked to discharge that portion of the order which followed *Labouchere v. Dawson*, and accordingly the judgment, which seems somewhat carefully worded, did not deal with the doctrine of *Labouchere v. Dawson*. There was no decision of the Court of Appeal as to whether *Labouchere v. Dawson* was to be followed or not. Again the matter came before the Court of Appeal in the case of *Walker v. Mottram* (45 L. T. Rep. N. S. 659; 19 Ch. Div. 355), where the question was whether the same rule was to be applied in the case of a compulsory alienation by trustees in bankruptcy of a bankrupt partner, who, of course, are bound by their duty to sell the interest in the business; and it was held that such rule did not extend to that case, but that any partner setting up business afterwards was at liberty, if he liked, to solicit the customers of the old firm, notwithstanding the business of the old firm had been sold in that compulsory manner. The matter likewise came before Fry, J. (now Fry, L.J.) in the case of *Mogford v. Courtenay* (45 L. T. Rep. N. S. 303), and he, without expressing any opinion, as I read the judgment, as to whether *Labouchere v. Dawson* (*ubi sup.*) was sound in point of principle or not, followed it, and decided accordingly. The matter was again mentioned in the case of *Dawson v. Beeson* (48 L. T. Rep. N. S. 407; 22 Ch. Div. 504) in the Court of Appeal, where the late Master of the Rolls, who had decided *Ginesi v. Cooper and Co.* (*ubi sup.*), was sitting as one of the judges; and it was there held that the rule did not apply where a partner has been expelled under a clause in the partnership articles, that being a compulsory dealing with his interest. But in the case of *Walker v. Mottram* (*ubi sup.*) two of the Lords Justices, without otherwise expressing any opinion, said that *Labouchere v. Dawson* (*ubi sup.*) will still be applicable to a voluntary sale. The other Lord Justice (Baggallay, L.J.) delivered a separate judgment, doubting the correctness of the decision in *Labouchere v. Dawson*, in which case I observe he was counsel arguing the result at which the court arrived. That is the state of the authorities. Well, upon principle, it certainly does raise a point very difficult to deal with, because it is quite clearly settled that, when a man has sold his interest in a business, he is at liberty, in the absence of express contract to the contrary, to set up a similar business next door, if he likes, to the place where the old business is carried on, and to hold himself out by way of public advertisement and in any way he likes, except by soliciting the old customers, as a person carrying on a similar business, so long as he does not represent that he is carrying on that same business, or a continuance of that same business. It has been said, and truly said, that to do that might very much interfere with an old business if it is of the class of business which has what is properly speaking a goodwill, namely, a number of customers who are in the habit of resorting to a particular place of business to do business of the particular nature carried on by the firm there. It is said that such a proceeding as opening a shop next door is more likely to interfere with the carrying on of the original business

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than soliciting the customers of the old business. There is very great force in that observation. One can easily conceive the case where the setting up a shop next door, or it may be in the same house, as the late Master of the Rolls pointed out in *Ginesi v. Cooper and Co. (ubi sup.)* would interfere far more with the business than if a man set up a shop at a distance and merely solicited the old customers. If there be a distinction between the two cases, it is, of course, in point of principle extremely difficult to say upon which side of the line so drawn the decision in *Labouchere v. Dawson (ubi sup.)* ought to fall. However, I do not feel myself at liberty to act upon my own opinion, even if I had an opinion (which I do not in the least mean to say) contrary to the decision in *Labouchere v. Dawson*. Before I made up my mind upon it I should require to give more consideration to it than I do at this present time. What seems to me to be clear is this, that it would be contrary to the usage which exists in different courts, if I were to decide this case upon the assumption that *Labouchere v. Dawson* is not a binding decision. Of course it is not absolutely binding upon me, because it is only a decision of a court of co-ordinate authority. Still I think the courtesy that one court shows to another must be exercised in this case by following that decision, and the decision of Fry, J. in *Mogford v. Courtenay (ubi sup.)*, and the dicta of the two Lords Justices in the Court of Appeal in *Walker v. Mottram (ubi sup.)*. Therefore, I shall decide this case on the footing of *Labouchere v. Dawson* being, at present, a correct statement of the law on the point before me. But then a distinction is sought to be drawn upon this ground. It was said that *Labouchere v. Dawson* was the case of a sale to a stranger, and that there is a difference, and a difference which is pointed out by the language of the judges in the later cases, where the sale is not to a stranger, but to one of the partners of a firm. Is there any reasonable ground for a distinction of that kind? Why should it be that, in the case of a sale to a stranger, the vendor may not solicit his customers, but if he sells to one of his copartners he may do so? I confess that the distinction is too fine for my intellect to grasp, and I do not think that any valid distinction of that kind can be maintained. Therefore it seems to me that I must treat this particular case as being one with respect to which the question arises whether the doctrine in *Labouchere v. Dawson (ubi sup.)*, if it is applied, is applicable. Is it, or is it not, applicable to the particular case? It is said it is not, because of something in the agreement itself. It is argued with reference to clause 3 of the agreement—which provides that nothing in the agreement shall be deemed to restrict or prevent James Pearson carrying on and exercising the trade or business of a potter and earthenware manufacturer, or any other businesses at such place as he thinks fit, and under the name of James Pearson—that such clause must mean that which it certainly does not express, namely, that James Pearson must be at liberty to solicit the customers of the old firm. The argument, if I have properly comprehended it (I am afraid I must state it in a way which those who press it will not exactly like) is this: Because you cannot give the clause any other meaning you must give it that meaning. Of course that would be to carry the argument to a manifest absurdity.

I take, however, the real meaning of the argument to be this: that these things which are absolutely stipulated for in this clause 3 are such as the law itself would imply without any express contract; and therefore it cannot be that clause 3 was meant only to stipulate those things which it expresses, but the meaning of it must be extended to make it include such a mode of carrying on the business as the law would not otherwise permit. I confess I am not able to adopt that mode of construction either. To depart from the very words of the clause, which merely says, he may carry on the business of a potter and earthenware manufacturer at such place as he likes, and in the name of James Pearson, and to read that as a clause enabling him to do what the law would not otherwise permit, namely, to solicit the customers of the old business, is a forcible kind of construction which I cannot adopt. I do not think that that will alter the matter, one way or the other. But then it is said, in the negotiation for this business there was an express stipulation which the court must require. When the agreement was being negotiated one of the parties sought to put in the agreement an express covenant that James Pearson should not solicit the customers of the old business, and the solicitor acting for James Pearson rejected that. He not only rejected that, but, to use the language of that solicitor, he said: "In the course of the negotiations referred to, Messrs. Smiles and Co. asked if the said James Pearson would give a covenant not to solicit the customers of the business. Acting on the express instructions of the said James Pearson, I stated that he absolutely declined to give any such covenant, and stated that the said James Pearson intended to compete with Theophilus Pearson, and get what custom he could." I am asked to read that, and say in a case of this kind, where an injunction is applied for, that although the agreement otherwise would have the effect of preventing James Pearson soliciting the customers, still, as there was an express refusal to put a clause to such effect into the agreement, I must treat the agreement as not having that effect. Is it possible for any court to accept such evidence as that? I have a concluded agreement—an agreement on which the court has made an order adopting the terms of it. Of course it must be assumed that the terms of it would prevent James Pearson, one of the parties to it, from soliciting customers of the old business, but I think that would be the consequence of this agreement. I am told that I, without any occasion to rectify the agreement, or anything of that kind, am to regard the negotiation which preceded the agreement into which this clause was asked expressly to be introduced, and which was refused, as being a thing which now must govern my decision as to what the consequence of this agreement is. Well I remember, as one does incidentally recollect, in the course of my own personal experience at the bar, a very similar question, and I confess at present I have not been able to see the very slightest distinction between the case which I am referring to and the case which is now before me. It was a case which came from Scotland. There is no difference between the Scotch law and ours, as I happen personally to know, on this point. It was a case of *Inglis v. Buttery and Co. (3 App. Cas. 552)*. There, a firm of shipbuilders agreed to lengthen

and repair an iron steamship, the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation: "Iron work.—The plating of the hull to be carefully overhauled and repaired;" and then there were inserted originally fourteen more words, which were crossed out, and the deletion was initialed in the margin with the initials of the persons who signed the agreement. Those words were, "But if any new plating is required the same to be paid for extra." I remember the case, because being the counsel, with the present Solicitor-General, in the case, it became my duty to argue that those words ought to be regarded upon a claim which was made for extra payment for new plating. Every one of the learned judges who then advised the House most distinctly repudiated any notion of looking at the deletion, or the words deleted. Lord Hatherley said: "Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe." Then Lord O'Hagan said the very same thing, and Lord Blackburn also said: "That to my mind is merely a communing" (which is a Scotch expression for previous negotiation), "and it is not a thing which ought to be looked at at all." If I wanted more authority, I need only look at one of the cases which have been referred to in this very matter, viz., the case of *Leggott v. Barrett* (*ubi sup.*), in which, the question being a similar question, James, L.J. said: "You have no right to look at the contract" (there had been a deed in that case) "either for enlarging or diminishing or modifying the contract which is to be found in the deed itself." And Brett, L.J. said: "I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written documents in the first case"—which is the case now before me—"or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document." But then it was urged here that this is not really interfering with the meaning of the document; that it is interfering with a legal consequence which flows from the document. Well, what is the legal consequence flowing from the document? It is only this, that if the document be a document by which the goodwill of the business is assigned or agreed to be assigned, then the man who assigned by way of voluntary sale, or who agreed to assign the goodwill of that business, has by such assignment or agreement to assign (which is the same thing) deprived himself of the right of thereafter

soliciting the customers of the business which he has sold. How is that a legal implication from the document? It is the legal consequence of the act he has done; and I think the illustration which I put, and which I rather borrowed from a part of the argument, is a perfectly good one. It was this. It was said to be a question of parcel or no parcel; that is to say, the deed has in terms conveyed the goodwill, or the agreement has agreed to assign the goodwill, and the question is, whether you can from the previous negotiation derive a conclusion that less than the goodwill was to pass. That is a very pertinent illustration. It seems to me that it is an attempt to contradict or to modify the effect of the agreement itself by referring to previous negotiations, which this court has no right at all to do. I therefore entirely reject that part of the case sought to be set up on behalf of James Pearson. Well, that would really dispose of the matter, because the circular which I have read was admittedly sent to the customers of the old firm; and undoubtedly, to say the least of it, it is a solicitation of their custom. It is true that it does not, in terms, ask them to withdraw their custom from the old business, but still, to the extent to which they do give custom to James Pearson, which they otherwise would have given to the old business, the effect is precisely the same. Therefore I think the circular is a circular which could not be allowed to be issued, and apart from the decision laid down in *Labouchere v. Dawson* (*ubi sup.*), I should be bound to grant an injunction restraining the further issue of this circular. It has been said at the bar quite openly, that James Pearson was always entitled to solicit the old customers of the old firm; he asserts his right to do it, and avows that he intends to continue doing so. Consequently I am bound to grant an injunction restraining him from issuing any circulars in these terms, and also—following the very words in *Labouchere v. Dawson* (*ubi sup.*), or rather following the very words which were used by Fry, L.J. in *Mogford v. Courtenay* (*ubi sup.*)—"from applying to any person who was a customer or correspondent of the late firm prior to the date of this agreement"—the 27th March 1884—"privately, by letter, personally, or by a traveller, asking such customer or correspondent to continue to have dealings with the defendant, or not to deal with the plaintiff." Those are the words in which it seems to me proper to grant the injunction. So much for that part of the case. Then the next matter I have to deal with is that of the letters. As I have said, there was an *ex parte* order which extended to dealing with the letters, and it was made upon the plaintiff saying in so many words that James Pearson had given an order to the post-office to have all letters sent to him, and that letters addressed to "James Pearson, The Potteries, Chesterfield," had been sent to the defendant James Pearson. I have the evidence on the other side, and I find that is not true. It was of course merely stated as the deponent has stated it, but it is absolutely disproved, and upon the evidence before me it seems that not in one instance has the defendant James Pearson received a single letter which was addressed to "James Pearson, The Potteries, Chesterfield," or to "James Pearson, Whittington Moor, Chesterfield," but that every single letter which he has received has been addressed "Mr. James Pearson, Pot-



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teries, Brompton, Chesterfield," which is the place where he is carrying on his own business. Therefore, that part of the *ex parte* order was improperly obtained; and if I could see that any damage had resulted to the defendant, it would be the duty of the court to grant an inquiry as to damages. I do not, however, want to complicate this matter more than is necessary, or to expose either party to more costs than can be helped, and as it cannot be suggested that any damage of that kind has occurred, I do not think it right to grant an inquiry as to that, and so far as this motion relates to that matter, I refuse the motion with costs.

James Pearson appealed from so much of the order as restrained him from soliciting business from the customers of the old firm.

Graham Hastings, Q.C. and William Baker for the appellant.

Robinson, Q.C. and Mulligan, for the respondent.

The following cases were cited:

- Labouchere v. Dawson*, 25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322;  
*Churton v. Douglas*, 33 L. T. Rep. O. S. 57; Johns. 174;  
*Ginesi v. Cooper*, 42 L. T. Rep. N. S. 751; 14 Ch. Div. 596;  
*Leggott v. Barrett*, 43 L. T. Rep. N. S. 641; 15 Ch. Div. 306;  
*Walker v. Mottram*, 45 L. T. Rep. N. S. 659; 19 Ch. Div. 355;  
*Cook v. Collingridge*, Jac. 607;  
*Mogford v. Courtenay*, 45 L. T. Rep. N. S. 303;  
*Crutwell v. Lye*, 17 Ves. 335; 1 Rose, 123;  
*Kennedy v. Lea*, 3 Mer. 452;  
*Smith v. Everitt*, 27 Beav. 446;  
*Barron v. Gardner*, 2 Mad. 198;  
*Pugh v. The Golden Valley Railway Company*, 42 L. T. Rep. N. S. 863; 15 Ch. Div. 330;  
*Reg. v. The Wycombe Railway Company*, 15 L. T. Rep. N. S. 610; L. Rep. 2 Q. B. 310.

BAGGALLAY, L.J.—The order granting this injunction must be discharged. The injunction restrains the defendant from issuing circulars to the customers of the old firm, and also restrains him from soliciting the customers of the late firm to deal with him. The defendant does not appeal as to the first part of the injunction, but only as to the second part, which restrains him from soliciting the customers of the old firm. It is important to bear in mind the terms of the agreement. If clause 1 stood alone, I should be of opinion that the words "estate and interest" included goodwill, and the case would be within the principle of *Labouchere v. Dawson* (25 L. T. Rep. N. S. 894; L. Rep. 13 Eq. 322); and, if that case is to be recognised as good law, the plaintiff would be entitled (leaving clause 3 of the agreement out of consideration for the moment) to an injunction. But, with respect to that case, I have myself on a former occasion, in *Walker v. Mottram* (45 L. T. Rep. N. S. 659; 19 Ch. Div. 355), expressed doubts which the argument to-day has certainly tended to confirm, so that I may now say that, in my opinion, *Labouchere v. Dawson* ought not to be recognised by the courts. I am well aware that it has been followed on two or three occasions by judges of co-ordinate jurisdiction, but it has never yet been distinctly followed or positively dissented from in the Court of Appeal. In that case there was an agreement for sale of a brewery with the goodwill of the business, and Lord Romilly decided that the vendor might set up a similar business and publicly advertise, but

might not solicit the customers of the old firm. The principle of the decision was, that vendors must not afterwards depreciate what they have sold. But the question, in the first instance, is, what is it that they have really sold? The law prior to that case was very distinctly enunciated by Lord Hatherley, when Vice-Chancellor, in *Churton v. Douglas* (Johns. 173) to the effect that a man who has sold the goodwill of his business is not thereby prevented from carrying on business with the customers of the old firm, provided that he does not represent that his is the old business, or that he is the successor in business of the old firm. *Labouchere v. Dawson* therefore went beyond this and all the older decisions. Similar questions have arisen in three more recent cases. In *Ginesi v. Cooper* (42 L. T. Rep. N. S. 751; 14 Ch. Div. 596) a trader sold his business and goodwill, and Jessel, M.R. restrained the vendor, not only from soliciting, but even from dealing with the customers of the old firm, a decision which went even further than *Labouchere v. Dawson*. That was not appealed; but in a very few weeks came the case of *Leggott v. Barrett* (43 L. T. Rep. N. S. 641; 15 Ch. Div. 306), in which Jessel, M.R. again granted an injunction in similar terms, and in that case there was an appeal from the order so far as it restrained simply dealing with the old customers, but no appeal as to the injunction restraining the soliciting—that is, the principle of *Labouchere v. Dawson* was submitted to by the defendant in that case. All the judges on the appeal were of opinion that the injunction should not be extended; but it was not possible for the court on that occasion to decide the exact point in *Labouchere v. Dawson*, though James and Cotton, L.JJ. both expressed doubts as to the soundness of that decision. Thirdly, the case was discussed in *Walker v. Mottram* (*ubi sup.*), a case in which Jessel, M.R. had again extended the principle to circumstances to which the Court of Appeal thought it ought not to be extended. In that case Lush and Lindley, L.JJ. did not dissent from *Labouchere v. Dawson*. Indeed, a passage in their judgment seems rather to assent to it. At the same time it is impossible to read the decisions on goodwill prior to 1872 without seeing that that case went much further than the old ones. In my opinion the authorities of *Cook v. Collingridge* (Jac. 607), *Churton v. Douglas* (*ubi sup.*), and *Crutwell v. Lye* (17 Ves. 335) do not warrant the extension. As I have already said, my doubts as to *Labouchere v. Dawson* are now confirmed, and I must express my opinion that that case is not correct, but goes beyond the older decision without good reason. Then it was pressed upon us that, because *Labouchere v. Dawson* is a case twelve years old, the Court of Appeal ought to act upon it and leave it to be overruled, if it is overruled, by the House of Lords; and in support of that *Pugh v. The Golden Valley Railway Company* (42 L. T. Rep. N. S. 863; 15 Ch. Div. 330) was cited, where, no doubt, Thesiger, L.J. did express an opinion that it was undesirable to overrule old-standing decisions upon which many private Acts of Parliament had been based in the meantime. At the same time it may be remarked that the judges did not act only upon that view, for they expressly approved of *Reg. v. The Wycombe Railway Company* (15 L. T. Rep. N. S. 310; L. Rep. 2 Q. B. 310), the case which it was then sought to overrule. Therefore,

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if this case was to be determined upon the first clause only of the agreement, I not being able to adopt the decision in *Labouchere v. Dawson*, should hold that there was no ground for restraining the defendant as to that part of the injunction as to which he has appealed. But clause 3 appears to confer on the defendant the right to carry on the same business, and certainly must modify any view which might be taken of the rights of the parties if they were to be decided upon a simple agreement for sale of the business. Having regard to clause 3 the defendant has certainly not done anything which he is not entitled to do. I prefer, however, to rest my decision upon clause 1, and to give it the full effect contended for by the appellant.

COTTON, L.J.—This case is founded upon a contract between the plaintiff and defendant. There is no express covenant that the defendant will not solicit the customers of the old firm; but it is said that there is an implied one. Now, I have a great objection to extending contracts, and I think it is much better when parties are entering into contracts to require them to say what they really mean. This very question must have been present to the minds of the parties in the present case, and yet the agreement is silent upon it. That, to my mind, is a strong argument that it was not intended to restrict the defendant in this way. As to goodwill, we may take what was said by Lord Eldon in *Crutwell v. Lye* (17 Ves. 335, 346): "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Having the old place of business, of course gives a very good chance of retaining the old customers. I think the terms of clause 1 in this agreement carry the goodwill in the sense of Lord Eldon, and though it may be that in some cases a contract for sale of goodwill means something more than the chance of the customers resorting to the old place, yet, as a rule, there is, in my opinion, no substantial difference between the sale of a business and the sale of the goodwill of a business. It has been argued that it is already decided by *Labouchere v. Dawson* that, upon the sale of the goodwill of a business, there is an implied covenant by the vendor not to solicit the customers of the old firm. We ought not to hesitate to say whether, in our opinion, that case was rightly decided. In the other cases which were brought to the Court of Appeal, and to which Baggallay, L.J. has referred, the exact point did not arise. Here it does arise. In my opinion, that decision was wrong. So far from there being anything in the earlier cases in support of such an extension of the meaning of goodwill, it seems to me that what was said in those cases was contrary to it. [His Lordship then referred to the judgments of Lord Eldon in *Crutwell v. Lye* (*ubi sup.*), *Kennedy v. Lee* (3 Mer. 452), and *Cook v. Collingridge* (*ubi sup.*).] That is, in Lord Eldon's opinion, a selling partner may carry with him the old customers by all fair means. It would be fraudulent, of course, to represent his new business as the old one. Here what has been restrained is the merely asking people to deal with the defendant. The question is, where is the line to be drawn? The defendant, it seems, is to be at liberty to carry on business next door, but he is not to write and tell the customers that he is doing so. It would be

wrong, in my opinion, to put upon a sale of goodwill a meaning which would imply a covenant not to solicit. And, if the vendor may solicit by private letter, why not by circular? Although I think it right to express my dissent from *Labouchere v. Dawson*, the defendant's right is certainly much clearer in this case, the intention of the parties being shown by the third clause of the agreement. It was urged upon us that *Labouchere v. Dawson* was a case of some age, and ought not now to be overruled by the Court of Appeal. For eight years there was no opportunity of questioning it in the Court of Appeal, and, of course, in the courts of co-ordinate jurisdiction it would not have been right to disregard it. But in *Leggott v. Barrett* (*ubi sup.*), in 1880, James, L.J. and I were careful to leave the point open in case it should afterwards arise in the Court of Appeal. We both expressed our doubts then as to the soundness of the decision, and this is the first time I have had an opportunity of really expressing my opinion on the point. In my opinion, parties ought to put their bargains, whatever they may be, in plain language.

LINDLEY, L.J.—The rights of the parties in this case depend on the construction of the agreement. It is not an agreement between an ordinary vendor and purchaser of a business, or between a continuing and a retiring partner, but it is an agreement the object of which was to put an end to the disputes which are referred to in the recitals. By the first clause Theophilus Pearson, the plaintiff, agreed to pay to his nephew 2000*l.* for his interest and estate in the property and business. To understand that we must realise the position of the parties. The purchaser was a trustee, and the vendor was his *cestui que trust*, who was giving up his whole interest under his father's will, whatever it might be, for 2000*l.* I do not doubt that "goodwill" was included in what was sold, for I do not see how anyone can sell his share of a business without including his share in the goodwill. But clause 3 of the agreement is a very important clause. It is introduced for the benefit of James Pearson, the defendant. Does it not mean that, though he has sold the goodwill, he is to be just as free to carry on a similar business as if he had not sold anything? As to *Labouchere v. Dawson*, there has been, no doubt, a difference among the judges of the Appeal Court. I am not prepared to say it is wrong. On the contrary, I think it is right. I always have thought so. I think the principle of it is right—that a person who has sold the goodwill of a business shall not derogate from his own grant. If the Court of Chancery had originally decided to go that length, no one would have quarrelled with it, and I think Lord Romilly went in the right direction. Lush, L.J., Jessel, M.R., and Brett, M.R. have all approved of it. I believe it has been acted on in agreements for sales ever since, and I am not prepared to overrule it. In construing the agreement in this case, however, I do not think *Labouchere v. Dawson* applies, and I agree in discharging so much of the order as has been appealed from.

*Appeal allowed; so much of the order as restrained soliciting old customers being discharged.*

Solicitors: *Smiles, Binyon, and Ollard; Burn and Berridge, agents for Silvester E. Swaffield, Chesterfield.*

CHAN. DIV.] *Re THE NORWICH EQUITABLE FIRE ASSURANCE CO.; C. BRASNETT'S CASE.* [CHAN. DIV.]

## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

Monday, July 21.

(Before BACON, V.C.)

*Re THE NORWICH EQUITABLE FIRE INSURANCE COMPANY; C. BRASNETT'S CASE.* (a)*Unlimited company—Payment by director—Calls—Set-off—Companies Act 1862 (25 & 26 Vict. c. 89), s. 101.*

A director of an unlimited company paid to the bankers of the company after a winding-up order, and after a call had been made, 500*l.* in respect of an overdraft of the company, for which he had become surety. On summons asking the court to declare that under sect. 101 of the Companies Act 1862 the director was entitled to set off this sum against 875*l.* due from him for calls on shares:

Held, that the payment being made after the winding-up, this was not a case of a company carrying on business and incurring a debt to bankers in the ordinary way, and that the director was not entitled to set off the debt against calls.

This was a summons on behalf of Mr. C. Brasnett, a director of the Norwich Equitable Fire Insurance Company, asking for a declaration that he was entitled to set off 500*l.*, which he had paid to the bankers of the company in respect of an overdraft, against 875*l.*, which he had been ordered to pay to the official liquidator of the company in respect of calls on shares.

The company was an unlimited company, incorporated in accordance with the provisions of 7 & 8 Vict. c. 110.

On the 27th April 1883 a meeting was held, at which a resolution was passed that a call of 1*l.* 10*s.* per share should be made.

On the 14th July 1883 the company was ordered to be wound-up.

On the 30th Oct. 1884 an order was made that Brasnett should pay 875*l.* to the official liquidator of the company in respect of calls on shares held by him.

In Oct. 1881 Brasnett with other directors had given a promissory note to the amount of 5000*l.* to the bankers of the company to secure the overdrawn account of the company.

On the 19th Feb. 1884 Brasnett paid 500*l.* to the bank, and took an assignment from the bank of all their rights against the company.

The directors, by the deeds of settlement of the company, had power to rescind contracts, compound for debts, and generally to act in the affairs of the company in such manner as in their discretion they should think most conducive to the interests of the company in all matters not provided for by the deeds of settlement.

Horton Smith, Q.C. and Methold for Brasnett.—Mr. Brasnett as a director was a trustee, and entitled to be indemnified:

*Re The German Mining Company*, 4 De G. M. & G. 43.

He is also entitled as a creditor:

*Re The Cork and Youghal Railway Company*, 21 L. T. Rep. N. S. 735; L. Rep. 4 Ch. App. 748.

Though there may be no borrowing powers conferred by the deeds of settlement, the overdrawing

of a banker's account is not borrowing, but is a necessary and inevitable incident of carrying on a business, and Brasnett is entitled to be indemnified by the company for all moneys expended by him on the company's behalf:

*The Blackburn Building Society v. Cunliffe, Brooks, and Co.*, 48 L. T. Rep. N. S. 33; 23 Ch. Div. 61;

*Re The Guardian Permanent Benefit Building Society*, 48 L. T. Rep. N. S. 134; 23 Ch. Div. 440.

Brasnett, under sect. 101 of the Companies Act 1862, is entitled to set off the 500*l.* paid by him to the bankers against the calls:

*Re The Cefn Cilen Mining Company*, 19 L. T. Rep. N. S. 593; L. Rep. 7 Eq. 88;

*Waterlow v. Sharp*, 20 L. T. Rep. N. S. 902; L. Rep. 8 Eq. 501;

*Laing v. Reed*, 20 L. T. Rep. N. S. 773; L. Rep. 5 Ch. App. 4;

*Re The International Life Assurance Company; Gibbs and West's case*, 23 L. T. Rep. N. S. 350; L. Rep. 10 Eq. 312;

*The Australian Auxiliary Steam Clipper Company v. Mounsey*, 4 K. & J. 733.

Marten, Q.C. and Seward Brice for the official liquidator.—There is no set-off, as the company neither by their articles nor by the ordinary law of partnership have power to borrow money:

*The Alliance Bank v. Kearsley*, 24 L. T. Rep. N. S. 552; L. Rep. 6 C. P. 433;

*Looker v. Wrigley*, 9 Q. Div. 397.

This is not an independent dealing with the company so as to entitle Brasnett to a set-off under sect. 101 of the Companies Act 1862:

*Re Whitehouse and Co.*, 39 L. T. Rep. N. S. 415; 9 Ch. Div. 595;

*Re The West of England and South Wales District Bank; Branwhite's case*, 40 L. T. Rep. N. S. 652; 43 L. J. (Ch.) 463; 27 W. R. 646.

Horton Smith, Q.C. in reply.

BACON, V.C.—I have listened for many hours to arguments that have not much to do with the matter, as I consider that a gentleman who is attacked in this manner has a right to be heard and defend himself. The cases cited have no application to the present case. The question is, whether, under the 101st section of the Companies Act 1862, which deals with cases in which a contributor is entitled to set off against calls moneys paid on behalf of a company, Mr. Brasnett has a right to set off against calls to the amount of 875*l.* 500*l.* paid by him to the bankers of the company long after the date of the winding-up. The question is not whether an overdraft on a banker amounts to borrowing. The German Mining Company's case has been relied upon; but that goes on a plain principle, and only shows that where a man claims money laid out for the benefit of the company before the winding-up, though there is no power of borrowing, he has a right to be indemnified. What independent dealing or contract did Brasnett enter into with the company that he can claim to be paid 20*s.* in the pound for any moneys expended by him for the company in preference to the other creditors? The company have bankers in the ordinary way, and sometimes there are overdrafts. The bankers then desire to have security. The shareholders transfer shares for this purpose, but this did not discharge the overdraft. There is still pressure on the part of the bankers for security, so Brasnett, with others, guarantees 5000*l.* in respect of the overdraft. The winding-up order

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is made, and Brasnett is liable to pay calls, and to pay the debts of the company in his character of partner and shareholder. The bankers still hold the security for 5000*l.* This is not a case of a company carrying on business and incurring a debt to their bankers in the ordinary way. In 1884, after the winding-up order was made, Brasnett pays 500*l.* to the bank in respect of the overdraft, and takes an assignment of all their interest against the company in that debt. He cannot claim to be paid 500*l.* in full, because he has discharged his debt to the bankers. There is no ground in law, reason, or equity on which such a claim can be sustained. All the bankers assigned to him was a right to prove as a creditor against the company, and receive a dividend with the other creditors, not to be paid 20*s.* in the pound in preference to the others. As this is a test case, the costs will be paid out of the assets of the company.

Solicitors: *Owles and Collinson; Boxall and Boxall.*

Thursday, July 24.

(Before BACON, V.C.)

Re WEBSTER; THE GUARDIANS OF DERBY UNION v. SHARRATT. (a)

*Estate of pauper lunatic—Guardians—Power to recover sums spent on maintenance out of estate of pauper after his death—Rules of Court 1883, Order XLV., r. 1.*

Where A. was maintained as a pauper lunatic, though the guardians knew that he had some property which was just sufficient to support his wife, on summons under Order XLV., r. 1, of the Rules of Court 1883, for payment of a sum of 56*l.* 6*s.* in respect of such maintenance:

*Held, that, though the guardians had not obtained an order from justices during the lifetime of the deceased, they were entitled to payment.*

This was an action by the plaintiffs on behalf of themselves and all other creditors against the administratrix and coheirresses-at-law of George Webster, who died on the 10th Feb. 1884 intestate. A summons was taken out on behalf of the plaintiffs that, pursuant to Order XLV., r. 1, of the Rules of Court 1883, an order might be made for the amount of 56*l.* 6*s.* claimed by the indorsement on the writ.

The plaintiffs had maintained the intestate as a pauper lunatic from the 27th July 1881 to the date of his death.

The guardians knew that the pauper had some property, but that it was only sufficient to maintain his wife, and that therefore, if they had obtained payment for his maintenance out of the property, his wife would have become chargeable on the parish.

The chief clerk was of opinion that the plaintiffs, not having obtained an order during the lifetime of the deceased from the justices, could not now rank as creditors against the estate.

The summons was adjourned into court.

*Hemming, Q.C. and Russell Roberts* for the plaintiffs.—The question turns on the construction of ss. 94 and 104 of 16 & 17 Vict. c. 97. The lunatic had a cottage worth 180*l.*, and we are entitled to be paid the cost of maintenance out

of the property of the lunatic, either during his life or after his death.

*Re Marman's Trusts*, 38 L. T. Rep. N. S. 797; L. Rep. 8 Ch. Div. 256.

*J. G. Alexander* for the representative of the deceased.—The guardians have no right as creditors, they should have proceeded under sect. 16 of 12 & 13 Vict. c. 103. The guardians took no steps in the lunatic's lifetime, they obtained no order from the justices. The lunatic died at Leicester asylum, the guardians of the place where he died are the only persons who have any remedy against his estate.

BACON, V.C.—There is no doubt that the guardians under the statute have a right to be paid the sums spent on the maintenance of the deceased; there must be an order for an account.

Solicitors: *Brook and Chapman* for Mole and Stone, Derby; *Berry, Binns, and Lincoln* for W. Briggs, Derby.

Tuesday, Aug. 5.

(Before BACON, V.C.)

Re HOUSEHOLD; HOUSEHOLD v. HOUSEHOLD. (a)

*Advance to stock farm—Tenant for life—Trustees.*

A testator gave his residuary personal estate and devised his real estate (subject as to the real estate only to two annuities) to his son for life, and then to his children, who were infants. A farm on the estate was vacant. On summons by the trustees for the sanction of the court to the advance of 1000*l.* to the tenant for life to stock the farm, the Court, holding that it was for the preservation of the estate, and following *Calthrop v. Calthrop*, before Bowen, J., in the vacation, the 17th Sept. 1879, made the order.

This was a summons by the trustees of an estate in Norfolk, asking that they might be allowed to advance 1000*l.* of the personal property of the testator to the tenant for life for the purpose of stocking the White House Farm, one of the farms on the estate.

The tenant for life of the estate was one of the trustees.

The testator gave his residuary personal estate, amounting to 11,000*l.* and 1500 acres of land, to R. B. Household for life, or till he should charge or otherwise incur the income, and then to his children.

R. B. Household had two children, both infants. There were two annuities payable out of the real estate only.

*Marten, Q.C. and Bardwell* for the parties.—The farm is vacant and deteriorating, the tenant for life is willing to farm it himself if this advance is made. Bowen, J. made an order for an advance in the case of *Calthrop v. Calthrop* on the 17th Sept. 1879, when sitting as vacation judge.

BACON, V.C.—The advance appears to be necessary for the preservation of the property. I therefore make the order in the terms of the summons.

Solicitors; *Burton, Yeates, and Hart.*

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

Wednesday, Aug. 6.

(Before BACON, V.C.)

MONCKTON TO GILZEAN. (a)

*Vendor and purchaser—Conditions of sale—Right to rescind—Conveyancing Act 1881 (44 & 45 Vict. c. 41), s. 3, sub-sect. 3.*

*A sale took place under a condition providing that all objections and requisitions should be sent to the vendor's solicitors within fourteen days from the delivery of the abstract, and if any objection or requisition should be made and insisted upon which the vendors should be unable or unwilling to remove or comply with, the vendors should be at liberty (notwithstanding any intermediate negotiation in respect thereof, or attempts to remove or comply with the same), by notice in writing to the purchaser, by whom such objection or requisition should be made, or his solicitor, to rescind the sale.*

*The purchaser sent the conveyance to the vendors for approval, and they requested that it should be stated in the conveyance that the property was sold subject to a restrictive covenant contained in a deed dated prior to the commencement of title, and which did not therefore appear on the face of the abstract.*

*The purchaser objected to the restrictive covenant being inserted in her conveyance, and asked for a copy of the deed containing it.*

*The vendors then gave notice that they rescinded the contract.*

*Held, on summons under the Vendor and Purchaser Act 1874, that there was no requisition made nor insisted upon, and that the vendors must specifically perform, the conveyance to be according to the purchaser's draft.*

On the 2nd April 1884 the trustees of William Monckton put up Colchester House, Clifton Park, Bristol, for sale subject certain conditions.

Interest at 5l. per cent, was to run on the unpaid purchase money after the 24th June.

The commencement of title was to be two deeds dated the 9th Oct. 1848.

Condition 7 provided that all objections and requisitions should be sent to the vendors' solicitors within fourteen days from the delivery of the abstract, and if any objection or requisition should be made and insisted upon which the vendors should be unable or unwilling to remove or comply with, the vendors should be at liberty (notwithstanding any intermediate negotiation in respect thereof, or attempt to remove or comply with the same), by notice in writing to the purchaser, by whom such objection or requisition should be made, or his solicitor, to rescind the sale.

Colchester House was sold to Margaret Gilzean for 2000l., and she paid a deposit of 200l. to the vendors. An abstract was delivered on the 7th April, whereby it appeared that the property was subject to a rentcharge of 15l. a year, and otherwise was free from incumbrances.

No requisitions were made within the fourteen days prescribed by the conditions, and, the title being accepted, the purchaser on the 6th June sent a conveyance to the vendors.

They wrote to the purchaser requesting either an indemnity, or that it might be stated in the conveyance that the property was sold subject to

the covenants, conditions, restrictions, and agreements contained in a deed dated the 31st Aug. 1846.

On the 19th June the purchaser wrote asking to see the deed which contained the restrictive covenant. The vendors said in answer that unless she took the deed in the form as altered by them they should rescind the contract.

On the 22nd June the purchaser took out a summons asking for a declaration that she was entitled, on payment of the purchase money of 2000l., to have the property conveyed to her in fee.

On the 23rd June the vendors gave notice that they rescinded the contract, and returned the purchaser's deposit.

*Marten, Q.C. and G. I. Foster Cooke for the purchaser.*—We are entitled to have a conveyance. No requisition has been made. It is true we are precluded by sub-sect. 3 of sect. 3 of the Conveyancing Act 1881, from requiring the production or any abstract or copy of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title; but at the time we asked to see the deed containing the restrictive covenant, the time for making requisitions had gone by. The vendors are not entitled to take advantage of what would be a fatal blot on their own title. We may be subject to the restrictive covenant, but we are entitled to have a simple conveyance without any statement of the restrictive covenant on the face of it. They cited

*Nelthorpe v. Holgate*, 1 Coll. 203;  
*Greaves v. Wilson*, 25 Beav. 290;  
*Turpin v. Chambers*, 29 Beav. 104;  
*Jackson v. Oakshott*, 14 Ch. Div. 351;  
*Re Higgins and Hitchman's Contract*, 21 Ch. Div. 95.

*Millar, Q.C. and Ingle Joyce for the vendors.*—The summons asks for a conveyance free from the covenants, conditions, restrictions, and agreements contained in the deed of the 31st Aug. 1846. The vendors cannot do it; they may be made to give compensation. This is a fatal blot on the title as the purchaser says, and the vendors cannot convey free from it:

*Dames to Wood*, 32 W. R. 844; 51 L. T. Rep. N. S. 109;

*Re Great Northern Railway Company and Sanderson*, 50 L. T. Rep. N. S. 87; 25 Ch. Div. 788.

*Marten, Q.C.* was not called upon for a reply.

BACON, V.C. — The owners of an estate put it up for sale, the property consisted of a freehold house, and was to be sold subject to conditions of the most ordinary kind; under them the vendors have reserved a right to rescind the contract if any requisition is made which they are unable or unwilling to comply with. There is no pretence for saying that the letter of the 19th June is a requisition. The vendors deliver an abstract, but protect themselves by their conditions from showing any deeds prior in date to 1848, a good long title as things go now, and they then protect themselves against requisitions on the title as shown by the abstract by clause 7 of the conditions, which provides that "if any objection or requisition shall be made and insisted upon which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty (notwithstanding any

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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intermediate negotiation in respect thereof, or attempts to remove or comply with the same) by notice in writing to the purchaser, by whom such objection or requisition shall be made, or his solicitor, to rescind the sale. If the condition had meant any requisition whatever, which the vendors were unable or unwilling to answer, it might have been a different matter. No such objections or requisitions were made and insisted on, and the time for making them expired. A good title was shown on the abstract, the vendors are shown to be able absolutely to convey, and the purchaser is entitled to have the property conveyed to her. But in the course of correspondence it comes out that there is a clause or covenant in the original conveyance, of the contents of which no one has informed me, though I understand from Mr. Millar that it is of the usual restrictive nature of covenants affecting building estates, the covenant in some way restricting the user of the land. If so, the restrictions run with the land; if the conveyance takes place, the purchaser takes subject to them. The vendors cannot sell free from the restrictions, because they have not themselves got the property free from the restrictions. The new purchaser will be subject to the obligations imposed by the original deed, and the first owner, or the adjoining owner, will be able to sue him on the covenant, the liability being attached to the land itself, not to the purchaser personally. If, for instance, the restriction is against using the house as a beer-house and the purchaser used it as one, the adjoining owner might at once restrain the owner of the house for breach of the covenant. So I think there has been a mistake on the part of the vendors. The vendors, by their condition No. 7, stipulate against unreasonable requisitions, the object of the stipulation is to protect them from unreasonable and unnecessary trouble and expense. There is no right given by it to the purchaser, she acquires no right to make requisitions. But the purchaser has made no requisition at all; all she has done is to say, "Let me see the deed by which these restrictions are imposed on the land," and when she sees it she does nothing further. The purchaser has made no requisitions, and has insisted upon none. There is no pretence for saying that the vendors will be prejudiced in any way by the conveyance not stating that the purchaser took the property subject to the restrictions. The vendors protected themselves against a danger, a danger which has never existed, and does not now, and never can exist. All the cases referred to go the other way; a purchaser, who makes an unreasonable requisition, and insists upon it, may lose his contract. But here she accepts the title shown on the abstract, and is content to take the conveyance in that form. The objections of the vendors to complete this very fair conveyance are wholly unreasonable. No requisitions were made and insisted upon, no unreasonable objections were made; the contract was clear, there must be a declaration according to summons, the conveyance to be according to the purchaser's draft, with reference to chambers in case the parties differ. The purchaser not to pay interest to the vendors on the purchase money at a higher rate than what the bankers, with whom it is deposited, allow.

Solicitors: Clark, Woodcock, and Ryland, for Isaac Cooke, Sons, and Dunn, Bristol; Tompson, Pickering, Styan, and Neilson.

V. 1, 3 — 65 —  
March 15, 22, April 7 and 8.  
(Before BACON, V.C.)

Re ASPHALTIC WOOD PAVEMENT COMPANY. (a)

Contract—Charge upon moneys payable under—  
Breach—Winding-up of contracting company—  
Notice—Set-off—Unliquidated damages—Proof.

By a contract of the 22nd Sept. 1882, between the Commissioners of Sewers and a wood pavement company, for the paving of a street, it was agreed that the money should be paid at stated times from the date of the engineer's certificate of the completion of the works. The company were to repair the roadway for two years from the date of such certificate; and after that time, if notice to that effect were given within that time, they were to repair the roadway for a further period of fifteen years, and to be paid at a fixed annual rate. The commissioners were empowered to retain from time to time out of moneys payable by them to the company an amount equal to such annual sum, and, in the event of failure to perform the contract by the company, such sum was to be forfeited as liquidated damages. The commissioners were also further empowered to sue for any moneys due to them "according to the terms of this contract," or to deduct and set off the same against any moneys due from them to the company. There also existed other similar paving contracts between the same parties containing similar powers of retainer by the commissioners. The company gave Messrs. Lee and Chapman a charge upon their interest in the contract of the 22nd Sept. 1882 to secure 1900l. Notice of this charge was given to the commissioners on the 9th Dec. 1882, and, later on the same day, a winding-up petition was presented by the company. The contract was completed by the official liquidator under orders of the court. A winding-up order was subsequently made, and on the 29th Jan. 1883 the official liquidator sent in to the commissioners a claim for work done.

On the 8th March 1883 the engineer certified to the completion of the work.

On the 19th March the commissioners sent in a cross-claim for damages in respect of anticipated loss from breach of the contract to repair for fifteen years, and gave notice of retainer and set-off in respect of such claim. They also claimed a similar right of set-off in respect of the other contracts.

On the 25th May 1883 formal notice was given by the commissioners requiring the company to keep the street in repair for fifteen years from the 8th March 1885.

Held, that out of the sum due to the company under the contract of the 22nd Sept. 1882 the official liquidator was first entitled to be paid the amount expended by him in completing the contract under the orders of the court; and, subject thereto, that Messrs. Lee and Chapman were entitled to a charge upon the residue for the amount due to them.

Held, also, that the commissioners were not entitled to any set-off in respect of damages for not re-

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*pairing for fifteen years, but might prove for such unliquidated damages.*

*Held, further, that there was no right of retainer under the contract of the 22nd Sept. 1882 in respect of damages under the other contracts.*

#### ADJOURNED SUMMONS.

On the 22nd Sept. 1882 the Asphaltic Wood Pavement Company Limited entered into an agreement with the Commissioners of Sewers of the City of London for the paving of Queen Victoria-street. By the terms of that agreement, the work was to be finished within three months, but no payment was to be made until the engineer should certify that the contractors had completed the paving. Payment was to be made as follows: 60 per cent. within one month after the engineer should have given his certificate, a further 30 per cent. within three months after the last mentioned payment; and the remaining 10 per cent. at the expiration of two years from the date of the completion of the work as certified by the surveyor. The contractors were at their own expense to keep the road in repair to the satisfaction of the engineer for two years from the date of his certificate; and after the expiration of that time, if the commissioners should give notice to the contractors within that time, the contractors were at their own cost to keep the roadway in repair to the satisfaction of the engineer for fifteen years in consideration of an annual payment of 6d. per square yard. Clause 18 of the contract was as follows:

Notwithstanding any provision for payment of money to the contractors, the commissioners may retain from time to time out of any money payable by them to the contractors, an amount equal to such annual sum as is mentioned in clause 15 (that relating to the repairing for fifteen years) by way of security for the due performance by the contractors of the repairs undertaken and to be performed by them under such clause; and in the event of any failure by the contractors to perform such repairs . . . the moneys so retained by the commissioners shall be forfeited by the contractors, and held by the commissioners as and for liquidated damages in respect of any such default, and especially the right of retainer given by this present clause shall extend so far as necessary over the moneys included in the last 10 per cent. of the contract price. . . .

There was also a clause enabling the commissioners to complete the works and execute repairs themselves in the event of the failure of the contractors to fulfil their contract, and to charge the contractors with all loss or extra expense.

Clause 39 was as follows:

Whenever, according to the terms of this contract, any money shall be due from the contractors to the commissioners, either for damages or work . . . the commissioners may either sue the contractors for such money, or any part thereof, or may deduct and set off the same or any part thereof from or against any money which may then be, or may thereafter become payable by the commissioners to the contractors.

Besides the above-stated contract there existed at this date four other similar contracts between the same parties for the paving of various streets (including amongst others, the Barbican and Fleet-street), each of which contracts contained a clause similar to clause 18. There still existed under these four contracts a liability upon the company to repair for fifteen years.

On the 15th Nov. 1882 the company gave Messrs. Lee and Chapman a charge upon all their interest in the contract of the 22nd Sept. 1882,

to secure a debt of 1900*l.* Notice of this assignment was given to the commissioners upon the 9th Dec. 1882. On the same day, but later on, a petition was presented for winding-up the company, and by orders of the 12th and 16th Dec. the official liquidator was empowered to complete the contract of the 22nd Sept. 1882. He did so at an expenditure of 740*l.* 15*s.* 7*d.*

On the 13th Jan. 1883 a winding-up order was made against the company. On the 29th Jan. 1883 the official liquidator sent in to the commissioners a claim for 2874*l.* 14*s.* 10*d.* in respect of the work done under the whole contract. The engineer certified to the completion of the work on the 8th March 1883.

On the 19th March 1883 the commissioners sent in their claim to set off a sum of 2536*l.* 17*s.* 6*d.* for breach of the contract to repair Queen Victoria-street for fifteen years, and gave notice that they intended to retain such sum in pursuance of the terms of their contract. They further claimed to set off other sums in respect of defaults which might arise under the other four contracts.

On the 25th May 1883 notice was served by the commissioners upon the company, requiring them to keep Queen Victoria-street in repair for fifteen years after the 8th March 1885. Messrs. Lee and Chapman sent in a proof in the liquidation for the full amount of their claim, setting out their security. By his certificate of the 15th Feb. 1884 the chief clerk found that a sum of 5843*l.* 11*s.* 6*d.* was due to the commissioners for liquidated damages under all the contracts; that the amount due to the company from the commissioners under the contract of the 22nd Sept. 1882 was 2874*l.* 14*s.* 10*d.*; and that 1908*l.* 8*s.* 2*d.* was due to Messrs. Lee and Chapman. But he would not allow Messrs. Lee and Chapman any priority over the set-off claimed by the commissioners. Messrs. Lee and Chapman took out a summons to vary the certificate of the chief clerk by declaring: (1) That they were entitled to their charge in priority to the set-off of the commissioners, if any, and that as between the commissioners and themselves it might be declared (i.) that there could be no right of set off for damages by the commissioners against the company upon any contract except that of the 22nd Sept. 1882; (ii.) that there could be no set-off for damages under that contract unless such damage had accrued before the 9th Dec. 1882; (iii.) that there could be no set-off in respect of damages which were unliquidated on the same 9th Dec. 1882.

A summons was also taken out by the official liquidator to vary the certificate by (1) disallowing the sum of 2536*l.* 17*s.* 6*d.* claimed in respect of loss for breach of the contract to maintain Queen Victoria-street for fifteen years; and (2) that the sum of 740*l.* 15*s.* 7*d.* spent by him in completing the Queen Victoria-street contract might be paid to him in priority out of the sum of 2874*l.* 14*s.* 10*d.* due from the commissioners to the company.

*Hemming, Q.C.* for Messrs. Lee and Chapman.—There can be no right of set-off against a present debt by merely saying that there will be a future liability either at law (*Evans v. Prosser*, 3 T. R. 186); or in equity (*Smith, Fleming, and Co.'s case*, 15 L. T. Rep. N. S. 148; L. Rep. 1 Ch. 538); or



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in bankruptcy (*Ex parte Price; Re Lankester*, 33 L. T. Rep. N. S. 113; L. Rep. 10 Ch. 648). You can prove in respect of future debts, but not set-off. That is also law in winding-up cases:

*Re Milan Tramways Company*, 48 L. T. Rep. N. S. 213; 22 Ch. Div. 122; 25 Ch. Div. 587;

*The Ince Hall Rolling Mills Company v. Douglas Forge Company*, 8 Q. B. Div. 179.

There is no right of set-off unless at the time when such right is claimed there is an immediate right of action. No set-off can be claimed against us except for something which happened before we gave notice of the assignment. If A. owes a debt to B., and B. assigns to C., who gives notice of such assignment to A., and B. afterwards incurs a further liability to A., A. cannot set off that liability against his liability to C.:

*Rozburgh v. Cox*, 45 L. T. Rep. N. S. 225; 17 Ch. Div. 520;

*Brice v. Bannister*, 38 L. T. Rep. N. S. 739; 3 Q. B. Div. 569;

*Watson v. Mid-Wales Railway Company*, 17 L. T. Rep. N. S. 94; L. Rep. 2 C. P. 593.

The commissioners can have no claim at all under this contract in respect of the damages claimed under the other four contracts.

*Horton Smith, Q.C.* and *C. H. Turner* for the official liquidator.—We seek that out of the sum of 5843*l.* 1*l.* 6*d.* allowed by the chief clerk's certificate the sum of 2536*l.* 17*s.* 6*d.* may be disallowed, inasmuch as until notice was given requiring repairs to be done for fifteen years there was no cause of action; and we say that the notice of the 25th May 1883 was void, being given after the winding-up order. After that order the company only existed for the purpose of being wound-up:

*Re Ince Hall Rolling Mills Company v. Douglas Forge Company (ubi sup.)*;

*Re Wreck Recovery and Salvage Company*, 43 L. T. Rep. N. S. 190; 15 Ch. Div. 353;

*Ex parte Emanuel*; *Re Batey*, 44 L. T. Rep. N. S. 882; 17 Ch. Div. 35.

As to the 740*l.* 15*s.* 7*d.* expended by the liquidator under the orders of the court in completing the pavement, he is clearly entitled to that; and there can be no set-off as against that sum:

*Mersey Steel and Iron Company v. Naylor*, 47 L. T. Rep. N. S. 368; 9 App. Cas. 434.

*Marten, Q.C.* and *John Henderson* for the commissioners.—We have a right of retainer under all the five contracts. An assignee of a contract can only take subject to the equities affecting that contract:

*Morris v. Livis*, 1 Y. & C. Ch. 380.

And at the date of the assignment to Messrs. Lee and Chapman such equities as we claim existed. Messrs. Lee and Chapman have also proved for the full amount of their claim, and that amounts to a waiver of their security. There can be a set-off for damages such as we claim:

*Young v. Kitchen*, 3 Ex. Div. 127.

A breach of the contract of the 22nd Sept. 1882 occurred when the winding-up order was made, and at that time the liability to repair for fifteen years existed. The company are therefore still liable, and Messrs. Lee and Chapman's claim cannot have priority to that liability. Reference was also made to the following cases:

*Re Trent and Humber Company*, 19 L. T. Rep. N. S. 295; L. Rep. 6 Eq. 396, 399, n.; 4 Ch. 112;

*Booth v. Hutchinson*, 27 L. T. Rep. N. S. 600; L. Rep. 15 Eq. 30;

*Cook's Policy*, 22 L. T. Rep. N. S. 92; L. Rep. 9 Eq. 703;

*Macfarlane's Claim*, 44 L. T. Rep. N. S. 299; 17 Ch. Div. 387;

*Re Bridges*, 44 L. T. Rep. N. S. 730; 17 Ch. Div. 342.

BACON, V.C.—The main thing to be considered is the contract of Sept. 1882. That there were other contracts between the contractors and the commissioners has nothing to do with the construction of this contract. The contract recites that the commissioners were desirous of having Queen Victoria-street paved with wood in the manner thereafter stipulated for, and that the contractors had agreed to execute the work in the manner thereafter mentioned. The contract contains a quantity of clauses, but that upon which the question turns is the 39th clause which is in these terms. [His Lordship having read the clause proceeded:] The words are "whenever according to the terms of this contract." There is no mention of any other contract; there is no reference to any of the other contracts for paving the Barbican or Fleet-street, or any other street. But by this contract the agreement is: "If I do the work specified you shall pay me at the rate specified." The work is done; it is true that it was completed, as to part of it, after the winding-up order by the liquidator, who advanced the money for it in order that the price stipulated for the work might be received by him. What can I find in this contract which relates to any other contract, or which gives a right to the commissioners to make the set-off? In my opinion there is no right of set-off. At the time when the winding-up took place the work was incomplete. Before that, in order to do the work, the company got goods sold to them by Messrs. Lee and Chapman, and they thereupon gave them the charge upon the money due in respect of this contract, and they gave them a charge which nobody disputes. If at the time of the winding-up order the company had entirely suspended its operations, Messrs. Lee and Chapman would have got nothing. The official liquidator, however, acting under the order of the court, and for the benefit of all the creditors of the company, completes the contract, so that the work is done, and the money becomes payable under the certificate of the surveyor. A multitude of cases have been referred to, but they have no application, because what I am called upon to decide is, whether there is any right of retainer in respect of matters wholly distinct from the contract of Sept. 1882. It is a plain bargain. "If I do the work you shall pay me for it." Now, the commissioners say, "We have other contracts, each of which contains a right to retain moneys payable by us to the contractors." But this is one contract, and cannot be taken with the others. Whatever rights the commissioners may have under the other contracts, those rights will not exempt them from their obligations to pay whatever is found to be due by the certificate of the surveyor under this contract. I was under the impression at one time that Messrs. Lee and Chapman by sending in their proof had given up their security; but, upon looking at the proof which has been handed up to me, I see that they have not done so, as the security which they held is there stated. I quite agree with what Mr. Marten has said, an assignor can assign no more than he has got. But what he assigns here is the

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right to receive the money payable under the contract, when the certificate of the surveyor has been given. If anything remained to be done, then there would be a clear right on the part of the commissioners to prove for unliquidated damages which they might have sustained by reason of any breach under this contract. But that is not what they have sought to do. They say that they have spent certain sums of money, and they estimate how much more it will cost to keep the street in repair for fifteen years, all which may be the subject of dispute or matter for inquiry when their proof is sent in, and they claim to retain this sum after having received notice of the charge of Messrs. Lee and Chapman, and having made no objection to it. As to the right of set-off, the receipt of the notice of the charge would, in my opinion, preclude the commissioners from saying that they were at liberty to alter the terms of this contract. The money payable under this contract is the subject of the agreement between the parties, the charge is upon the money so payable, and, in my opinion, Messrs. Lee and Chapman have a good charge for the sum of 1900*l*. The commissioners have no right, therefore, of set-off, but they have a right to prove for any damages which they may have sustained. The official liquidator, having spent money under the orders of the court, must have that made good to him; it was made for the benefit of the creditors and to complete the contract. The winding-up order dispenses with the necessity of the notice given to the liquidator of the 25th May 1883. The commissioners may prove in respect of the breach of contract to repair for the fifteen years. The costs of both applications will come out of the assets of the company.

Solicitors: *Halse, Trustram, and Co.*; *W. H. Smith and Sons*; *E. A. Baylis*.

Wednesday, April 9.

(Before BACON, V.C.)

*Ex parte* HARRISON; *Re* CANNOCK AND RUGELEY COLLIERY COMPANY. (a)

*Company—Transfer of shares—Refusal to register—Liquidation of shareholder—Rights of trustee in liquidation—Companies Act 1862 (25 & 26 Vict. c. 89), s. 35.*

*Where a shareholder has executed a transfer of his shares by way of mortgage, but the company have declined to register such transfer upon the ground that the shareholder was indebted to the company; the trustee in the liquidation of the shareholder is entitled to be entered in the register of shareholders, but subject to any equities that may exist in respect of the shares.*

THIS was a motion by a trustee in liquidation to have the register of a company rectified by entering his name thereon in respect of certain shares.

By the articles of the Cannock and Rugeley Colliery Company it was provided that transfers of shares should be executed by both transferor and transferee, the transferor to be deemed a holder of such shares until entry of the name of the transferee in the register.

Art. 17 provided that the directors might

decline to register a transfer whilst the member making the same was indebted to the company.

Art. 20 was as follows:

Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member . . . may be registered as a member, upon such evidence being produced as may from time to time be required by the directors.

It was also provided by another article that any transfer, or pretended transfer, not being approved by the directors, should be void.

Prior to Nov. 1883 Edward Copson Peake was the registered proprietor of certain shares in the company.

In Aug. 1876 and 1878 transfers of some of these shares had been executed by E. C. Peake to nominees of Lloyd's Banking Company, and were duly executed by the transferees.

On the 30th Oct. 1883 Lloyd's Banking Company gave notice of the shares having been deposited with them by way of equitable mortgage, and subsequently sent the transfers to them for registration.

On the 12th Nov. 1883 Peake filed his petition for liquidation, and Charles Augustus Harrison was appointed trustee. The directors of the Cannock and Rugeley Company refused to register the transfers upon the ground that Peake owed them a sum of 2465*l*. The application of the trustee to be registered as a member of the company in respect of the shares having been refused by the directors, he served the above notice of motion on the 26th March 1884.

*Millar, Q.C.* and *Burton Buckley* for the motion.—Our claim is under sect. 35 of the Companies Act 1862. The case is governed by

*Re Bentham Mills Spinning Company*, 41 L. T. Rep. N. S. 10; 11 Ch. Div. 901.

*Marten, Q.C.* and *F. Thompson* for the colliery company.—Lloyd's Banking Company are here the real owners of the shares by virtue of the transfers executed to them. By procuring the registration of the shares in the name of the trustee they will be able to deal with them. It is a mere trick. The trustee in the liquidation has no interest whatever in the matter. The colliery company are not bound to register anybody. [BACON, V.C.—The trustee has the equity of redemption of the shares, and may redeem. The law has made him the only legal owner of the shares, and the company can suffer no harm by admitting him.] The trustee is a bare trustee only, he is not the true owner. If the trustee of stock becomes bankrupt the trustee in bankruptcy does not become the legal owner. Here there was a proper transfer effected, and no interest passes to the trustee.

BACON, V.C.—The argument is not helped by means of ringing the changes on the words "legal" and "equitable owner." There is only one legal owner of these shares, the liquidating debtor, and until he became bankrupt he remained such owner. He mortgaged the shares, but the transfer was not made effective. He remained, therefore, the legal owner, and the bankruptcy vests the legal ownership in the trustee in bankruptcy. There is no similarity between this case and that which Mr. Marten has suggested to me of the bankruptcy of a trustee of stock. Here nobody is entitled to these shares except the debtor himself. The transaction between the

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

debtor and Lloyd's Banking Company was a useless thing, and could not be carried out, and it does not alter the legal estate of the shares. The legal right is in the bankrupt's trustee, to be admitted into the place of the bankrupt. It takes nothing from him; it gives nothing to anybody; it leaves things just as they were, and the trustee in bankruptcy can make no improper use of it. He can make a transfer of the shares, but only if he pays the bankrupt's debt. He may then transfer, but that must be subject to any equities that may exist between him and the bank. The trustee must have his costs of this motion.

Solicitors: *Smiles, Binyon, and Ollard, for Duignan, Lewis, and Elliot, Walsall; Field, Roscoe, and Co., for Gardner and Sons, Rugeley.*

Wednesday, July 2.

(Before BACON, V.C.)

WEST LONDON COMMERCIAL BANK v. RELIANCE PERMANENT BUILDING SOCIETY. (a)

*Mortgagor and mortgagee—Second mortgage—Notice to first mortgagee—Mistake—Rights of second mortgagee.*

*The second mortgagees of leaseholds gave notice of their charge to the first mortgagees. The mortgagor, with the concurrence of the first mortgagees, and acting by the same solicitors, subsequently sold the property, and the proceeds of sale were distributed without having regard to the rights of the second mortgagees, whose notice of charge had been forgotten. Upon an action by the second mortgagees against the mortgagor and the first mortgagees for an account, the mortgagor not appearing:*

*Held, that the fact of the notice of the second charge having been forgotten did not alter the rights of the parties; and that the first mortgagees were liable to the extent of the balance of the proceeds of the sale after the satisfaction of their charge.*

This was an action by second mortgagees by way of equitable charge, against their mortgagor and first mortgagees, for an account of what was due to them under their security. By various indentures of mortgage and further charge, and ultimately by an indenture of the 21st June 1877, the Reliance Permanent Building Society were the first mortgagees from Henry Pike, a member of the defendant society, of a leasehold house, No. 16, Orvington-street, Chelsea, in the county of Middlesex, for the residue of the term, less three days. On the 19th March 1879 Henry Pike gave an equitable mortgage upon the same premises to the West London Commercial Bank, in the following terms:

In consideration of your having this day discounted my promissory note dated this day for 100l., and payable four months after date, or of any further or future advances on my account by way of discount, overdraft, or otherwise, I hereby grant to you, as collateral security by way of equitable mortgage, a lien upon the estate comprised in the title deeds relating to leasehold premises, No. 16, Orvington-street, Chelsea, Middlesex, now in the possession of the trustees of the Reliance Permanent Building Society, of 25, Percy-street, Tottenham-court-road, to the extent of such present and further or future advances, with interest thereon after the rate of 10 per cent per annum in the event of default, and subject to any mortgage or further charge now

existing thereon. And I authorise you to make any payments that may be necessary to prevent a forfeiture or sale of the said estate if you should think fit, and to charge the same with interest as aforesaid on the said estate. And I undertake, when called upon to do so, to execute any further agreement, deed, or assurance that may be required by you to give effect to the collateral security hereby granted, at my expense in all things, including stamps and penalty. And in case of a sale by the said Reliance Permanent Building Society, I authorise you to receive any surplus there may be, and to apply the same in payment of the debt or liability hereby intended to be secured.

HENRY PIKE.

16 and 18, Exeter-street, Chelsea.

The sum claimed by the plaintiffs to be due under this charge was 309l. 15s. 6d.

On the same 19th March 1879 notice of this charge was sent to the Reliance Society, the receipt of which notice was duly acknowledged by their secretary, Mr. James Hoppey. On the 8th Dec. 1882 another letter was received by the secretary from the plaintiffs, asking if the defendant Pike was keeping up his payments to the Reliance Society, and again mentioning the fact that they held a second charge. This letter was also duly answered on the 9th Dec. On the 31st March 1882 Henry Pike wrote to the secretary of the Reliance Society, stating that he had instructed Messrs. Gouldsmith and Sons to sell his house in Orvington-street. On the 22nd May 1883 the house was sold by public auction to Col. Charles Carew de Morel for 500l. By the conveyance, dated the 23rd June 1883, the Reliance Society, "as mortgagees and by the direction of the said Henry Pike," conveyed, "and the said Henry Pike as beneficial owner," conveyed and confirmed to the purchaser. Out of the purchase moneys the Reliance Society retained 119l. 15s. 3d., and the balance of 380l. 4s. 9d. was paid to Henry Pike. Messrs. Shaen, Roscoe, and Co. acted as solicitors for both mortgagor and the first mortgagees in the transaction. Mr. Richard Roscoe deposed in evidence that at the time of the sale he had no notice or knowledge of the second equitable charge of the plaintiffs, and that the Reliance Society did not negotiate for, nor intervene in the sale. The actual receipt of the notice in March 1879 was admitted. Henry Pike put in no defence, and did not appear at the trial of the action.

*Hemming, Q.C. and B. P. Newman* for the West London Commercial Bank.—The fact that the notice of our charge was forgotten by the Reliance Society cannot affect our rights as against them. Judgment against the mortgagor will go by default.

*Horton Smith, Q.C. and Osler* appeared for the Reliance Society.—The equity claimed is one *primæ impressionis*, and has no foundation in law. There has been no fraud, and the only question is the legal effect of what has been done. The first mortgagee has a right to transfer his mortgage to anyone who will pay him off, and the notice of the second charge is immaterial:

*Bates v. Johnson, Johnson, 304;*  
*Peacock v. Burt, 4 L. J. N. S. 33, Ch.;*  
*Jones v. Jones, 8 Sim. 633.*

Further, the second mortgagees, by not registering their charge in Middlesex, have lost their remedy. Its terms are also vague and indefinite, and such as the court will not give effect to.

*Hemming, Q.C. in reply.*—The cases cited are those in which the right of "tacking" is discussed, and in which no notice of charges had

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been given to prior incumbrancers. They do not apply.

BACON, V.C.—Nothing can be more embarrassing or more disagreeable than to have to come to a decision in cases where there has been no moral delinquency on the part of anybody, but where a loss has been sustained through an irregular course of proceedings, through a mistake arising from forgetfulness. The consequence of what has happened is, that the plaintiff, who had a good equitable mortgage, a good second mortgage of this property, has been deprived of it by reason of the course which the first mortgagees of the property thought fit to pursue. Now, what was the condition in which the parties stood? The first mortgagee holding the legal estate in this property had a very good security for the sum in which Pike was indebted to him. The equity of redemption was vested in Pike. The mortgagee therefore held his legal right, but he held it subject to the equity of redemption. Pike then assigns that equity of redemption to the plaintiffs in this action. Notwithstanding what has been said by Mr. Osler in the course of the argument as to the vagueness and indefiniteness of this equitable charge, I find a very clear equitable assignment of the equity of redemption in favour of the present plaintiff. I have read the terms of the charge, and I need not repeat it; it is one of those printed forms which societies such as this are frequently in the habit of taking from their customers, and I find that the concluding passage in it is this: "And in case of a sale by the said Reliance Permanent Building Society, I authorise you to receive any surplus there may be, and to apply the same in payment of the debt or liability hereby intended to be secured." Well, that equitable assignment of the equity of redemption was made, and notice of it was given distinctly to the Reliance Society. What is the state of things after that? The man who by the original mortgage to the Reliance Society acquired the right of redemption, has now parted with that right to another person. The first mortgagee has also been given full notice of that transaction. Why some more particular entry of the transaction was not made in some book or other I do not know; for that would have been a more business-like way of doing it. But the matter does not stop there, because by that letter of the 8th Dec. 1882, which Mr. Horton Smith stated to me in the course of his argument, there was an anxious inquiry made on the part of the second mortgagees to know whether the payments which were due from Pike to the society had been duly made; and adding, "Remember that we hold a second mortgage," which was at a much more recent period than the original notice in 1879. It is difficult to understand why men of business have dealt with this subject in this way. There was very clear notice that the plaintiff was the owner of the equity of redemption, and that he was, to some extent, vigilant in looking after his interest; and why, when there was a proposition made by the mortgagor to sell, no notice was given by the Reliance Society to the owner of the equity of redemption, I am at a loss to gather, except that I believe that the whole matter had been forgotten. However, forgetting a thing cannot alter the rights of the parties; and, at the time when the sale took place it is quite clear to my mind that the Reliance Society

knew that the equity of redemption did not belong to Mr. Pike; and it is also clear, to my mind, that, by the terms of the charges, if they had exercised their power of sale they would have been bound to have paid the surplus money derived from the sale to the owner of the equity of redemption, and that they suffered this to pass without giving any notice to the person who was entitled to redeem. Then it is said that this is a case *prince impressionis*. In my opinion that goes too far. It may well be that this is the first time that such a question has been raised, because nobody has ever disputed that if the equitable owner of the property gives notice to the person in whose hands the property is (whether by way of pledge, or trust, or anything else) he acquires a right which cannot be disregarded, and one which the holder of the property is bound to respect, and which he cannot destroy by merely handing over the money to somebody else. The cases which have been referred to by Mr. Horton Smith were cases in which notice was a principal feature. They are all cases in which priorities were determined; but those cases do not approach the case which is before me, and which is plainly this: the owner of the equity of redemption, who had given notice of his charge, is deprived of his security because the person to whom he gave notice chose to disregard his title as owner of the equity of redemption. The rules of the society, which were referred to by Mr. Horton Smith in the course of the argument in favour of the defendants, cannot have any effect as between the parties to this suit. They are very good rules as to matters which arise between subscribers, but they cannot possibly affect the right which is asserted here by the plaintiff. In my opinion the plaintiff has sustained a damage by the negligence which the defendants have suffered to exist, and the loss must be made good by the defendants in this action.

Solicitors: Shaw and Co.; Shaen, Roscoe, and Co.

July 28, 29, and Aug. 1.

(Before KAY, J.)

FRY v. TAPSON. (a)

*Trustees—Breach of trust—Investment of trust money—Change of investment—Improvident loan on mortgage—House property—Value—Insufficient security—Employment of agents—Liability of trustees.*

A trust fund of 5000*l.* was invested by trustees on mortgage of a freehold house and grounds at Liverpool. They employed for the purpose a firm of experienced solicitors, who found the security, and suggested a surveyor as valuer. This surveyor carried on business in London, and was not shown to have any local knowledge. The trustees accepted the suggestion, although, according to the evidence, they were aware, or were in a position to know, that the surveyor employed was also instructed by the mortgagor to find a lender, and he was interested in doing so, as his commission depended upon his success. His report stated that the fair market value of the property was from 7000*l.* to 8000*l.*, and recommended the property as a security in somewhat inflated language. The

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

*report was accepted by the trustees as sufficient evidence of value without any attempt being made to check it.*

*The mortgage was completed in 1875, and the deed stipulated that, upon punctual payment of interest, the principal should not be called in for five years. The interest on the mortgage was regularly paid during five years from the date of the security. The mortgagor was made a bankrupt in 1879. Subsequently the payments became irregular, the property fell vacant, and no interest had been paid since Oct. 1883.*

*Owing to various circumstances the value of the property had very much decreased, and was worth considerably less than in 1875.*

*An action was brought to recover the trust money. One of the trustees had died before the commencement of the action.*

*Held, that, as the investment was owing to the employment of a valuer whom no prudent person would have employed, the trustees were not exonerated because such valuer was appointed not by them, but by their solicitors; that the trustees had neglected the rule of not lending more than half the value on house property; and that the surviving trustee and the executors of the deceased were jointly and severally liable to replace the 5000*l.* with interest.*

JOHN DUNN, a banker at Hobart Town, in Tasmania, by his will, dated 11th July 1854, directed that his trustees should stand possessed of the moneys arising from the sale of all his real and personal estate upon trust for all his children (except John Dunn the younger) equally, but, as to the daughters' shares, upon trust that they should be invested in the names of the trustees, or in the names of such persons as such trustees should appoint for that purpose, in or upon first mortgages of real estate in Tasmania, or in Great Britain, or in or upon the public stocks or funds or other Government securities in the United Kingdom; and he directed that during the life of each daughter the interest of her share should be paid to her for her separate use, free from the control of any husband, but without power of anticipation, and he declared that after the decease of each daughter her share should be upon trust for her children and remoter issue as she should appoint; and after stating that it might happen that some one of the persons interested in the trust fund might thereafter reside elsewhere than in Tasmania, and that it might be advantageous or convenient to have the trust moneys in which such person was interested removed to Great Britain, the testator authorised the trustees to appoint any two or more fit persons resident in Great Britain to invest in their own names in the public funds of Great Britain, or on real securities in England, the whole or any part of the share of the trust fund to or in which any of his children or their issue might be entitled, or beneficially interested, either actually or presumptively, and such share of the trust funds should be accordingly remitted to the persons so appointed for the purpose of being so invested, and the receipt of the persons so appointed should be a sufficient discharge to the trustees under the will for any moneys that might be so remitted, and should wholly exonerate them from seeing to the application or being answerable for the loss, misapplication, or non-

application thereof, and the persons so appointed should pay and apply such moneys, and the interest and the yearly proceeds thereof respectively, upon the trusts and for the ends, intents, and purposes declared in the will concerning the same, and in all other respects should have such powers and authorities consistent with the trusts declared in the will as the trustees under the will should think proper.

The testator died on the 20th Jan. 1861.

One of the daughters of the testator was Catherine, the widow of the Rev. Henry Phibbs Fry. She had four children.

Catherine Fry resided in England, and it was therefore considered desirable by the trustees of the will to have the trust moneys, or part thereof, to which she was entitled under the will, removed to England, and to appoint trustees thereof resident in England.

Accordingly, by an indenture, dated the 12th July 1873, Alfred Joseph Tapson and William Henry Benyon-Winsor were appointed trustees of such part of Catherine Fry's trust fund as might be remitted to them.

In pursuance of such appointment the trustees of the will remitted to Tapson and Benyon-Winsor the sum of 5000*l.*, which was invested by them in the purchase of 5439*l.* 9*s.* 2*d.* New Three per Cent. Annuities.

In Aug. 1875 Paterson Kerr (of the firm of Paterson Kerr and Goldring, surveyors, land agents, and auctioneers, London) called on Roy and Cartwright, who were solicitors to Benyon-Winsor, and had acted as solicitors in the trust. He applied to them for an advance of 5000*l.* on a freehold estate situate at Grove Park, near Liverpool, the property of George Campbell, of Liverpool and London, and he promised to send them further particulars for perusal and submission to their clients.

On receipt of these particulars, Roy and Cartwright wrote to Tapson, on the 19th Aug. 1875, as follows:

Inclosed we send you short extract from a letter containing particulars of a security for 5000*l.*, with interest at 4½ per cent., which we think will suit Mrs. Fry's trustees. We have sent Mr. Benyon-Winsor a copy of these particulars, and he desires us to tell you that he approves of the security, subject to our being satisfied as to title and value. On the first point (title) we of course shall carefully examine the deeds in the usual way; and on the second point (value) we shall have an auctioneer's value. We endeavoured to get 5 per cent. for the loan, but without success, and we should probably have lost the security had we insisted on the higher rate. However, the security appears a perfectly good one, and Mrs. Fry's income will be materially improved by this transaction; and we may further notice that good mortgage securities are extremely scarce at present. Be good enough to inform us if you approve of the security, subject to the questions on title and value being properly investigated. At present we know nothing more of the borrower or the security than what appears in the inclosed extract.

The extract referred to in the above letter was as follows:

5000*l.* at four and a half per cent. The security offered is a freehold house and ground, situate in Grove Park, Liverpool, which cost the present proprietor between 8000*l.* and 10,000*l.* a few years ago. He has, in consequence of his London partner's ill-health, permanently left Liverpool, and he has let the property for a short term of two years to a brother merchant at the nominal rental of 250*l.* per year for the simple purpose of having it occupied. The tenant offered 350*l.* a year to obtain a seven years' lease, but this our client would

not agree to, as his intention is to sell it immediately in Liverpool has revived a little. We feel quite confident that this is a first-class security, and we should say that even if the borrower wished to mortgage up to the hilt, for he is, we might almost say, a millionaire. The reception rooms on the ground floor will sufficiently speak for the character of the house without giving you in the meantime further details. They consist of magnificent dining room, very large and lofty hall, and most complete offices. This security, we may as well assure you, has been offered to no one else either here, at Liverpool, or elsewhere, and if you have a client desirous of investing this sum, we feel sure you cannot do better than advise him to take this security.

On the 20th Aug. 1875 Tapson replied :

The description given of the proposed investment of 5000*l.* is satisfactory so far as it goes, except the money is only required for a short time as the intention of the owner is "to sell it immediately in Liverpool has revived a little." It seems scarcely worth while to disturb the present investment unless there is some probability of the fresh investment being for some longer time than this one. Of course, also, the facts about the reasons for the house being let, as it is stated, below its value would require full investigation. I would rather that the decision about this matter should be left with Mr. Benyon-Winsor. I shall be content if he is.

On the same date Roy and Cartwright wrote again to Tapson thus :

Your objection to the money being advanced for a short period only is a natural one, but we have arranged that the borrower shall take the money for five years certain. We think that is as long as we can ask the mortgagee to bind himself to keep the money.

On the 26th Aug. 1875 Roy and Cartwright received the following report from Paterson Kerr and Goldring :

Grove Park is a private road, containing about twenty houses, and is situate in the best part of Liverpool, close to Princes Park and Sefton Park, about forty minutes' walk and ten minutes' drive from the Exchange.

This residence is one of the best if not the best in the park, and stands at the end of the road, thus rendering it quite private, commanding lovely views over Sefton Park and Toxteth Park districts. It is detached, of commanding and pleasing elevation, consisting of main building and two wings, with conservatory on either side, is approached by a carriage sweep having two entrances, and contains on the ground floor vestibule and large hall artificially heated, the vestibule paved with encaustic tiles, and the ceiling gilded, and the hall ornamented with marble pillars and handsome mirror, and opening into the reception rooms, which are all on the ground floor, and consisting of noble dining room 34 feet by 20 feet, fitted with valuable mantel and stove, and having the ceiling and walls panelled and decorated with hand painting, and the cornices of ceilings gilded and picked out in gold and colours. This room communicates with the library 24 feet by 14 feet, and both open into a beautiful domed conservatory 25 feet by 15 feet, an elegant drawing-room 22 feet by 18 feet, and a smaller drawing or morning room 20 feet by 15 feet, both communicating and handsomely fitted and opening by French casements on to a lawn in front, and the larger room opening into a conservatory ; a splendid billiard room 27 feet by 16 feet, opening into a smoking room, with lavatory, and hot and cold water laid on. Adjoining the dining room, and communicating with it, is a butler's pantry, well fitted with every convenience, with a serving lift from the kitchen ; and entirely shut off from the reception rooms is the following accommodation—water-closet, a lavatory, with hot and cold water laid on, a large butler's pantry, with water and all convenience, and having an opening into the billiard room for the supply of refreshments ; and in the basement, the entrance to which is shut off from the hall, are a large kitchen, completely fitted for the requirements of a family of distinction, housekeeper's store room, splendid wine cellars, scullery, larder, coal cellars, boot and lumber rooms, &c.

On the first floor, which is approached by principal and secondary staircases, are nine bedrooms two dressing

rooms, two fitted bath rooms, two water-closets, lavatories, linen room, and housemaid's store closet, and a lady's boudoir.

The principal bedroom is a handsome apartment, 24½ feet by 20 feet, and the boudoir is fitted with carved marble mantel, ceiling beautifully ornamented in gold and colours. On the second floor are two very large bedrooms for servants, and a lumber room ; the principal staircase is lighted from the roof, and the first-floor landing is lighted by coloured glass dome. In the rear of the house is a small pleasure garden, arranged in terrace and lawns, and in the rear of this pleasure garden is a range of recently erected glasshouses arranged in five divisions, the centre one being a conservatory, with a vinery on either side of it, and two stovehouses beyond the vineries, all fitted up upon the most approved principle, and regardless of cost. In the front of the residence large lawn, with flower parterres, and ornamental fountain, and well clothed with shrubs and timber. This part of the property has a frontage of about 121½ feet to Grove Park by a depth of about 187 feet and a width of about 74½ feet ; on the other side of the park is a piece of land having a frontage of about 131½ feet, by a depth of about 220 feet, part of which is arranged as an ornamental ground, with croquet lawn, and part as kitchen garden, profusely stocked with standard wall and espalier fruit trees ; there are also first-class outbuildings, inclosed in carriage yard, and comprising large coach house for four carriages, heated by hot water pipes, harness room, with mahogany fittings, a three-stall stable, and a large loose box, fitted with patent iron mangers and racks, and thoroughly well drained and fitted with patent ventilating shafts, large loft over, and three rooms for coachman, with a pantry, sink, and water laid on, and other conveniences.

A property of this kind, and in this district of Liverpool, is always certain to command a tenant from among the numerous wealthy merchants of that town. Mr. Campbell fitted it up, added to it, and improved it, with a view of its being his permanent residence, but in consequence of the ill-health of his London partner he was compelled to relinquish the conduct of his Liverpool business and take up his residence in London. We are of opinion that it is worth a rental of 350*l.* per annum, and we are given to understand that this could have been obtained for it if Mr. Campbell had chosen to grant a lease for seven years to a tenant, but this he declined to do ; he has now accepted the nominal rent of 250*l.* per annum for a tenancy of two years, thinking that at the end of that period, and with a revival of the normal state of trade in Liverpool, he will be able to get a higher rental on lease than he could now obtain, or sell at its fair value. Taking all the circumstances affecting this property into consideration, we are of opinion that its fair market value is from 7000*l.* to 8000*l.* This opinion we have formed after mature consideration, in the face of the fact that the property has cost the present owner between 9000*l.* and 10,000*l.* We believe the money has been quite judiciously spent, but the present position of the trade of Liverpool is such that few if any of the merchants of the town care to look up capital in landed property or houses, and therefore we do not think, if this residence were forced into the market at the present time, it would realise more than the value which we have put upon it. We understand that there is a rentcharge of 16*l.* 11*s.* payable by this property as its annual contribution towards the maintenance of Prince's Park, Liverpool.

The report was next day sent by Roy and Cartwright to Benyon-Winsor, who returned it the following day with a letter saying that, as it read all right, the matter had better be followed up ; and on the 24th Sept. 1875 Benyon-Winsor wrote to Tapson as follows :

After much looking about Messrs. Roy and Cartwright have succeeded in obtaining a mortgage for Mrs. Fry's money to the material augmentation of that lady's income. I believe you know the particulars, but I trouble you with a line to mention that I quite approve of the matter and that I think the affair "all right" in every particular.

On the 27th Sept. 1875 the sum of Bank Annuities was sold, producing 504*l.* 17*s.* 11*d.*



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cash, and Tapson and Benyon-Winsor advanced the sum of 5000*l.*, part of the 5044*l.* 17*s.* 11*d.*, to George Campbell at 4*l.* 10*s.* per cent. per annum on the security of a mortgage of the Grove Park Estate, such mortgage being created by an indenture, dated the 28th Sept. 1875.

One of the terms of the mortgage was, that upon punctual payment of interest the principal should not be called in for five years from the date thereof.

On the same date Catherine Fry was duly advised of what was being done by a letter written to her by Benyon-Winsor, as follows:

You will be glad to hear that Messrs. Roy and Cartwright have succeeded in obtaining for your money a mortgage of 4½ per cent. The matter has been on some time, and I have received the reports, &c., and have approved the security. I have written to Mr. Tapson accordingly.

The mortgage property is situated at Liverpool, and is valued at about 10,000*l.* The mortgage is for seven years. We have been so particular about the security and money has been so plentiful, that there has been great difficulty in placing your money to our (R. and C. and self's) satisfaction. The difference between interest at a shade over 3 and one at 4½ will of course be very acceptable to you, and I may mention that you will not lose your October dividend.

The interest on the mortgage was regularly paid during five years from the date of the security.

George Campbell, the mortgagor, was, however, made bankrupt some time before May 1879. Subsequently the payments became irregular. The property fell vacant, and no interest whatever had been paid since Oct. 1883.

After the date of the mortgage the property immediately adjoining the Grove Park Estate was covered with buildings of an inferior description, the back windows of which overlooked that estate. Owing to this circumstance and to the depression of trade in Liverpool, the property very much decreased in value.

Paterson Kerr and Co. were therefore instructed to make a further survey of the mortgaged property, and their report, dated the 29th May 1879, was as follows:

We attended at Liverpool, as arranged, for the purpose of inspecting the property known as Nos. 1 and 2, Grove Park, held by you as security for an advance of 5000*l.* on mortgage to Mr. George Campbell, who has lately been declared a bankrupt, with a view of advising you as to the present position of the property, and especially as to the advisability of accepting or declining an offer of 2000*l.* which has been made for that part of the property known as No. 1, Grove Park.

We regretted very much to find that since our survey in 1875, when we recommended the security as being amply sufficient for the advance of 5000*l.*, a very great alteration has taken place in its immediate surroundings. What was once an open country lying between Sefton Park and Grove Park has unfortunately been dealt with by the Earl of Sefton in a manner which has materially prejudiced, not only this property, but the whole of the surrounding property of a first-class character. The land has been let or sold by his lordship for the erection of houses of an inferior description, and the arrangements still to be completed must, when carried out, still further interfere with the value of your security. It is, therefore, to us a source of gratification that the property in 1875 afforded such an ample margin as it did for the advance then made upon it, as we hope that, by taking action at once, there may be no difficulty in obtaining such a price now as will secure the repayment of the mortgage.

The sum offered for that part of the property, known as No. 1, Grove Park, which consists of the stabling, the kitchen garden, and croquet lawn, &c., is, we think, under the present circumstances, a fair price, and with

a view of reducing the mortgage should be accepted, subject, of course, to the present tenant's occupation. We think, however, that the purchaser should be required to take at a valuation, or at a price to be agreed upon, such tenants' fixtures as may be upon the property not belonging to the present tenant, and which would be of comparatively little value to you to remove. These fixtures consist principally of hurdles, summer-house, fowl-house, &c.

It also ought to be a condition of the sale of this part of the property that until you have disposed of No. 2, Grove Park, no building should be erected on it, but that it should be kept in as good order as it now is, by the purchaser, the object of this condition being that the out-look of the front windows of No. 2 should not be affected.

It will then be desirable that immediate steps should be taken to sell No. 2 while the present tenant is in occupation, and we should recommend that the purchaser of No. 1 should accept, as the apportioned part of the rent for it during the time that elapses between his purchasing and his obtaining vacant possession, a merely nominal sum, say at the rate of 20*l.* per annum. The fact that the tenant of the entire property does not use the stabling is, no doubt, a reason why he pays the low rent of 250*l.* for the entire property, and should any question be raised by the purchaser of No. 1 as to the lowness of the proposed apportionment (which, we think, improbable), this argument, we think, will satisfy him.

We shall then be in a position to offer the remainder of the property (No. 2), subject to the tenancy to a first-class man at an apportioned rent of 230*l.* per annum, and in the meantime, pending the sale, and while the present tenancy continues, you will be receiving 230*l.* per annum for that portion of the property on which something like 3000*l.* will be owing.

We shall be glad to give you any further information you may require and to receive instructions as to the sale of No. 2.

On the 22nd Nov. 1879 Benyon-Winsor died, having by his will appointed Rosina Benyon-Winsor, William John Winsor, and Thomas Broadbent Cartwright his executors.

Paterson Kerr also died.

This action was commenced by writ, issued on the 6th June 1883, by Catherine Fry and her four children, against Tapson, the surviving trustee, and the three executors of the deceased trustee.

By their amended statement of claim, delivered on the 16th Jan. 1884, the plaintiffs alleged that Tapson and Benyon-Winsor were severally guilty of wilful default in advancing the 5000*l.* to George Campbell on the security in question.

The acts of wilful default on which the plaintiffs relied were that Tapson and Benyon-Winsor advanced the money upon a report and valuation made on behalf of the mortgagor alone; and that such report and valuation showed, or gave notice on the face of them, that the security was not a good and sufficient security for the advance of the 5000*l.* under the trusts affecting the same.

The plaintiffs also alleged that the investment was an improper one; that the mortgage was an insufficient security; that if the property comprised in it were sold it would not produce so much as two-thirds of the 5000*l.* advanced; that Tapson and Benyon-Winsor had not valued their security or proved under the bankruptcy of George Campbell; and that nothing could be realised from the mortgage beyond the value of the property charged.

The plaintiffs further alleged that, before the commencement of the action, they had applied to Tapson requiring him to take proper steps for the purpose of realising the security, and informed him that he and the estate of Benyon-Winsor would be held answerable to make good any loss occasioned by the improper investment, and



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unless he proceeded without delay to make good the breach of trust by realisation, an action would be commenced against him and the executors of Benyon-Winsor for the purpose of having the security realised and the loss made good; but that, notwithstanding such application, Tapson had neglected to take any steps in the matter.

The claim was for a declaration that the investment was an improper investment, and was made by the wilful default of Tapson and Benyon-Winsor respectively; to have the mortgage realised and any loss occasioned by such improper investment and wilful default made good by Tapson and the executors of the will of Benyon-Winsor, and, if the latter did not admit assets, to have the personal estate of Benyon-Winsor administered for the purpose; and to have, if and so far as the case might require, the trusts of the will of John Dunn, so far as they related to the 5000*l.* and any property of which Tapson and Benyon-Winsor were trustees for the plaintiffs, administered under the direction of the court.

The defendant Tapson, in an amended statement of defence, delivered on the 24th Jan. 1884, denied that the investment was an improper one, and submitted that he and his co-trustee were not guilty of wilful default, or of any default at all, in advancing the money on the security in question. He alleged that he and his co-trustee acted in making the investment with all due care and prudence, and under the advice of Roy and Cartwright, and upon the valuation of Paterson Kerr and Goldring; that the mortgagor was reputed to be an exceedingly wealthy man; that the report stated the fair market value of the property to be from 7000*l.* to 8000*l.*; that the mortgage was not, at the date of the investment, an insufficient security; but that, even if it were so, he submitted that, under the circumstances, he was under no liability to make good any part of the loss occasioned by the insufficiency of the security. He denied that such report and valuation were made on behalf of the mortgagor alone, or that they showed on the face of them that the security was not a good and sufficient one, but submitted that they fully justified the advance. He also alleged that some time subsequently to the investment the property became depreciated in value by the erection in its vicinity of buildings of an inferior character; that this happened through no fault or neglect of his, and he was not aware of what had happened in this respect until after the bankruptcy of the mortgagor, and he submitted that he was not answerable for any loss occasioned by such depreciation.

He further alleged that Catherine Fry had, prior to the mortgage investment, become a widow; that she had a large family, and was not in affluent circumstances, and requested him and his co-trustee to sell out the New Three per Cent. Annuities, and to invest the proceeds on some security which would produce a larger annual income than was produced by such annuities; that he and his co-trustee were willing to comply with such request if they could properly do so, and the property on which the 5000*l.* was lent was proposed to them as a security by Roy and Cartwright, who negotiated the mortgage and investigated and approved the mortgagor's title; and that Catherine Fry, before the 5000*l.* was lent, knew what the security was, and approved of the

money being lent on it, and in all respects sanctioned the mortgage transaction.

The amended statement of defence of the defendants the executors of Benyon-Winsor (delivered on the 24th Jan. 1884) was to the like effect.

The action now came on for trial.

*Finlay*, Q.C. and *C. C. Macrae*, for the plaintiffs, cited

*Ingle v. Partridge*, 34 Beav. 411.

*Graham Hastings*, Q.C. and *Henry R. Woodhouse*, for the defendant Tapson, cited

*Re Speight*; *Speight v. Gaunt*, 48 L. T. Rep. N. S. 279; 50 Ib. 330; 22 Ch. Div. 727; 9 App. Cas. 1;

*Re Godfrey*; *Godfrey v. Faulkner*, 48 L. T. Rep. N. S. 853; 23 Ch. Div. 483.

*W. Pearson*, Q.C. and *Sefton Strickland* for the defendants, the executors of Benyon-Winsor.

*Finlay*, in reply, cited

*Budge v. Gummow*, 27 L. T. Rep. N. S. 667; L. Rep. 7 Ch. App. 719;

*Hopgood v. Parkin*, 22 L. T. Rep. N. S. 772; L. Rep. 11 Eq. 74;

*Sutton v. Wilders*, 25 L. T. Rep. N. S. 292; L. Rep. 12 Eq. 373;

*Bostock v. Floyer*, 13 L. T. Rep. N. S. 489; L. Rep. 1 Eq. 26.

*Cur. adv. vult.*

Aug. 1.—The following written judgment was delivered by

KAY, J.—The argument in this case has raised some very important questions as to the duties of trustees investing money on mortgage. There were here two trustees who had a sum of 5000*l.*, which they were desirous of so investing. Such an investment was entirely within their powers, and they seem to have been actuated by a wish to increase, if they could do so, the income of the tenant for life. Accordingly they sold out the fund, which was in Consols, and invested it on mortgage under the circumstances which I will proceed to describe. The trustees employed a firm of experienced solicitors, and one of these gentlemen, in the month of August 1875, wrote to each of the trustees thus: [His Lordship read the letter, and continued:] Inclosed in each of these letters was an extract from a communication previously made to the solicitors by a Mr. Paterson Kerr, who, it seems, carried on business as a surveyor, land agent, and auctioneer in Moorgate-street, London, under the style of Messrs. Paterson Kerr and Goldring. The extract ran thus: [His Lordship read it, and continued:] Mr. Tapson, one of the trustees, wrote in answer on the 20th Aug. thus: [His Lordship read the letter, and continued:] On the same day the solicitors replied that they had arranged that the borrower should take the money for five years certain; and on the 24th Sept. Mr. Winsor wrote to Mr. Tapson, "After much looking about, Messrs. Roy and Cartwright have succeeded in obtaining a mortgage for Mrs. Fry's money, to the material augmentation of that lady's income. I believe you know the particulars, but I trouble you with a line to mention that I quite approve of the matter, and that I think the affair 'all right' in every particular." The effect of this correspondence, so far as Mr. Tapson is concerned, is to make him liable for everything done by his co-trustee, Mr. Winsor, under the authority so delegated to him. The original letter from Kerr, from which the extract

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sent to each of the trustees was taken, was addressed to the firm of solicitors on behalf of the owner of the proposed security, a gentleman named Campbell. The letter has been lost. On or after the 20th Aug. 1875 the writer, Mr. Pater-son Kerr, was verbally instructed by Mr. Cartwright, one of the solicitors of the trustees, to make a report as to the value of this property. Whether he went down to Liverpool for that purpose is not proved; but on the 26th Aug. he made a report in writing, which is also lost, but a copy of it, which has been put in evidence, runs thus: [His Lordship read the first report, and continued:] This report was shown by Mr. Cartwright to Mr. Winsor, one of the trustees, on the 26th Aug., and from a receipt dated the 30th Sept. it appears the trustee's solicitors paid Mr. Kerr 75*l.* for his charges. The ordinary fee for such a report in Liverpool would be about ten guineas. The 75*l.* was Kerr's commission for obtaining the loan. This was afterwards repaid by the mortgagor. The mortgage was completed on the 28th Sept. 1875. The deed stipulated that upon punctual payment of interest the principal should not be called in for five years. Kerr has since died, and Winsor also, and I am deprived of the advantage of their evidence. The interest on the mortgage seems to have been regularly paid during five years from the date of the security. Campbell, the mortgagor, was made bankrupt some time before May 1879. Subsequently, the payments became irregular. The property fell vacant; no interest whatever has been paid since Oct. 1883. In the meantime, on the 29th May 1879, after the bankruptcy of Campbell, Mr. Kerr made another report concerning the property, which runs thus: [His Lordship read the second report, and continued:] Since the transaction of the mortgage the property immediately adjoining this has been built over with buildings of a small class, the back windows of which overlook this property. Owing chiefly to this circumstance, and partly also, but in a much less degree, to the depression of trade in Liverpool, the value of this property has very much decreased, and it is now worth, as Mr. Kerr's report, which I have referred to, shows, considerably less than in 1875. Experienced Liverpool surveyors place its present value at from 3500*l.* to 3700*l.*, and Mr. Boulton, an estate agent who was called on behalf of the defendants, states its value to be from 3000*l.* to 3500*l.*. The evidence on both sides is practically the same on this point. As to its value in 1875, there is more difference of opinion. Mr. Sherlock, an architect and surveyor of thirty-five years' experience in Liverpool, says that its utmost value in 1875 was 5000*l.*; that a street had been projected by Lord Sefton's agents to come down to this neighbourhood, and had actually been begun rather more than a quarter of a mile away, and that building scheme has been carried out since the year 1876. Mr. Whiteman, another Liverpool architect and surveyor of great experience, places the value of the house in 1875 at the sum of 4659*l.*. Mr. Hermann, a witness for the defendants, estimates the value in 1875 at 6700*l.*, but he says 4500*l.* would have been an outside sum for trustees to advance upon mortgage of it, and that he should have anticipated the depreciation which has taken place. Mr. Boulton, who is, as I have said, an estate agent at Liverpool, and was called by the

defendants, says that the property was sold to Campbell in 1868 for 5000*l.*; that before 1873 he added some large rooms to the house and very much altered the character of the place; but that in 1873 he advised him that he would not be likely to get more than 8500*l.* for it; and that the value diminished between that time and 1875. This witness agrees, in the main, with Kerr's report in 1875, though he says it is a little high flown, but, he adds, it was a property which did not, to his mind, recommend itself as a security for trust money; it was too expensive a house for most people, and was not easy to let or sell; it might have been a good security for 4000*l.* or 4500*l.*; but, being cross-examined, he says the mortgagees' attention should have been called to the probability of the adjoining land being built upon, and, taking that into consideration, he should not have lent money on it at all. There is no substantial dispute among the witnesses that the loan was an extremely improvident one for trustees to make. The facts show strongly the wisdom of the general rule that not more than one-half the estimated value should be lent by trustees upon house property. No prudent man reading Mr. Kerr's report of 1875 would have put the value of the property as a security for trust money higher than 7000*l.*, and to lend 5000*l.* upon it was obviously rashly to disregard the ordinary rule. But the most incautious act was to employ Mr. Kerr to value for the mortgagees, and to accept his report as sufficient evidence of value. He was a London surveyor, not shown to have any of that local knowledge which was so important in this case, and his employment was inexpedient for that reason: (*Budge v. Gummow*, 27 L. T. Rep. N. S. 667; L. Rep. 7 Ch. App. 722.) He was employed by the mortgagor to find a lender. He was interested in doing so. His commission of 75*l.* depended on his success. He had written recommending the property in terms which read more like the language of an auctioneer puffing what he had to sell than of a man exercising a calm judgment upon its value as a security for a loan of trust money; and solicitors of experience who have been called on the part of the defendants have all confirmed my impression that no prudent lender, whether a trustee or not, would have been satisfied with his valuation under such circumstances. But then it has been argued that, supposing his valuation to be excessive and that it was improper to act upon any valuation by him, the trustees employed competent solicitors, who instructed Mr. Kerr, and that this completely absolves them, and I have been pressed with the authority of *Speight v. Gaunt* (50 L. T. Rep. N. S. 330; 9 App. Cas. 1), and other cases, as deciding the question in their favour. *Speight v. Gaunt* did not lay down any new rule, but only illustrated a very old one, viz., that trustees acting according to the ordinary course of business, and employing agents as prudent men of business would do on their own behalf, are not liable for the default of an agent so employed. But an obvious limitation of that rule is, that the agent must not be employed out of the ordinary scope of his business. If a trustee employs an agent to do that which is not the ordinary business of such an agent, and he performs that unusual duty improperly, and loss is thereby occasioned, the trustee would not be exonerated. Suppose, for

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example, that in selling trust property or changing an investment, trustees were to allow the trust fund to pass into the hands of their solicitors, and that it was lost in consequence, they would be liable. I take that illustration because I am afraid it not unfrequently happens that trustees do allow trust funds to be in their solicitors' hands without sufficient reason. It would be no excuse to say, as one of the witnesses said in this case, solicitors often do so. The question is not what they often do, but what is properly within the scope of their employment as solicitors. Suppose in *Speight v. Gaunt* the trustee had exercised no discretion as to the choice of a broker, but had left that to his solicitor, who had employed a man known to them to be untrustworthy, would the trustee have been exonerated? In my opinion clearly not, because he would have delegated to his solicitors that which was not properly the business of the solicitors, but a matter as to which his own judgment should have been exercised. Now, is it part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage? To take Lord Hardwicke's words, in *Ex parte Belchier* (Amb. 218), is that a case "where trustees act by other hands either from necessity or conformable to the common usage of mankind." I should suppose not. But the matter is not left in any doubt. Some eminent solicitors have been called on behalf of the defendants, and they all agree that this is not the solicitor's business, but that if asked to name a valuer the ordinary course is to submit a name or names to the trustees, and to tell them everything which the solicitor knows to guide their choice, but to leave the choice to them. If, therefore, this unfortunate investment is owing, as I cannot help thinking is the case, to the employment of a valuer whom no prudent person would have employed, I cannot hold the trustees exonerated, because such valuer was appointed, not by them, but by their solicitors, if the fact were so. It has been necessary to consider this question partly because the defence was mainly rested upon it, but also for another reason. Watching the evidence as it was given, I observed that no attempt was made in the first instance to show that the trustees knew that the valuer employed was the same person who had written the letter, an extract from which had been sent to them. His name does not appear in that extract nor in the letters accompanying it. But Mr. Cartwright was recalled by the plaintiffs, and then said that he had no doubt he communicated that fact to Mr. Winsor. I cannot by reason of his death have Mr. Winsor's testimony on this point. However, it would certainly be Mr. Cartwright's duty to make this statement, and I cannot, in the face of his evidence, assume that it was not made. Unfortunately he does not say or suggest that he cautioned Mr. Winsor against employing Mr. Kerr, or that he suggested the employment of a local agent. The impression I derive from the evidence is that Mr. Cartwright, who had known Kerr previously, suggested his employment to Mr. Winsor, and that this imprudent suggestion was imprudently assented to. If Mr. Cartwright was to blame in doing this, so also was Mr. Winsor, and no attempt to throw blame on one would exonerate the other. If I am to deal with the case on the footing that these facts were

known to Mr. Winsor the case against the trustees is more direct, if not stronger; and no advice of their solicitors would relieve them from the consequences of knowing and employing an improper valuer. I am most reluctant to visit trustees acting *bonâ fide* with the consequences of a want of due caution, but I cannot avoid the conclusion that the trust fund has been diminished, if not lost, by their fault. They neglected the rule of not lending more than half the value on house property. They most incautiously employed the mortgagor's agent, who had been puffing the proposed security, and was interested to obtain the loan to value on their behalf, and they accepted his valuation without attempting to check it, and this, although he was a London surveyor, and it was most important to obtain the opinion of some experienced local surveyor as to property of this kind. I regret to be obliged to declare that they are jointly and severally liable to replace the 5000*l.* with interest at 4 per cent. from the time of the loan, against which interest must be set off the sums paid to the tenant for life. There must be an order upon the surviving trustee and the executors of the deceased to pay the amount within three months. If the executors of Mr. Winsor do not admit assets there must be the usual creditor's decree against them, and the defendants must pay the costs of the action. Of course, upon such payment being made the defendants will be entitled to the mortgage.

Solicitors for the plaintiffs, *Vallance and Vallance*.

Solicitor for the defendant Tapson, *Joseph Pearce*.

Solicitors for the other defendants, *Roy and Cartwright*.

Wednesday, June 11.

(Before CHITTY, J.)

FUSSELL v. DOWDING. (a)

*Practice*—Revisor for purpose of appealing—Expiration of time for appealing—Rules of Supreme Court 1883, Order XVII., r. 4.

By a marriage settlement the wife's property was vested in trustees upon trust for herself for life, and in default of issue (which happened) upon trust in case her husband survived her for such of her own blood and kindred, and in such shares as she should by will appoint, and subject thereto in trust for her next of kin according to the statutes for the distribution of intestates' estates, as if she had died intestate and without having been married. The marriage was dissolved by a decree of the Divorce Court, and in July 1872 Lord Romilly made a decree in a suit by the wife against the trustees of the settlement and her former husband, declaring that in the events which had happened she was absolutely entitled to the property comprised in the settlement. In pursuance of the decree the whole of the property then subject to the trusts of the settlement was transferred to the wife. The wife died in 1881, having, by her will dated in 1877, disposed of this property in favour of certain persons, some of whom were not her next of kin, and leaving her former husband surviving.

(a) Reported by G. WELBY KING, Esq., Barrister-at-Law.

*Held, that the next of kin were not entitled to revive the suit for the mere purpose of appealing against the decree of Lord Romilly.*

By a settlement dated the 30th April 1858, and made on the marriage of the plaintiff, then Miss M. M. Fussell, and Pierre Philippe Eugene Count de Gendre, certain property belonging to the plaintiff was vested in trustees upon trust to pay the income to the plaintiff during her life and in default of issue

In trust for the said M. M. Fussell, her executors, administrators, and assigns, in case she shall survive the said Pierre Philippe Count de Gendre, but if she shall die in his lifetime then in trust from and after her decease, and such failure of issue as aforesaid to pay the annual income of the whole capital trust fund, or so much thereof as shall not become absolutely vested or disposed of as last aforesaid to the said Pierre Philippe Count de Gendre or his assigns for the then residue of his life, and subject thereto shall stand possessed of the same fund in trust for such person or persons as is or are or shall be of her own blood or kindred, and in such shares and proportions as the said M. M. Fussell by her last will and testament in writing or any codicil or codicils thereto, or any writing or writings in the nature of her last will and testament, or a codicil or codicils thereto to be respectively executed by her according to the law of England shall, notwithstanding her coverture, direct or appoint, and in default of such direction or appointment, and so far as any such, if incomplete, shall not extend in trust for such person or persons as under the statutes for distribution of the residuary personal estates of persons dying intestate would have been entitled to her residuary personal estate at her decease in case she had died without having been married and intestate, and in such shares as such persons, if more than one, would be entitled thereto under the same statutes as tenants in common.

There was no issue of the marriage, and on the 7th Nov. 1871 the plaintiff obtained a final decree for the dissolution of her marriage with the Count de Gendre. Shortly afterwards the plaintiff filed the bill in this suit in her maiden name against the trustees of the settlement, and the Count de Gendre to have it declared that she was entitled to the whole of the property subject to the settlement, and that the trustees might be decreed to transfer the same to her. The Count de Gendre disclaimed all interest in the trust property, and on the 12th July 1872 a decree was made by Lord Romilly declaring that the plaintiff was absolutely entitled to the property comprised in the settlement: (see *Fussell v. Dowding*, 27 L. T. Rep. N. S. 406; L. Rep. 14 Eq. 421.)

In pursuance of this decree the surviving trustee of the settlement transferred to the plaintiff the whole of the property then remaining, subject to the trusts of the settlement.

The plaintiff died in Dec. 1881, and made her will in Jan. 1877, whereby she gave certain legacies and annuities in favour of persons, some of whom were not her next of kin, and bequeathed the residue of her estate to the London Diocesan Home Mission.

Shortly after the death of Mrs. Fussell an action to administer her estate was commenced, under which the portion representing pure personality, to which the charitable legatees were entitled, was handed over to them, and a sufficient amount of real and personal estate was set aside to provide for the legacies and annuities, none of which had up to March 1884 been paid.

In March 1884 an application was made to the Court of Appeal on behalf of Mrs. Kent, the sole next of kin of Mrs. Fussell, for leave to appeal

against the decree in *Fussell v. Dowding*. The Count de Gendre, the surviving trustee of the settlement, and the executor of Mrs. Fussell's will, were served with notice of the application. Upon the application coming on to be heard, the Court of Appeal directed it to stand over in order to enable the applicant, Mrs. Kent, to make such application as she might be advised to revive the suit of *Fussell v. Dowding*.

This was a motion on behalf of Mrs. Kent, that, in default of the legal personal representative of Mrs. Fussell obtaining an order to revive the suit of *Fussell v. Dowding*, or carry on proceedings therein within one week from the date of the order to be made on that application, the said suit might stand revived from the date of making that application without further order, and that proceedings therein might be carried on between the legal personal representative of the plaintiff and the defendants, the surviving trustee of the settlement and the Count de Gendre, as the same might have been carried on between the plaintiff and the said defendants.

*Grosvenor Woods*, for the applicant, contended that the trustee did not represent the next of kin, who at the date of the decree were an unascertainable class. He referred to

*Curtis v. Sheffield*, 46 L. T. Rep. N. S. 80, 177; 20

Ch. Div. 398; 21 Ch. Div. 1;

*Barstall v. Fearon*, 24 Ch. Div. 126.

*Macnaghten*, Q.C. and *Northmore Lawrence*, for the surviving trustee of the settlement, argued that revivor was not allowed merely for the purpose of appealing against a decree which had been fully worked out, particularly when the time limited for appealing had long since expired.

*Romer*, Q.C. and *B. B. Rogers* for the legal personal representative of the plaintiff.

*Grosvenor Woods* in reply.

CHITTY, J.—This is an application for an order to carry on the proceedings in the suit of *Fussell v. Dowding*. The position of the applicant is this: She alleges, and I understand has given *prima facie* proof, that she is one of the next of kin of Mrs. Fussell. Mrs. Fussell instituted a suit in 1872, and in July of that year a judgment was made which was final on the face of it. It was a declaration that she was entitled absolutely to the whole of the property comprised in her marriage settlement, and that was followed by a direction that the trustees should transfer the property over to her. It is not for me to say whether that decree was right or wrong. I think I ought to assume that it was right. Mrs. Fussell had obtained a final decree of divorce from her husband, and she contended that, on the true construction of the settlement, the dissolution of the marriage was equivalent to death, and Lord Romilly so decided, and consequently he held that she was entitled to the fund absolutely under the trusts of the settlement, on the footing that she survived her husband. If she had died in her husband's lifetime, which she did in fact, as it afterwards turned out, the funds would have been held not for her absolutely, but in trust for such persons as should be of her own kindred, in whose favour she might make an appointment, and in default to such persons as would be entitled under the Statute of Distributions in case she had died intestate and unmarried

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The decree, as I have said, was final, and there has been no objection brought forward as to the suit having been improperly constituted at the time the decree was made, or as to the suit having been improperly conducted. The circumstances were such that it was impossible to make her next of kin parties, because, she being alive, her next of kin under the statute of Distributions were necessarily an unascertained class. If a decision is wanted, I refer to the case of *Clowes v. Hilliard* (4 Ch. Div. 413), for the purpose of showing that persons in that situation could neither have maintained a suit themselves, nor would they have been necessary or proper parties to any suit that might have been instituted by anyone else. *Ex necessitate rei*, they being an unascertained class, and a class that could not be represented by an individual member of it at the time, they were, according to the law of the court, not depending on any statutes, but, from the very necessity of the case, represented by the trustees. And the trustees in the suit did their duty, contested the case, and, notwithstanding their argument, the decree, which I have already referred to, was made. At the time when that decree was made the time for appealing was five years, and Mrs. Fussell has lived and died in the belief, which she was justified in entertaining, that that decree was final, and that the property which had thus been adjudged to belong to her did belong to her, and that it could not be taken away from her. Under those circumstances she made her will about five years after the date when the decree was made, and under that will the present applicant takes an interest. Nothing whatever remains to be done under the decree. Now the applicant avowedly asks for an order to revive simply for the purpose of appealing. When I say "revive" I mean to carry on the proceedings. The rule under which the present application is necessarily made is rule 4 of Order 17; and, passing by the introductory matter, I refer to the rule for the purpose of reading these words, only "where it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity." It seems to me that it has been held previously that the court has a discretion in making the order, and the applicant is bound to show that it is either "necessary or desirable" for the purpose of working out the decree. In this case the decree admittedly has been worked out, and the transfer of the funds was made years ago. The only object therefore is that there may be an appeal from the decree. It appears to me that, having regard to the observations which fell from the late Master of the Rolls in *Curtis v. Sheffield* (*ubi sup.*), the right principle for the court to act upon in cases of this kind, where the only object of a party asking for an order is to appeal, is that where there are no special circumstances in the case, where, for instance, there is no suggestion of collusion or fraud, or the like—where there is no irregularity, such as in the case of *Wolmsley v. Foxhall* (1 De G. J. & S. 451), where the decree had erroneously dealt with future rights—that the right rule to observe would be this; that such an order should not be made after the expiration of the time which is limited for an appeal, now one year. It is not necessary for me to go so

far as that in the case which I am dealing with, because a period of something like twelve years has elapsed since that decree was made. I think that the application ought not to succeed, that it certainly is not "necessary," nor in my opinion "desirable," that such an order should be made. It is for the benefit of all suitors that they should be able to act on a judgment which, on the face of it, is final, after the time has elapsed for the bringing of any appeal, and I think they are entitled so to act and treat that judgment as final unless there are special circumstances, which I am quite clear there are not in this case. It is said by Mr. Grosvenor Woods that there is a hardship in the case, because the next of kin were not before the court, but they were before the court in the only way in which they could be. They were represented by the trustees, and the trustees did their duty to them. I think I should be making a very evil precedent, one that would be most injurious to suitors, particularly having regard to the amended practice under which the court can appoint parties to represent other persons in a suit, if I were to say that the fact alone that they were not actual parties, but only represented, is a ground for making such an order as is asked for. I hold that the application fails, and must be refused with the usual consequence.

Solicitors: Robinson, Preston, and Stow; Guscotte, Wadham, and Davr.

# QUEEN'S BENCH DIVISION.

Thursday, June 12.

(Before MATHEW and DAY, JJ.)

REG. v. FLETCHER AND OTHERS. (a)

*Bastardy—Issue of summons—"Such justice of the peace shall thereupon issue his summons"—The Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), s. 3.*

*By the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) any single woman who may be with child, or who may be delivered of a bastard child, may, within the time therein specified, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, "and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty sessions to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."*

*On the 15th Jan. 1884 a single woman made application under the said section to a justice of the peace, who thereupon issued a summons to the putative father to appear on the 1st Feb. On the 1st Feb. the putative father, by his solicitor, objected to the said summons on the ground that it was not duly served, and thereupon another justice issued a fresh summons returnable on the 15th Feb. On that date the case was heard on its merits, no objection being taken to the summons, and an order was made on the putative father for the payment of 5s. per week.*

*Held, on rule for certiorari, that the issuing of the*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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*summons by a justice of the peace other than the justice to whom the application was made was an irregularity waived by the appearance of the putative father and his failing to take the objection at petty sessions, and not an illegality nullifying the order, and that the order was therefore good.*

THIS was a rule *nisi* for a writ of *certiorari* to be directed to justices of Worcestershire commanding them to bring up a bastardy order made by them to be quashed on the ground that they had no jurisdiction to make the said order.

The circumstances under which the order was made were as follows:—

On the 15th Jan. 1884 the mother of a bastard child made an application under the 3rd section of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) to a justice of the peace for the county of Worcester, acting for the petty sessional division in which she resided, for a summons to be served on the man alleged by her to be the father of her child, and the said justice thereupon issued his summons to the man so alleged to be the father to appear at a petty session to be holden for that petty sessional division of the county on the 1st Feb. On that day a solicitor appeared at the said petty session on behalf of the putative father, and took the objection that the summons had not been duly served. This objection was allowed by the justices, and thereupon a justice for the said county, who was there sitting at the said petty sessions, other than the justice to whom the mother had originally made application and who had issued the original summons, without any fresh application by the mother, issued a second summons returnable on the 15th Feb. On that day the case was heard upon its merits, and, no objection being taken to the summons by the solicitor who appeared for the putative father, an order was drawn up against the putative father for the payment of 5s. a week as from the 1st Feb. Objection being taken to this order on the ground that the magistrates had no jurisdiction to order the payment to be made from the 1st Feb., a second order was drawn up in accordance with the facts ordering the payment to be made from the date of the order, and on the face of this order it appeared that the application of the mother had been heard by one justice, and the summons on which the putative father had appeared and the order had been made had been issued by another. The putative father thereupon obtained a rule *nisi* calling upon the justices who had made the order to show cause why a writ of *certiorari* should not be directed to them commanding them to bring up the order so made to be quashed on the ground that they had no jurisdiction to make it under the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), ss. 3 and 4.

The 3rd and 4th sections of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) are, so far as material, as follows:

3. Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man

alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

4. After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child, under the provisions of 7 & 8 Vict. c. 101, of a sum of money weekly not exceeding five shillings a week for the maintenance and education of the child, and of the expenses incidental to the birth of such child, and of the funeral expenses of the child, provided it has died before the making of such order, and of such costs as may have been incurred in the obtaining of such order, &c.

*Paterson*, for the justices, showed cause against the rule.—The objection that the application of the mother was made to one justice, and the summons on which the order was made was issued by another, has no force to invalidate the order. It might have been a good objection, if taken at petty sessions to invalidate the summons; but the objection not being taken then is of no force now, but was waived by the appearance of the putative father. This case is concluded by *Reg. v. Hughes* (40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614), which was decided in 1879 by nine judges against one, Kelly, C.B. dissenting. There a police constable procured a warrant to be illegally issued without a written information on oath for the arrest of T. upon a charge of assaulting and obstructing him in the discharge of his duty. Upon such warrant T. was arrested and brought before justices, and was without objection tried by them and convicted. The police constable was afterwards indicted for perjury committed on the said trial and convicted, and it was held that he was rightly convicted notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge though the warrant on which the accused was brought before them was illegal. So here the justices had jurisdiction to hear this case, the irregularity being of much less importance. The fact that that was a case of assault makes no difference. The case of *Reg. v. Fletcher* (24 L. T. Rep. N. S. 742; L. Rep. 1 C. C. R. 320), however, in 1871, is a bastardy case. It was under 7 & 8 Vict. c. 101, s. 2, which provided that where application for a bastardy summons is made before the birth of the child, the woman shall make a deposition upon oath, and there the prisoner was convicted of perjury



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alleged to have been committed on the hearing of a bastardy summons which had been issued before the birth of the child, upon the application for which no written deposition was made, but only a verbal statement upon oath by the woman. The prisoner appeared to the summons and made no objection to its validity or to the jurisdiction of the court, and it was held that the court had jurisdiction to hear the summons, and that the conviction for perjury was right. The justices therefore were justified in making the order, and the order is good. He also cited

*Ex parte Johnson*, 8 L. T. Rep. N. S. 275; 3 B. & S. 947.

A. T. Lawrence for the applicant.

H. Dickens for the putative father.—The order is bad, and cannot be said to have been waived by the putative father, since he never knew, and had no opportunity of knowing, of the illegality of the summons until the first order had been objected to, and the second drawn up. In the case of *Reg. v. Fletcher (ubi sup.)* the finding of the court was not that the justices had jurisdiction in spite of the statute having been disobeyed, but that the statute had not been disobeyed. Bovill, C.J. says: "I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient;" in fact, that the woman did make a deposition upon oath. The other case cited (*Reg. v. Hughes*, 40 L. T. Rep. N. S. 685; 4 Q. B. Div. 614) was a case of assault, and is not an authority on this point, because it was not a case in which the jurisdiction of the justices was founded on statute. In this case the statute had clearly not been complied with, and therefore the justices never had any jurisdiction. [MATHEW, J.—Did you not waive the non-compliance.] The summons contains no statement as to before what justice the application was made, and the putative father did not, and could not, know of the defect, and therefore cannot be said to have waived it. But it was not an irregularity which could be waived, but an illegality which could not in any way be waived, the condition precedent necessary to give the justices jurisdiction being absent. The case of *Reg. v. Pickford* (4 L. T. Rep. N. S. 210; 1 B. & S. 77; 30 L. J. 133, M. C.) is parallel to the present. There a single woman, having been delivered of a bastard child, within twelve months obtained a summons upon the putative father, but he having absconded it was not served. More than twelve months after the birth the justice who issued the summons died; and, the putative father having returned, she applied to another justice, and a summons was issued and served, and the justices made an order of maintenance, and it was there held that the second justice had no power under 7 & 8 Vict. c. 101, s. 2, to issue a summons, and therefore the order was bad. Here the second justice had no power to issue a summons under the Act of 1872, no application having been made to him by the mother, and therefore the order is bad. [MATHEW, J.—You were entitled to take the point before the justices, and demand strict proof that the summons was issued by the justice who heard the application, but you omitted to do so.] This is an illegality which cannot be waived by such an omission. Further, the mistake made by the justices in their first order was a

mistake in point of substance, and could not be amended:

*Reg. v. Tomlinson*, 27 L. T. Rep. N. S. 544; L. Rep. 8 Q. B. 12.

[MATHEW, J.—I think not; it did not agree with the actual facts, and was therefore rightly amended; but is the hearing of the application and the issuing of the summons by the same justice essential to give the justices jurisdiction?] It is; the whole of the 4th section is based on the 3rd. [MATHEW, J.—Is it not rather based on the appearance of the person summoned?] No; the words are, "so summoned," i.e., in accordance with the 3rd section. [MATHEW, J.—It does not seem from the report that the putative father appeared in *Reg. v. Pickford*.] The court cannot go outside the order, which is bad on the face of it.

MATHEW, J.—I am of opinion that this rule must be discharged. The learned counsel who appears in support of it has failed to satisfy me that there is any such irregularity in the order he seeks to bring up as to entitle him to have it quashed. The circumstances of the case are very simple. In the first instance a summons was issued by a justice upon the application of a single woman, who had been delivered of a bastard child, directed to the man whom she alleged to be the father of the child, calling upon him to appear at a petty session to be holden on the 1st Feb. In the service of this summons there was some irregularity, and it became necessary to issue a second summons. A second summons was therefore issued by another magistrate for the 15th Feb., and properly served, and to this summons the defendant appeared, and, the case being investigated upon the merits, the magistrates found that the man so summoned was the father of the child, and an order was drawn up ordering him to pay 5s. a week for its maintenance from the 1st Feb. Objection was taken to this order, on the ground that the payment ought not to have been ordered to commence from the 1st Feb., and another order was then drawn up in accordance with the proceedings that had actually taken place. From this second order it appeared that an irregularity had taken place in the issue of the summons, inasmuch as it had been issued by one justice, another having heard the application. On these facts the learned counsel for the defendant has argued that the order of the justices is a nullity, and that they had no jurisdiction to make it, since, in order to give them jurisdiction, it is necessary that the summons should be issued by the same justice who hears the application. But the learned counsel has not convinced me that the arguments which influenced the court in the case of *Reg. v. Hughes (ubi sup.)* do not apply here. There a police constable procured a warrant to be illegally issued, without a written information or oath, and it was held that a person arrested upon it and brought before justices and without objection tried by them and convicted was rightfully convicted, notwithstanding that there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which the accused was brought before them was illegal. In that case therefore the appearance of the defendant was held to be a waiver of an irregularity of the



grossest kind, the man being arrested on an illegal warrant under circumstances entitling him to maintain an action for false imprisonment, and yet being held to be rightly convicted. In this particular case the justices had jurisdiction under the 4th section of the Act of 1872 on the appearance of the person so summoned. Up to that time the disobedience complained of to the letter of the 3rd section of the Act was a matter of substance, and if the defendant had chosen to take his stand and insist upon that objection, the magistrates would probably have felt themselves bound to entertain it and give weight to it, but the moment he appeared and proceeded to discuss the matter on its merits with his opponent, without taking the objection which was open to him, he waived that objection, and it ceased to be material. For these reasons, I think that the order of the magistrates was right, and that this rule must be discharged with costs.

DAY, J.—I concur.

Solicitors for the justices, *Gregory, Rowcliffes, and Co.*, for *W. H. King*, Stourbridge.

Solicitors for the applicant, *Hunt and Son*, for *Miller Corbet*, Kidderminster.

Solicitors for the putative father, *Kingsford, Dorman, and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Feb. 27 and 28.

(Before COTTON, BOWEN, and FRY, L.JJ.)

BAYLEY v. GREAT WESTERN RAILWAY COMPANY. (a)

*Right of way—Purchase by railway company—General words in conveyance—User for purposes of railway.*

*By the conveyance to a railway company of certain land purchased under the powers of their Act, on which was a stable, the premises were granted together with all rights, members, or appurtenances to the hereditaments belonging or occupied, or enjoyed, as part, parcel, or member thereof. Some years previously the vendor, for his own convenience, had made a private road on his own land from the highway to the stables, and had used it ever since. The soil of this road was not conveyed to the company, and no express mention of it was made in the conveyance.*

*Held, that the general words in the conveyance gave the company a right of way over the road so long as they used the premises as a stable, notwithstanding that the stables had been purchased for the purposes of their undertaking; and that the company was at liberty to use the stables as such until such time as they were required for the special purposes of the railway, or were sold as superfluous land.*

*Kay v. Oxley*, 33 L. T. Rep. N. S. 164; L. Rep. 10 Q. B. 360 and *Watts v. Kelson* (24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166) followed. *Decision of Chitty, J. affirmed.*

*Whether, when the company converted the stables to*

*other purposes connected with the railway, they could claim the right of way, quære.*

#### SPECIAL CASE.

In 1874 the Great Western Railway Company, under the powers given to them by the South Devon Railway Act 1872, gave the plaintiff notice that they required to take for the purposes of their undertaking a certain piece of land, with the messuage and stables standing thereon, which were further described in a plan and coloured pink.

By an indenture, dated the 14th Aug. 1875, and made between the plaintiff of the one part and the company of the other part, it was recited that the plaintiff Bayley was seised in fee simple in possession

Free from all rights of way and other incumbrances of the several pieces or parcels of land, messuage or dwelling-house, cottages, offices, stables, coach houses, greenhouse, carpenter's shop, sheds, buildings, out-buildings, yards, curtilages, gardens, and other hereditaments situate at Coxside, in the parish of Charles, in the borough of Plymouth, hereafter particularly described, and with their rights, members, and appurtenances hereby granted and conveyed, or otherwise assured and intended so to be, and which the South Devon Railway Company are, by the South Devon Railway Act 1872 and the public general Acts incorporated therewith, some or one of them, authorised to purchase and take for the purposes of their undertaking and works.

And it was witnessed that, in consideration of 15,330l. 12s. 2d. paid by the company to the plaintiff, the receipt of which sum, and that the same was in full satisfaction for the absolute purchase of the said several pieces of land, messuage and dwelling-house, and other hereditaments, with their and every of their rights, members, and appurtenances in fee simple in possession, free from all rights of way and other incumbrances, the plaintiff thereby acknowledged, the plaintiff conveyed to the company the hereditaments particularly described in the indenture and specified in a plan drawn thereon, together with all buildings, erections, sheds, walls, hedges, fences, trees, ditches, rights, members, and appurtenances whatsoever to the said several pieces or parcels of land and hereditaments hereby granted and conveyed, or otherwise assured or intended so to be, or to any of them belonging, or in anywise appertaining or deemed, taken or known, held, occupied, or enjoyed as part, parcel, or member thereof.

The stables were expressly mentioned as being conveyed, and the plan was a copy of the plan in the notice to treat.

The property so conveyed was a part of an estate which, at the date of the conveyance, had belonged to the plaintiff and his predecessors in title for more than eighty years.

In 1811 the plaintiff's predecessors in title built on a part of their estate not comprised in the conveyance to the company a row of houses called Brunswick-terrace, fronting Exeter-street, a public highway forming the northern boundary of the estate. For the convenience of these houses they made on their estate a private road from Exeter-street round to and along the back of the houses. This road, throughout its whole length, adjoined the land specifically described in the conveyance to the company and coloured pink. The soil of the private road was thus the property of the plaintiff, and was vested in him subject to the rights (if any) over the same.

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In 1823 and 1829 the plaintiff's predecessors in title built the stables comprised in the conveyance for the accommodation of the occupiers of the houses in Brunswick-terrace. These stables fronted the private road, and the doors had always opened on to it, and this road was at the date of the purchase and conveyance, and always had been, the obvious access to these doors. There were also windows in the stables overlooking the road. There were also doors and windows in the other side of the stables, opening on to and overlooking the land purchased by the company, which was a field, but there was no access to the private road from last-mentioned doors.

On the passing of the South Devon Railway Act 1872, the plaintiff let one of the houses in Brunswick-terrace to a Mr. Hayes, and in 1874 he let him the said stables on a yearly tenancy, determinable by a three months' notice. As tenant of the stables Hayes had access to and used the private road as a means of communicating with Exeter-street, and enjoyed the access of light and air through the windows overlooking the private road. At the date of the conveyance to the company both the stables and private road were in the possession of the plaintiff, the former subject to Hayes's tenancy.

No compensation was claimed by or paid to the plaintiff in respect of any rights of way over or user of the private road, and no claim was made for contribution by the company towards the expenses of its maintenance or repair. Although the stables were specifically mentioned, and comprised in the conveyance to the company, the private road was not mentioned or referred to therein in express terms. It appeared that the private road was outside the company's limits of deviation.

The plaintiff objected to the company using the private road, and insisted that he had a right to block out the access of light and air to the windows overlooking it. A special case was therefore settled, and the decision of the court was asked as to the following questions:

1. Whether the defendant company had any right of user of or right of way over the private road by virtue of their conveyance or otherwise?

2. Whether the company were entitled to an easement of light and air over the private road?

The special case was heard by Chitty, J. on the 21st Feb. 1883, when the second question was not contested by the plaintiff, and was therefore decided in favour of the defendants, and the first question only was argued.

*Inca, Q.C., J. W. Batten, and Dundas Gardiner,* for the plaintiff, referred to

*Thomson v. Waterlow*, 18 L. T. Rep. N. S. 545; L. Rep. 6 Eq. 26;

*Peachin v. London and Blackwall Railway Company*, 5 De G. M. & G. 851;

*Bolton v. Bolton*, 11 Ch. Div. 968;

*Simpson v. South Staffordshire Waterworks Company*, 12 L. T. Rep. N. S. 840; 24 L. J. 380, Ch.;

*Boslock v. North Staffordshire Railway Company*, 3 Sm. & Giff. 283;

*Norton v. London and North-Western Railway Company*, 39 L. T. Rep. N. S. 25; 41 Ibid. 229; 9 Ch. Div. 623; 18 Ch. Div. 263.

*Romer, Q.C. and Medd*, for the company, referred to

*Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*, 23 L. T. Rep. N. S. 518; L. Rep. 7 E. & I. 697;

*Earl of Sandwich v. Great Northern Railway Company*, 10 Ch. Div. 707;

*Kay v. Oatley*, 33 L. T. Rep. N. S. 184; L. Rep. 10 Q. B. 360;

*Barkshire v. Grubb*, 45 L. T. Rep. N. S. 333; 18 Ch. Div. 616;

*Langley v. Hammond*, 18 L. T. Rep. N. S. 858; L. Rep. 3 Exch. 161;

*Watts v. Kelson*, 24 L. T. Rep. N. S. 209; L. Rep. 6 Ch. App. 166;

*Allen v. Taylor*, 16 Ch. Div. 355;

*Gale on Easements*, 4th edit. pp. 80, 81.

[CHITTY, J. referred to *Polden v. Bastard*, 13 L. T. Rep. N. S. 441; L. Rep. 1 Q. B. 156, and *Leech v. Schweder*, 30 L. T. Rep. N. S. 536; L. Rep. 9 Ch. App. 463.]

CHITTY, J.—The questions submitted to the decision of the court on this special case are: First, whether the defendants have, by virtue of the conveyance to them, any right of user of or right of way over the private road referred to in the special case; and secondly, whether by virtue of the same conveyance the company are entitled to any easement for the access of light and air over the private road and other adjacent land of the plaintiff. Both these questions are submitted on the footing of the conveyance of the 14th Aug. 1875, and on any other grounds warranted by the facts as appearing in the special case. In regard to the question of light, it appears that the plaintiff, by the conveyance of 1875, conveyed to the defendant company certain parcels of ground and also stables, which stables abut upon the private road referred to. At the bar the plaintiff's counsel advisedly and quite rightly abandoned the case as to light, because they felt the force of this principle, that where a house is granted lights as enjoyed by the house at the time of the grant pass without any express words, or indeed any words whatever, which implies a grant of the lights beyond the term "house;" and of course the same principle would apply in all its force to a grant of stables. That being so, the question of the access of light must be decided in favour of the defendant company. Then comes the question which, upon the facts of the case before me, is one of some little difficulty, namely, whether the company have a right of user of the private road. The facts are these: The stables abut on the private road. There have always been doors in the stables opening on to the private road, which private road at the time of the purchase and conveyance was and always had been the obvious access to such doors. The road belonged, as to the soil thereof, to the plaintiff, and at the date of the conveyance the stables were in the occupation of a Mr. Hayes as tenant of the plaintiff; and he had, as a matter of fact, between himself and his landlord, and as I gather also as a matter of right the use of the road for the purpose of access. The tenancy was a yearly tenancy, determinable on a three month's notice. It is quite plain that at the date of the conveyance there was no right of way that was "appurtenant" to the stables, using the term in the legal and strict sense. It is equally plain that the way was enjoyed as a matter of fact by the tenant. It is equally plain, from what I have said, that this was the obvious access to the stables, and the first question that I have to consider is, what is the true construction of the conveyance itself? I should say that part of the argument adduced by the plaintiff's

counsel on this question was that, where a railway company takes a conveyance of land simply, and there is, as "appurtenant" to that land, in the legal and strict sense of the term, a right of way, that right of way does not pass, because the conveyance is to a railway company. That argument may be disposed of in two or three words. The Lands Clauses Act, under which this conveyance was made and under which these lands were taken, contains a schedule which is referred to in the 81st section of the Act, a section which enacts that a conveyance of lands to be purchased under the provisions of that or the special Act may be according to the forms in the schedules (A.) and (B.), and schedule (A.) is a form of conveyance to the company of the lands purchased "together with all ways, rights, and appurtenances thereto belonging." That, in my opinion, shows clearly that, if the railway company takes a conveyance, and there are no express words in the conveyance one way or the other, the Legislature considers that the right of way which was appendant or appurtenant to the lands in question should pass. As if the Legislature had foreseen that such a question as this might arise, in order to prevent any question of the kind arising they introduced in the statutory form the words, "together with all other ways, rights, and appurtenances thereto belonging." Therefore I should decide, if this were the only question before me, that the right of way which was legally annexed to the property conveyed would pass to the railway company. But, as I have said, in this case it cannot be contended on the part of the railway company that there was any right of way which, in the strict sense of the term, was "appurtenant" to the stables; but, on the part of the railway company, it is said that there is an express grant of the way in question. Every part of the deed has been referred to in the argument, and, therefore, I will go through the deed at somewhat greater length than I should have otherwise thought necessary. [His Lordship then read the material portions of the deed as above stated, and continued:] Upon that the railway company argue that there is an express conveyance of a right of way created by deed for the first time by virtue of the words I have read; and they say that, though the right of way did not at the date of the conveyance exist as a right of way, there is a reference to the user, and the user and enjoyment at the time must be regarded, and that when you find that the way was enjoyed, not as of right, but in fact, at the date of the conveyance, the words are sufficient to pass it. The difficulty in the company's way at first sight are the words "rights, members." On the part of the plaintiff it is said that those words refer only to those rights which are enjoyed, so to speak, "as of right;" and it is pointed out that the term "ways" does not occur in this deed. That is quite true; but, having regard to the decisions on this point, one or two of which I will mention presently, I think there is enough on the face of this conveyance to show that the term "rights" is not used in its strict legal sense throughout this clause. It is no doubt used in the earlier part of the clause as "rights" in the strict sense, but, when you come to the latter part of the clause, it appears to me that the term "rights" must be used in some secondary sense, and as

denoting something less than the legal right. In point of law "rights" with reference to land would include all easements, and easements would include, as a subordinate class, rights of way; and it appears to me that the term "rights" is here used in that sense, and that, for the purpose of seeing what the parties intended should pass by way of express grant, I must look to the actual facts as they existed at the time of the execution of the conveyance. Besides that, I am entitled to look, and I do look, at the plan. On the face of the plan it appears that the stables abut upon the private road in question, and at the time when the deed was executed the tenant Hayes was in occupation of the stables, and had actually the user of the way for the purposes of going to and from them. Now, the user by the tenant clearly did not create an easement or right of way annexed to the fee simple of the land conveyed, because the user was only a tenant user over land which belonged to the landlord. If authority were wanting for that, *Gayford v. Moffatt* (L. Rep. 4 Ch. App. 138) is sufficient to show that no right is acquired so as to become annexed to the fee simple by the enjoyment, even as of right, by a tenant of a way over his own landlord's ground. Before I go to the authorities I will mention the following point. During the argument I put this case to the plaintiffs' counsel: assume that a house abuts on a private road belonging to the owner of the house with its front door opening on to the private road, and that there is an ordinary back way to the house, so that as a matter of fact you could get into the house, not by the front door in the ordinary way, but by the back door. If in those circumstances the owner of the house and of the private road in front were to grant the house, and the deed were entirely silent as to the private road running in front, would the grantee of the house have a right of way? The plaintiff's counsel said "No;" and, as far as I am aware, there is no express decision on the point. But, if that point should ever come for decision, it seems to me it will be worthy of consideration, whether the same principle which applies to the grant of a house with reference to light should not apply to the grant of the house with reference to a way of this kind. I am assuming that in such a case there is a front door, and that the private road is the usual mode of access to the house as a house, a man not being in the habit of approaching his own house by the back door. I quite admit that in point of law there is a difference between the easement of light, which is always permeating the open spaces which form the windows of a house, for in that sense, no doubt, the easement of light is continuous, whereas, as regards a right of way, that is a discontinuous easement, because a man is not always walking in and out of his front door; but at the same time the reason why the easement of light passes as against the grantor is because the grantor has granted the house in the state in which it is. It seems to me there is strong ground for holding, if the point should come up for consideration, that in the case I have put, of the right of way, there is in like manner a grant of the house to be used as the house stands, and that the ordinary mode of access to the front door is one that ought to pass. But that is not the case I have now to consider. Substituting "stables" for "house," the case is no doubt exactly similar to the one I

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have put; but there are in the particular conveyance before me words which, on the true construction of them, appear to me to be an express grant of the way actually used at the time. Here there is only this one way: it is not a question of half-a-dozen ways or accesses, but this is the obvious mode of access to these stables. No doubt the horses could be taken out, and the carriages also, by the back door of the stables across the field; but that is not the way in which stables are ordinarily used. The horses are taken out of the front door of the stables, and so are the carriages. For these reasons it appears to me that in this case there is a grant of a way, considering this as a conveyance between ordinary parties, and quite apart from the question which has been raised as to whether any difference ought to be made because the grantee happens to be a railway company. But before I leave this part of the case I will refer to the authorities which appear to me directly in point. On the construction of the deed the first case to which I shall refer is that of *Kay v. Ooley*, where the words of the conveyance were "together with all . . . ways and rights of way . . . easements and appurtenances to the said dwelling-house, cottage, and hereditaments, or any of them, appertaining, or with the same, or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them or any of them, or appurtenant thereto." The Court of Queen's Bench held that a private way which was actually used or enjoyed at the date of the conveyance passed, although it was not strictly appurtenant. In *Barkshire v. Grubb Fry, J.*, having before him a case of rectifying a deed of conveyance, considered that he ought to suppose that the deed which was executed in pursuance of an informal agreement contained the ordinary general words; and he goes on to say: "I think that among the general words would have been found a grant of 'all ways now used or enjoyed with' the blue land." It was the owner of the blue land under the informal agreement for partition who was claiming a way over a clearly defined path constructed over another portion of the land which was the subject of the agreement for partition, and Fry, J. held that a right of way over this clearly defined path would have passed if the words had been such as he assumed ought to have been contained in the conveyance. Quoting from the judgment of Mellish, L.J. in *Watts v. Kelson*, he says: "I am not satisfied that, if a man construct a paved road over one of his fields to his house, solely with the view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field. And," continues Fry, J., "when he afterwards delivered the considered judgment of the Court of Appeal, he said (L. Rep. 6 Ch. 174), 'We may also observe that in *Langley v. Hammond* (18 L. T. Rep. N. S. 858; L. Rep. 3 Ex. 161) Bramwell, B. expressed an opinion in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words.'" Then Fry, J. says: "I adopt that view. I think that when there are two adjoining closes, and there exists over one of

them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously." That passage shows that he understood the language of Mellish, L.J. and Bramwell, B., when they used the term "with the ordinary general words" to mean the ordinary general words which in our time have been always inserted by conveyancers; namely, words which go beyond merely that which the law itself would imply from a grant of the easements which already are annexed to the land—words such as "together with all ways now used or enjoyed therewith," and which, according to my reading of this deed of conveyance, are to be found here. I think it unnecessary for the purpose of this judgment to refer to any other authorities. Now comes the question whether any difference is to be made in the construction of this instrument of conveyance because the grantee happens to be a railway company. Upon that it is said that a railway company can only take the lands included in their notice to treat, and that the lands in this particular case included in the notice to treat were the lands coloured pink and nothing more, also that in the notice to treat they did not suggest that they were going to take a right of way. It is also said that the way itself—the site of the private road—is outside the limits of deviation. But the question before me is not one of rectifying the deed; I must take the deed as I find it; and upon the construction of the deed I do not find that ambiguity which the counsel for the plaintiff say, on the reading of the deed as a whole, exists. The way in which they shape their argument on this part of the case is, that in the first recital which I have read there is a reference to the statutory powers. But the mode in which that reference is made is well known to conveyancers. After the description of the lands and property, of which Mr. Bayley is said to be seised, there follow the words "with their rights, members, and appurtenances hereby granted and conveyed," throwing anyone who reads the recital on to the operative part of the deed. And the words which follow referring to the Acts of Parliament are only inserted in the manner well known to cautious conveyancers, so as not to limit that which has gone before; they are not inserted for the purpose of cutting down the previous recital in any way, but merely state an additional fact with reference to the lands. A similar observation occurs with regard to the body of the deed where the money is said to be paid for the purchase of the "said" lands "with their and every of their rights, members, and appurtenances," the word "said" throwing you back to the recital, which recital again throws you forward to the body of the deed where the description of the parcels and the general words are to be found. It seems to me that there is not any ambiguity in this deed, and that I ought not to give effect to the argument which is put forward as against the defendants, that they are a railway company. The railway company buy the land, and they buy the stables, and they have paid for the stables as such; and as part of the price which they have given for the stables they must

have paid a sum of money which would permit the enjoyment of the stables as such, including therefore a right, which I say is expressly granted, of going to and from these stables by the ordinary mode of access. For these reasons I think the plaintiff's claim fails wholly. It fails admittedly as to the lights, and I think, for the reasons I have stated, that it fails also as to the right of way. There must, therefore, be a declaration that the company have a right of user of this private road.

From this decision the plaintiff appealed.

*Littler, Q.C. and J. W. Batten* for the appellant. —The stables and road have always been in the possession of the same owner, and therefore no right of way existed at the time of the conveyance. Therefore no right of way passed under the general words:

*Thomson v. Waterlow*, 18 L. T. Rep. N. S. 545; L. Rep. 6 Eq. 36.

The fact that the purchaser is a railway company makes a difference in our favour, as the rights of a public company over their land are much more restricted than the rights of a private person:

*Bosack v. North Staffordshire Railway Company*, 3 Sm. & Giff. 283; 4 E. & B. 798.

Both parties contemplated that the premises should be used for the purposes of the undertaking, and not as a stable. The user of the stable is inconsistent with the purposes of the defendants' Act:

*Norton v. London and North-Western Railway Company (ubi sup.)*;

*Mulliner v. Midland Railway Company*, 40 L. T. Rep. N. S. 121; 11 Ch. Div. 611.

The case of *Kay v. Oxley (ubi sup.)* differs from the present case, as it was a dispute between private persons.

*Webster, Q.C., Romer, Q.C., and Medd*, for the defendants, were not called on.

COTTON, L.J.—This is an appeal from Chitty, J. upon a judgment given by him on a special case stated between the plaintiff and the Great Western Railway Company. The only question which we are asked to decide is this, whether the defendant company have any right of way over a particular private road by virtue of the conveyance to them of the 14th Aug. 1875. There is another question asked, but that was abandoned in the court below, and has not been raised here by the plaintiff. Chitty, J. decided in favour of the company. I may state, and I may have to advert to it again, that no question is raised in this case that the company are using this stable which has been conveyed to them, and the land which has been conveyed to them, in a way contrary to the provisions of their Act of Parliament, or that they could be restrained from allowing the stables to be used for the purposes for which they are used. The conveyance, subject of course to the arguments which have been relied on as to the position of the railway company, the grantee, is that which must govern this case. The railway company gave notice to take and took a large block of land, in one corner of which, the north-west corner, there was a stable, and before the gate of that stable there was a private road made by the owner of the property taken by the railway company, and of the adjoining land, for the convenience of himself and other occupiers of the stable. At the time it was taken by the company

the owner did not himself use the stable, as he had done for his horses, but it was let to a tenant, and the access used for the purpose of getting horses and carriages to the stables was that private road, the right to use which is the question in the case. Now, the conveyance between the plaintiff and the predecessor in title of the present defendant company, the South Devon Company, conveyed to the railway company "all those pieces or parcels of land, with the messuage or dwelling-house, cottages, offices, stables," expressly mentioned, "and coach-house thereon," and then there are general words, "with all buildings, &c., rights, members, and appurtenances whatsoever, to the said several pieces or parcels of land and hereditaments hereby granted and conveyed, or otherwise assured or intended so to be, or any of them, belonging or in anywise appertaining, or deemed, taken, or known, held, occupied, or enjoyed as part, parcel, or member thereof." Now, undoubtedly, as this stable was so sold, and the piece of land over which the access to the stable was enjoyed was in the hands of the same owner, no easement in the right of way was acquired, but the way was actually enjoyed by the occupier of the stable for the purpose of access to that stable, and it was hardly contested, and I am of opinion it could not be contested, that, as between ordinary grantor and grantee of this stable, there would have passed with the stable on a conveyance of the stable a right to use that road, which was a reasonable access to the stable, and which as a matter of fact had been enjoyed with the stable as the means of access thereto. If the road had been the property of anyone else, and had been so enjoyed, it would have become an easement. It was not an easement, but it was a right to use it which passed to the grantee of the stables as that which had been used and enjoyed with, and had been held, occupied, and enjoyed together with the stables. That was not contested, nor could it have been. Then it was said that the position of the railway company made a difference, and that was really the main argument before us. Before I go to that I may observe on one particular word in the parcels, namely, "stables and coach-house." It was said that might just as well have been described, having regard to the purpose for which this land was sold to the company, as a piece of land covered with bricks and mortar. But, if one is to rely on words, we do find the words "stables and coach-house," and that together with them there are general words, which pass all those rights and members used, enjoyed, or occupied therewith. Why should the stables being used by the company make any difference? It was put in two ways: First, that, if these words are doubtful, one ought to consider the use for which the purchaser bought it. One case was quoted where words which, on their fair and reasonable construction, bear a particular meaning were cut down by considering the purposes for which it was intended the land should be used. Undoubtedly, when a grant is made for a particular purpose on the principle that with a grant passes that without which the thing granted cannot exist, you do take into consideration that purpose which was in the minds of both parties when the grant was made. But here what we are asked to do is, that, in consequence of the fact of their

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being a railway company who buy, we are to cut down what otherwise would be the fair meaning of these words; that is to say, to give an effect contrary to that which, upon their interpretation as between vendor and purchaser, they ought to bear. It was put in this way: that railway companies only have authority to do that which their Acts give them authority to do, and that the court have expressly cut them down from using what they bought for one purpose for another and different purpose. But that is limited in this way: when a company is intending to alter the land which it has bought, or to construct on it works or other things which will interfere with the rights previously enjoyed by the adjoining owners, the court will say, You are authorised to make a railway; and whatever the result of that may be, subject to compensation, if compensation is given, the adjoining owners must bear it. But when they are doing something on their land, either by digging a shaft or erecting a building, or otherwise, which they are not authorised to do, then the court has a right to interfere on the ground that they are abusing their parliamentary power by which they acquire the land. What is the position of things here? If the parties intended so to prevent the user of these stables, and the right of way to them, of course the natural way would have been to have covenanted. Can it be said that the words here are equivalent to such a covenant? In my judgment, no. If there were an express covenant not to use it as a stable, then the use of the right of way to the stable would probably be entirely prohibited, and if they were prevented from using them as stables, then the right to use them as a way to stables would cease when the injunction was granted which prohibited them from using them as stables. But there is nothing to compel us to arrive at that conclusion except the argument that railway companies must be confined within their powers. Undoubtedly they could only buy this land if they honestly required it for their own purposes. But what does Parliament say? Parliament says that, if a railway company do not use their land within a limited time for the purposes of their undertaking, then it becomes superfluous land, and goes to the adjoining owner or to the person from whom it was bought. During that period, which cannot yet have arrived, the land, even though not used for the actual purpose of the railway, is retained, and at the end of the time when it becomes necessary to inquire whether it has become superfluous land, if the railway company say, and the court is satisfied that they are saying so honestly, "Though we have not applied it to any railway purpose, yet we do honestly require it for a purpose which will arrive in a limited period," the court allows them to keep it. What are they to do within the period during which they are not bound to sell, and although they have not used it for a particular purpose, are not bound to treat it as superfluous land? They may not erect upon it anything which, altering the character of the ground, would interfere with rights of neighbours. That is that case which was referred to of *Norton v. The London and North-Western Railway Company* (*ubi sup.*), before Malins, V.C. But is there any decision or any statutory enactment which will prevent them from using their land in the same state and condition without making any altera-

tions, or building, or otherwise which would interfere with the rights of their neighbours by the interim use of it until the time arrives when they must either sell it or satisfy the court that they are keeping it for the purposes of their undertaking? In my opinion, during that time they have a perfect right to use it in the same state in which it was conveyed to them; not to alienate it, or to do an act which will prevent them from using it for purposes of their railway, but using it by way of interim user till the time arrives when they apply it to the purposes of their undertaking. Therefore, in my opinion it cannot be said that using these stables as such till the time arrives when they must either sell them or satisfy the court they intend to use them for their railway purposes, is wrong and prohibited by Act of Parliament. That being so, so long as these stables are lawfully used as stables (and, if they are unlawfully used, they can be stopped by another proceeding which we are not considering here), on the construction of the grant to them they had and have a right to use the right of way which passed by the grant to them of the stables with the "members used and enjoyed therewith." Then it is said that the case of *Mulliner v. The Midland Railway Company* (*ubi sup.*) is against that; but in that case the railway company, having constructed their railway, had purported to grant a perpetual right of way to the plaintiff, and he sought to make use of that for the purpose of preventing them from carrying out some further railway purposes which required the user of this piece of land over which they had purported to grant him a perpetual right of way. They had therefore attempted in perpetuity to alienate the land which they only held for the purposes of their railway, and that was held bad. But that is an entirely different thing from what we are here considering, where we must treat it as if there is no ground for saying that they are improperly allowing these stables to remain. They may have lost their parliamentary powers for the purpose for which they originally bought these stables, but still at the end of the five years, or whatever the period may be which is limited in this Act, they have the right to retain them if they can show they can apply them to any other railway purposes. That leads me to another point. It has been urged on us that there are cases which say that when the need for the easement ceases the easement ceases; that is, that when this building which has enjoyed a right of way as a stable no longer is used as a stable, when it is pulled down and a station is built, if that is ever done, then the right which is granted to a stable will not exist for an entirely different purpose, namely, the passage of omnibuses, carts and carriages to the station. That question we are not considering. This building is being used as a stable only, and the sole question between the parties is, while that is so, have the railway company by virtue of their conveyance that right of way which was enjoyed as appurtenant thereto by the occupier of the stable, not in law but in fact? That really disposes of the principal arguments which have been addressed to us, but I may mention one which was somewhat pressed on us, though I cannot see that it can interfere with the true construction of this grant. It was said that under this grant for the company to acquire



the right to use this way would be contrary to the view of Parliament requiring a railway company always to state most particularly what they intend to acquire and what access they intend to make. Now, as regards what they intend to acquire, if acquiring this stable carried with it not the soil of the road but the right to go over that road, they have given the notice that is required. The argument seems to me not sufficiently to discriminate the difference between claiming to have the soil of the road and claiming to have a right to go over the road as it had been previously enjoyed, together with the stables, and as we hold it passed with the grant of the stable. As regards the other matter, as to the access, that in my opinion does not mean that, if by buying a house they buy as belonging to it a right to use a certain way, they are to indicate that, but only that, if they require to take land or make a road to their works, they are to indicate that. In my opinion the decision of the court below was right, and the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion, and I confess I think it is a very clear case. The question is whether the defendant company has any right of user over this way between A and B coloured green on the map. That question must mean whether the defendant company have any right of user over this road, assuming that the premises are in their present state. We are not asked to speculate or conjecture whether they will have a right of user under some other circumstances different from the present. I only mention that to prevent it being supposed that the company may not do something on the pink ground which may destroy the right of way which at present exists between A and B. It is not necessary to consider that. This private road or way which is claimed is a way to the stable, which was sold to the company by the conveyance of the 14th Aug. 1875. Now the first matter we have to consider is whether, assuming this were a conveyance simply between ordinary individuals, the right of way to this stable would not pass; and the second point which will have to be decided is, whether any distinction arises owing to the fact that the grantor here is granting to a railway, and the grantees are the company who take. First, as to the terms of the conveyance, I think that this case is a pure case of construction of the conveyance, and must be governed by the construction placed upon it. In considering this conveyance, in reference to rights like rights of way (and I put aside apparent easements for the moment), the cases fall into two classes: first of all, cases where rights of way arise by simple implication; and secondly, where they arise owing to the express words of the conveyance. In the first class of cases, namely, cases of implication, it may be assumed for the moment that there are no words which indicate an intention of the grantor about the right of way; but we are left to gather it from the fact that he has made a grant of premises to which this right of way is, or is supposed to be, annexed. The rule about rights of way which arise from implication is simply this, that on a severance of the properties, anything like a right of way or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too.

The principle is, that the grantor is assumed to have intended that his grant shall be effectual. When two properties are severed, the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way. This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary. Here we have express words, and what we have to decide is, whether this is a way which the owner by appropriate language has shown an intention to grant. Now, let us look first of all at the facts. The facts are, that the owner has granted the stable, and this is a hard beaten road which has been the only way by which access to the stables has been had. There were doors to the stable leading on to the field and not facing to the road itself. But this road between A and B has really been the path to the stables. Let us see what the grantor has said. He has said that he grants the premises, including the stables, "together with all buildings, erections, sheds, walls, hedges, fences, trees, ditches, rights, members, and appurtenances whatsoever to the several pieces or parcels of land and hereditaments hereby granted and conveyed, or otherwise assured or intended so to be, or any of them belonging or in anywise appertaining, or deemed, taken, or known, held, occupied, or enjoyed, as part, parcel, or member thereof." It is quite true that the words "part, parcel, or member thereof" seem somewhat inapt to apply to an easement of a right of way which cannot be said to be "part, parcel, or member" of the premises granted. Still, taking the thing broadly and endeavouring to judge what the intention of the parties as expressed by their language is, it seems to me that the grantor intended to give, and that the company should have all such rights in the nature of rights of way as were *de facto* occupied or enjoyed at that time as appurtenant to the premises. It is quite true that this, at the moment of the grant, was not a right of way. It was only a way. Does that make a difference? That, again, is a question of construction, and the authorities which have been cited from *Thomson v. Waterlow* (*ubi sup.*) downwards are really authorities, it seems to me, on the construction of similar deeds which may be used for the purpose of verification, but are not actually conclusive. In *Thomson v. Waterlow*, which was decided by the then Master of the Rolls (Lord Romilly), it was supposed that a distinction must be made between the cases where some road or right of way had existed before the unity of possession, and that in that class of cases words like these might revive a right of way which had previously existed, but would not operate to create a right of way which had never been a right of way before, but had been a way used during the unity of possession. That decision was disapproved of by the Court of Queen's Bench in the case of *Kay v. Ousley* (*ubi sup.*), and Lord Blackburn says: "If the words had been 'together with the right of way which Green *de facto* has enjoyed of passing over the private farmyard,' supposing that had been a right of way never



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enjoyed as of right, but merely a way *de facto* used still, I think the words would have clearly enough created a right of way." That is to say, he would have construed the words as creating a right of way, even if they had been a little obscure. A similar view was taken in this court in *Watts v. Kelson* (*ubi sup.*), though it was not necessary for the decision. It is not actually a case in point, but the point which had been raised in *Thomson v. Waterlow*, and which it is necessary for us to consider in the present instance, was considered again by Fry, L.J., in the case of *Barkshire v. Grubb* (*ubi sup.*), where his Lordship said, after alluding to the point made in *Thomson v. Waterlow* by the Master of the Rolls, and in *Langley v. Hammond*, which had drawn a distinction between the right of way which had existed before unity of possession, and ways which had only been enjoyed *de facto* during the possession: "And accordingly the doubt which was introduced by these cases seems, I am happy to say, to have been dispelled by the cases of *Kay v. Oxley* and *Watts v. Kelson*, which have restored the law as it had been settled by the earlier decisions." Then he quotes the passage from Lord Blackburn's judgment in *Kay v. Oxley*, which I have referred to. That seems to me really sense. It is still a question of construction. I think one must look at the particular words of every particular deed. But these cases, as summed up and expounded by Fry, L.J., in the recent decision of *Barkshire v. Grubb*, show this, that the mere fact that the way did not exist as a right of way before unity of possession, and was only enjoyed as a way before unity of possession, will not prevent the court putting such a construction upon general words, which *prima facie* might apply to rights, and not to ways enjoyed *de facto* only, as is to be gathered from the intention of the parties. That, I think, is what the Lord Justice decided in *Barkshire v. Grubb*, and, as he will give judgment in this case, I express my view in the hope that, if I have misread his decision, he will say so. Therefore, if this is to be taken to be a conveyance between ordinary parties, these words would create to my mind a new right of way as appurtenant to the use and enjoyment of the stable. Is that view to be affected in any way by the mere fact that a railway company is one of the parties to this conveyance? Mr. Littler has put his point in two ways: he says first of all, that the known object of the conveyance here was not that the stable should be used as a stable, but that it should be pulled down, and therefore he says that restricts in some way the grant, or ought to induce us to put a different construction upon it to that which we should otherwise apply. But the known object of the conveyance, as has been pointed out by Cotton, L.J. from the knowledge of the object of the conveyance, does not raise an implication of a covenant to use the premises only for the purpose for which the parties know it is going to be used. The case where there is an implied covenant by a grantor not to derogate from his own grant and to allow the premises to be used by the grantee for the purpose he knows they are intended to be used, is a converse principle which has nothing to do with such a proposition as that for which it has been used as an illustration, and I do not think that in law or sense it can be said that, because

the vendor knows, or thinks he has reason to know, the vendee is going to use what he buys for a particular object, that therefore the vendee is to be assumed to have bound himself by implication never to use it for anything else. That I believe would introduce a principle for which there is no foundation in reason or law. Then Mr. Littler also puts it in this way. He says it is contrary to the Act of Parliament that this should be used as a stable. In my mind it is not. I take issue with him on the fact. It is perfectly true that railway companies only acquire land for the legitimate objects of their railway. Without considering in the present instance, which I do not think it is in the least necessary to do, under what circumstances railway companies can be prevented from making an improper use of the land they acquire by the statutory powers for railway purposes only, to my mind it is obvious here that there is not the faintest reason for thinking that the use of the stable as a stable during the interim period which elapses before it either becomes superfluous, if it ever does become superfluous land, or before they put it to the use of their undertaking, would be contrary to law. They might not have of necessity to convert it for many years, and to say that during that interim period they should not be allowed to use the premises in the state in which they bought them, would be contrary to sense, and I believe absolutely inconsistent with the train of thought which passed through the mind of those who decided both in the House of Lords and in this court the cases of which *Hooper v. Bourns* (37 L. T. Rep. N. S. 594; 42 L. T. Rep. N. S. 97; 3 Q. B. Div. 258; 5 App. Cas. 1) is an illustration. The class of cases where railway companies are prevented from depriving themselves of the power of using their land for the railway purposes for which they have bought it are totally, it seems to me, beside the present case. Therefore I come back to what I started with, that this is a question upon the construction of the deed, and upon the true construction of this deed I think this right of way passed, and that the appeal fails.

Fry, L.J.—I agree with my learned brothers in this case. The first question, and I think the whole question, is one of construction. It appears to me that the cases of *Watts v. Kelson* (*ubi sup.*) and *Kay v. Oxley* (*ubi sup.*) have laid down a general principle of construction which, I think, may be stated in this way: that, if one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that, if two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser retaining Whiteacre, then, in my opinion, the grant of Blackacre, either "with all rights usually enjoyed with it" or "with all rights appertaining to Blackacre," or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre. That appears to me to be the result of those cases. Now, in the present case there is no doubt but that there was a made and visible way used for these stables. What is the conveyance to the company? It grants, among other things, the stables, and it grants them (I have selected such words as

appear to me to be material) "together with all rights to the said hereditaments hereby granted, or any of them, belonging or in anywise appertaining or enjoyed as part, parcel, or member thereof." Now it is plain the parties to this conveyance considered that rights could be enjoyed as part, parcel, or member. What the precise legal effect of those words is may not be very clear, but it is quite plain that, used as they are by the parties to this instrument, they must mean a right relating to or enjoyed with or for the benefit of a tenement or part of a tenement. Now this visible road was used in fact at the time of the conveyance, and was enjoyed, therefore, as if it were a right and attached to the stables, and, in my judgment, that passed by the effect of the instrument itself. Now, if there were any doubt about this point, I should think that the reference to the plan upon the conveyance made it more plain, because there the road in question is indicated, like all the other roads, by the colour brown. That seems to me, as it appeared to Chitty, J. in the court below, to be an indication of the intention that, as between the parties, this road should be treated as a road. Does it, then, make any difference that the grantee, instead of being an individual, is a railway company? I think it makes no difference. The point has been argued in two ways. In the first place, it has been said that the words being ambiguous the court ought to give a narrower interpretation to the words where the grantee is a company having limited powers and limited objects to what it would in the case of a private owner; but, in my opinion, the words in this case are not ambiguous, and there is really no doubt as to the meaning of the words. Therefore that argument fails. It has been then said that there is an implied reservation to the grantor of this right of way in such a manner as to prevent the grant taking effect for the benefit of the company; but, in the first place, there is the broadest distinction between implied grants, grants which may be implied for the object for which the grant is made, and implied reservations. That is a point which this court had to consider not very long ago (*Russell v. Watts*, 50 L. T. Rep. N. S. 673; 25 Ch. Div. 559), and the majority of the members of the court felt that distinction to be a very broad one. It appears to me as a general rule that a person who desires to reserve a right to himself must do so by express words, and there is great difficulty, if not impossibility, in holding that a right of this sort could be reserved by implication. But, in the present case, to hold that there was such a reservation would in my judgment be inconsistent with the terms of the deed, and nothing can be plainer than that such an implied reservation cannot be raised as would be inconsistent with the express terms of the instrument. That appears to me to be enough to determine the case. In saying that, I am not in any way withholding my assent from the other ground referred to by Cotton, L.J. in particular, and Bowen, L.J. also, and I assent to the view which they have expressed on those points.

*Appeal dismissed.*

Solicitors for the plaintiff, *Milne, Riddle, and Mellor*, agents for *S. Cater*, Plymouth.

Solicitor for the defendants, *R. R. Nelson*.

Feb. 29, March 4 and 13.

(Before COTTON, BOWEN, and FRY, L.JJ.)

*Ex parte* CHAPLIN; *Re* SINCLAIR. (a)

*Act of bankruptcy—Assignment of all debtor's property—Fraudulent conveyance—Intent to defeat or delay creditors—13 Eliz. c. 5—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 6, subsect. 2.*

In July 1882 a trader in pecuniary difficulties assigned substantially the whole of his property (including stock-in-trade, book-debts, and the goodwill of his business) to one of his creditors, the consideration expressed in the deed being the release by that creditor of a debt of 3271l. then owing to him by the debtor. At the date of the assignment only 1370l. was in fact due by the assignor to the assignee, the real consideration being the release of the debt actually due, and a verbal undertaking by the assignee to pay the assignor's debts, but it was not clear whether this referred to the whole of his debts, or to his trade debts only. On the same day the assignor agreed in writing to manage the business as the servant of the assignee at a weekly salary. A few days before the execution of the deed, but after the agreement had been come to, the assignee paid out some executions for the assignor, and shortly after the deed was executed he paid certain rent which the assignor owed to the landlord of the business premises. After the execution of the deed the assignor carried on the business as before in his own name, and there was nothing to show that he was not the owner of it, though in fact he acted under the direction of the assignee. No other creditor knew of the assignment.

In March 1883 the assignor was adjudicated a bankrupt. At that date nearly all the trade debts due from the assignor at the date of the deed had been paid in the course of carrying on the business.

Held, by Cotton and Bowen, L.JJ., that the effect of the deed being to defeat and delay the assignor's creditors in enforcing their ordinary remedies for the recovery of their debts, and as they could not enforce the agreement by the assignee to pay them, the execution of the deed was an act of bankruptcy, and it was therefore void as against the trustee in bankruptcy.

Held, by Fry, L.J., that the deed was void as against the assignor's creditors under 13 Eliz. c. 5.

Held, also, that the assignee could only prove in the bankruptcy for the sums paid by him under the agreement.

This was an appeal from an order of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy, declaring that two deeds of assignment, both dated the 14th July 1882, and executed by Walter Sinclair, a bankrupt, were fraudulent and void as against the trustee in bankruptcy.

The bankrupt carried on business as a watchmaker and jeweller, at No. 137, Newington-causeway. He had for some years purchased goods from Messrs. G. H. and A. C. H. Chaplin, who were wholesale jewellers and silversmiths, and these assignments had been made to them.

The first of these deeds was dated the 14th July 1882, and was made between the bankrupt

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of the one part and Messrs. Chaplin of the other part, and it recited that

Whereas the said W. Sinclair has for some time past carried on the business of a silversmith in the messuage, shop, and premises, No. 137, Newington-causeway aforesaid, and whereas the said W. Sinclair is indebted to the said G. H. Chaplin and A. C. H. Chaplin in the sum of 3271l. 2s. 10d., and being unprepared to pay the same, the said W. Sinclair hath agreed to sell to the said G. H. Chaplin and A. C. H. Chaplin all the furniture, stock-in-trade, fixtures, chattels, and effects now being in or about or belonging to the said messuage and premises, and also all book-debts now due for the same, and the goodwill of the business of a silversmith, in consideration whereof the said G. H. Chaplin and A. C. H. Chaplin have agreed to release the said W. Sinclair from their said debt, in manner hereinafter appearing. And it was thereby witnessed that "in pursuance of the said agreement, and in consideration of the 3271l. 2s. 10d. so as aforesaid due from the said W. Sinclair to the said G. H. Chaplin and A. C. H. Chaplin, the said W. Sinclair doth hereby sell and assign unto the said G. H. Chaplin and A. C. H. Chaplin all and singular the furniture, stock-in-trade, fixtures, goods, chattels and effects now being in and about and belonging to the said messuage, shop, and premises aforesaid, and also all book-debts due and owing in the said business, and also all the estate and interest of him the said W. Sinclair in the goodwill of the said business of a silversmith now carried on upon the said messuage and premises, together with the right at all times hereafter to use the name of the said W. Sinclair in carrying on the same business; to hold the said furniture, fixtures, stock-in-trade, book-debts, goodwill, and other the premises hereby assigned unto the said G. H. Chaplin and A. C. H. Chaplin absolutely. And these presents further witness that, in further pursuance of the said agreement, and for the consideration aforesaid, the said G. H. Chaplin and A. C. H. Chaplin do hereby absolutely release and discharge the said W. Sinclair of and from the said debt or sum of 3271l. 2s. 10d. so as aforesaid due to them from the said W. Sinclair, and all actions, suits, claims, and demands in respect thereof.

The other deed was made between the same parties and bore the same date. There were no recitals, and it was thereby witnessed that, in consideration of the sum of 50l. paid to Sinclair by Messrs. Chaplin "on the execution hereof," Sinclair, as beneficial owner, did thereby assign to the Messrs. Chaplin the shop and premises in which he carried on his business, to hold to them, their executors, administrators, and assigns, for the then unexpired residue of the term for which the premises were held, subject to the payment of the rent reserved by and to the performance of the covenants and conditions contained in the original lease. And the Messrs. Chaplin covenanted to pay the rent and to observe and perform the covenants and conditions.

In a written agreement dated the same day between Messrs. Chaplin and Sinclair it was recited that Messrs. Chaplin

are possessed of the business of a silversmith and jeweller, now carried on upon the messuage and premises No. 137, Newington-causeway, and the said W. Sinclair hath agreed to enter the employment of the said G. H. Chaplin and A. C. H. Chaplin for the purpose of managing the said business, as hereinafter mentioned.

And it was agreed that Sinclair should enter the employment of Messrs. Chaplin for that purpose from that date, and should, to the best of his power, endeavour to promote the business. It was provided that he should devote his whole time during ordinary business hours to the management of the business, and should not be engaged in any other business or occupation whatsoever. That Sinclair should in all respects

comply with any orders and directions that might from time to time be given to him by the Messrs. Chaplin. That he should not purchase any goods or give any orders whatever without special directions in writing given to him by Messrs. Chaplin. That they would pay him for his services the sum of 5l. a week, and also permit him during the continuance of the agreement to reside in the house rent free, and that the agreement might be determined at any time by either party by one week's notice in writing, expiring on any day.

After the execution of these deeds the business was carried on as before in the name of Sinclair, and he appeared to be the owner of it, but he acted under the directions of Messrs. Chaplin, who visited the shop from time to time, but stayed in a small room at the back of it.

The account at the bank relating to the business remained in Sinclair's name, and he continued to draw the cheques, but it was alleged that he only did so after Messrs. Chaplin had initialed the counterfoil.

On the 2nd Feb. 1883 Sinclair filed a liquidation petition, and on the 18th March he was adjudicated a bankrupt. The trustee in the bankruptcy applied to the court for an order declaring the two deeds of assignment of the 14th July 1882 fraudulent and void as against him.

From the evidence it appeared that at the date of the execution of the deeds Sinclair was in pecuniary difficulties, and that substantially the whole of his property was comprised in the deeds. There was a parol agreement between Sinclair and Messrs. Chaplin that they should pay all his debts, though it was not clear whether or not this referred to his trade debts only. This agreement and the release of the debt which Sinclair owed Messrs. Chaplin at the date of the deeds, amounting to 1370l. 7s. 3d., was the real consideration for the deeds.

It was alleged by one of the Messrs. Chaplin that the 3271l. 2s. 10d., which was stated as the consideration in the first deed, included the debt due to them, and all the other liabilities of the bankrupt. After the arrangement had been entered into, Messrs. Chaplin paid on the 4th July 1882, through their solicitors, an execution against Sinclair for 88l. 14s. 7d., and on the 11th July another for 44l. 17s. 2d., and on the 12th July they paid a judgment debt of 62l., which had been recovered against him. On the 31st July they, through their solicitors, paid Sinclair's landlord 211l. 10s. for rent in arrear, and the landlord gave his assent to the assignment of the lease to them.

Sinclair stated that the only persons who were aware of the assignment were himself, his wife, Messrs. Chaplin, and their solicitors. It also appeared that in Jan. 1883, the business being then carried on by Sinclair on behalf of Messrs. Chaplin, one of the creditors pressed for payment, and Sinclair, having consulted Messrs. Chaplin on the subject, by their direction, gave the creditor some acceptances signed by himself as security for the debt.

On the 3rd Aug. 1883 the registrar made an order declaring both the deeds of assignment fraudulent and void as against the trustee, and declared that the property comprised in the first deed formed part of the property of the bankrupt devolving upon the trustee, and he ordered

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Messrs. Chaplin forthwith to deliver up to the trustee the property comprised in the first deed, or so much thereof as remained unsold or undisposed of, and further that they should render an account upon oath of all their dealings and transactions with the said property, and should pay to the trustee what should by such account appear to be due in respect of such part or parts of the said property as might have been sold or disposed of; and he directed an inquiry to assess the damages sustained by the trustee by reason of the dealings and transactions of Messrs. Chaplin with the said property; and he ordered the assignment of the lease to be delivered up to the trustee to be cancelled.

From this order Messrs. Chaplin appealed.

*Wimelow, Q.C.* and *F. Cooper Willis* for the appellants.—This was not a fraud on the bankruptcy laws, as there was a *bona fide* advance made by the assignee to enable the debtor's business to be carried on. The consideration for the assignment was the original debt due to Messrs. Chaplin, and the payment of Sinclair's debts. A payment made to a creditor of the debtor is as good as a payment to him:

*Bell v. Simpson*, 26 L. J. 360, Ex. ; 2 H. & N. 410.

Here there was an out-and-out sale, and therefore, in determining whether it is an act of bankruptcy or not, the effect on future creditors must not be considered. In *Hutton v. Orutuwell* (1 E. & B. 15) the consideration for the assignment was the payment of one creditor, and it was held not to be an act of bankruptcy. Here the consideration was the payment of all the creditors. [FAY, J. referred to *Ex parte Zwilchenbart* (3 M. D. & D. 671.) There the assignees only covenanted to pay a composition to the creditors. In *Ex parte Ellis* (34 L. T. Rep. N. S. 705; 2 Ch. Div. 797, 798) Mellish, L.J. said: "The result of the authorities is, that where a debtor assigns his whole property as a security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance, it is not a question whether the further advance was great or small, but whether there was a *bona fide* intention of carrying on the business." The further advance need not be made at or before the time the deed is executed. This is a sale out-and-out, and is not an act of bankruptcy if there is a sufficient consideration, which means that a fair value must be paid. *Lomax v. Buxton* (24 L. T. Rep. N. S. 137; L. Rep. 6 C. P. 107) is in our favour. Messrs. Chaplin paid several creditors, some of whom held security and others did not. If the deed is a mortgage, then advances were made to enable Sinclair to carry on his business. The deed was net, therefore, an act of bankruptcy. This was really an out-and-out sale. There was no trust for the debtor, and therefore the fact that he remained in possession is not sufficient to overcome the evidence of *bona fides*. The statute 13 Eliz. c. 5 does not apply. Under the Bankruptcy Act defeating or delaying creditors is in itself a fraud: under the statute of Elizabeth that is not sufficient, fraud must be proved. The question is whether this was a *bona fide* transfer and it was intended that the assignee should keep the property, or whether it was a sham, the

intention being to retain the property for the assignor:

*Alton v. Harrison*, 21 L. T. Rep. N. S. 282; L. Rep. 4 Ch. App. 622;

*Ex parte Games*, 40 L. T. Rep. N. S. 799; 12 Ch. Div. 314;

*Biddulph v. Gould*, 11 W. R. 882.

Messrs. Chaplin could not have had notice of any fraud when they took the precaution of examining the debtor's books, and made a bargain to pay all the creditors so far as they were made known to them, and they have in fact all been paid except two. A *bona fide* sale of goods is not invalid, because it is known that an execution is intended:

*Hale v. Saloon Omnibus Company*, 4 Drew, 498.

[FAY, L.J. referred to *Holmes v. Penney*, 3 K. & J. 90.] Here the settlement was voluntary. [FAY, L.J.—But Wood, V.C. said that a settlement for valuable consideration might be fraudulent.] But there the grantee must have notice of the fraud. Here the debtor being in possession was consistent with the arrangement between the parties, and fraud cannot be inferred. [BOWEN, L.J.—In *Re Colemere* Lord Cranworth said (13 L. T. Rep. N. S. 621; L. Rep. 1 Ch. App. 132) that, in order that an assignment of all a trader's goods should be fraudulent under the bankruptcy law, it "must be an assignment, not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favoured creditor, or making some payments to all his creditors otherwise than through the Court of Bankruptcy." That is not good law now; at any rate, it has never been so decided. If a trader sells the whole of his stock, intending to abscond and take the purchase money, that is not an act of bankruptcy, if the purchaser pays a fair price, and is ignorant of his intention:

*Baxter v. Pritchard*, 1 A. & E. 456;

*Ross v. Haycock*, 1 A. & E. 460, n.

At any rate the order is wrong in form. Messrs. Chaplin were dealing with Sinclair without any notice of an act of bankruptcy. When the liquidation petition was filed the act of bankruptcy was more than six months old, and was not "available" for the adjudication which has been made. Therefore, the protection given by sect. 94 applies to all dealings with the goods for valuable consideration:

*Ex parte Gilbey*, 38 L. T. Rep. N. S. 728; 8 Ch. Div. 248;

*Ex parte Crosbie*, 37 L. T. Rep. N. S. 583; 7 Ch. Div. 123.

The effect of the order would be that Messrs. Chaplin would have to pay over again for goods of which the bankrupt's estate has had the benefit. The amount of the rent paid to the landlord and of the executions paid out by Messrs. Chaplin, ought at least to be allowed to them. They also referred to

*Cooke v. Caldecott*, Moo. & M. 522;

*Ex parte Saffery*, 44 L. T. Rep. N. S. 324; 16 Ch. Div. 668;

*Taylor v. Eckersley*, 36 L. T. Rep. N. S. 442; 5 Ch. Div. 740;

*Ex parte Wingfield*, 40 L. T. Rep. N. S. 15; 10 Ch. Div. 591;

*L'Apôtre v. Le Plaistre*, 1 P. Wms. 318;

*Gibson v. Bray*, 8 Taunt. 76; Robson, 510.

[BOWEN, L.J. referred to *Ex parte Watkins*, 1 Dea. 296. FAY, L.J. referred to *Livesay v. Hood*, 2 Camp. 83.]

*Cooper Willis, Q.C.* and *Herbert Reed* for the

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trustee.—The execution of the deed was an act of bankruptcy, because it alters the form for the distribution of the assets, and necessarily defeated and delayed the creditors:

*Worsley v. De Mattos*, 1 Burr, 467;

*Ex parte Saffery*; *Re Cooke*, 35 L. T. Rep. N. S. 715; 4 Ch. Div. 555.

A man must be taken to intend the natural results of his acts:

*Ex parte Snowball*, 26 L. T. Rep. N. S. 295, 894; L. Rep. 7 Ch. App. 534.

If ninety-nine out of a hundred creditors assented to the deed, the remaining creditor could treat the deed as an act of bankruptcy (*Alderson v. Temple*, 4 Burr. 2235); though of course he could not avail himself of an act of bankruptcy to which he had been a party. A man may sell his property for a sum sufficient to pay his debts, but must not assign his property to anyone on condition that he pays them. If the debtor gets the money the creditors may be able to get hold of it; but otherwise a third person is interposed, who acts as a shield to protect the property from the creditors. The recitals in the deed are clearly untrue, and that is evidence of fraud. On the face of the deed it does not appear that the grantees are liable to pay anything, but it is an assignment of all the grantor's property in consideration of an existing debt, and therefore an act of bankruptcy. If you go behind the deed and inquire into its real consideration, still the effect would be to defeat and delay the creditors, and it therefore comes within 13 Eliz. c. 5. Under the order made by the registrar, the appellants will be allowed all sums which they have properly paid; but they cannot be allowed salvage money in relation to a fraud. The trustee will be content with an order simply setting aside the deeds. All the goods which were not disposed of are in the possession of the trustee, and he will get in effect the value of those which have been sold. Messrs. Chaplin can prove for any sums which they have paid to creditors. If these moneys are ordered to be paid in full, it will be an encouragement to fraud. [COTTON, L.J.—If the deed is set aside the debtor will have been carrying on the business as his own, and any payments made to creditors will be protected if the creditors, when they received them, had no notice of any act of bankruptcy by the debtor, and there was no fraudulent preference.]

*Winslow* in reply.

March 13.—COTTON, L.J.—This is an appeal from an order of Mr. Registrar Pepys, declaring that two deeds executed by the debtor some time previous to his bankruptcy were fraudulent and void, and giving certain consequential directions. The first question which we have to consider is, whether the registrar was right in declaring those deeds, which were executed on the 14th July 1882, to be fraudulent and void as against the trustee in bankruptcy of the grantor. There was a contemporaneous agreement between the parties: whether it was under seal or not is not material, but they were all parts of one transaction, and at the time when these deeds were executed the bankrupt was undoubtedly in some difficulty. He was a retail silversmith and jeweller, and Messrs. Chaplin were wholesale manufacturers of jewellery. The debtor seems to have approached

them, and desired them to take over his business and all his property, and in consideration of which they were to release him from a debt which he owed them, and an arrangement was to be entered into for the payment by them of some of his other debts, but what the debts were which were to be paid by them is somewhat doubtful. [His Lordship then stated the effect of the two deeds and continued:] The only debt which was due from the debtor to Messrs. Chaplin was a debt of about 1370*l.* The exact amount is not very material, but that debt with the debts which were due and owing by the bankrupt to other persons made up the sum of 3271*l.* 2*s.*, which is mentioned in the first deed as a debt then due from the bankrupt to Messrs. Chaplin. As to the 50*l.* mentioned in the assignment of the lease I do not know how that was arrived at. As I understand it, an account was stated by which 3271*l.* 2*s.* was made out to be the amount of debt which was to be released with the debts which were to be paid by Messrs. Chaplin. What were the real facts? Previously to this there had been that negotiation which, as I understand, had been begun by the bankrupt. The Messrs. Chaplin had undoubtedly paid sums for him. They had paid out several executions, and on the 31st July they paid the back rent, then due by the bankrupt, to the landlord of the business premises; but this debt of 3271*l.* 2*s.*, mentioned in the deed, was not in any way due from him to them. There was, according to the statements both of the bankrupt and Messrs. Chaplin, an agreement, not in writing, but verbal, that Messrs. Chaplin, when they took the business, should pay certain debts of his. On the one side it is said they were to pay all the debts Sinclair owed. On the other side it is said that they were to take the business subject to the debts, which would mean that they were to pay the debts of the business. That there was some such agreement I think we must on the evidence take to be proved. But it was not in any way reduced into writing; it was a mere verbal agreement, and its terms are not clear. Then there is this remarkable circumstance, that, although both parties agree that the consideration for the deed was something beyond the release of the debt due to Messrs. Chaplin, viz., an agreement that they should pay some other debts of the bankrupt, there is not in this deed, nor in any paper that appears before us (not even in the agreement that the bankrupt should continue to carry on the business apparently as the owner of the business, carrying it on as his own business) a single word about the agreement to pay the debts. The registrar held that these two deeds, the assignment of the lease and the assignment of the personal chattels to Messrs. Chaplin, were fraudulent and void as against the trustee. In my opinion that was a correct decision. In my view it is unnecessary to decide whether the deeds are bad under the statute of Elizabeth; but, having regard to the law and practice in bankruptcy, I think both the deeds were bad. What was the effect of them? The effect was to withdraw by a deed, which was kept secret, all the property of the debtor, as far as it could possibly be done, from the reach of his creditors, so as to prevent them from enforcing their legal rights and remedies by execution, and to protect it in the event of bankruptcy by taking it out of the hands of the debtor and assigning it

to somebody else. What did the debtor get in exchange? It is true that a certain sum of money was paid by Messrs. Chaplin to some of the creditors, but still the debtor obtained nothing which could be a substitute or equivalent to the creditors. They got nothing except that agreement between Messrs. Chaplin and the debtor that Messrs. Chaplin should pay the debts (whether it was all the debts or not I need not inquire), but that agreement is left quite indefinite, and there is nothing which in the event of a bankruptcy the creditors could lay hold of. If the agreement had been an open one on the face of the deed, such as the creditors could have laid hold of and enforced by using the name of the debtor, so that when there was a bankruptcy, the trustee could enforce it, the matter might have stood in a very different position. But I very much rely on this, that all that was given as a substitute to the creditors for the property which was taken away from them was that agreement (whatever it was) between Messrs. Chaplin and the debtor, an agreement which ought (if it had been a fair and honest one) to have been stated in the deeds, or if not stated in these deeds, then at least in some deed which could be made available for the purpose of enforcing payment. Then there is this fact, which though it is not material as regards the original transaction, is material as an index of the intention of the parties, that when one of the creditors was pressing for payment it was not Messrs. Chaplin who came forward and paid off the debt, or gave security in their own names, but it was the debtor, who, after communication with Messrs. Chaplin, gave him a promissory note or something of his own, and not as from Messrs. Chaplin. That is, in my opinion, material evidence, and, coupled with other things, it induces me to arrive at the conclusion that Messrs. Chaplin were intending (and it was the natural effect of this deed) to withdraw the debtor's property from the legal rights of the creditors by execution or otherwise, and to make themselves as safe as they could by taking it into their own hands. I do not mean to say, indeed I do not think, that the creditors would not be paid, and I cannot say that this would not have been a good way of paying them. Still, in my opinion, if persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him and bankruptcy ensues, that deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction that it might be the best for the debtor or that it might afford an effectual way of paying the creditors. And I am much struck by this, that the recitals in the deed entirely misrepresent the true nature of the transaction, and, in the absence of investigation, they would conceal the truth from any creditor; indeed, they would lead him away from the real truth, and they offer nothing which would enable him to infer it. In my opinion, therefore, the registrar was right in declaring these deeds void as against the trustee. Then comes the question, what consequential directions should be given? The registrar seems to have considered the proper

course was to treat Messrs. Chaplin as having carried on the business by the debtor as their agent, and to make them answerable for all the dealings of the debtor with the property and accountable for all the receipts and payments in the business. Of course, if any of the property comprised in the deed had not been realised at the commencement of the bankruptcy, it must go to the estate; but, as I understand, it is not in any way denied that all the property which remained at that time has been taken possession of by the trustee, and we have not to deal with that. But we have to deal with consequential directions as to the property which was not forthcoming and had been realised, and, in my opinion, the way the registrar has dealt with it is erroneous. The third document—I mean that under which the debtor carried on the business—made him the servant of Messrs. Chaplin and made his acts acts for which they would be answerable. But, in my opinion, if the two principal deeds are set aside, they should all three be looked on as one transaction; and, if we treat the property which passed by the principal deeds as the property of the debtor, it would be wrong to treat Messrs. Chaplin at the same time as having employed the debtor as their servant in carrying on the business. In my opinion, therefore, the registrar's order, so far as it gave those directions, is erroneous. There was also an inquiry directed as to the damages sustained by the estate by reason of those deeds. In my opinion, there was no case made for that inquiry, and I think the proper order to make is simply to declare that the two deeds are fraudulent and void, striking out all those directions and the inquiry as to damages, it being admitted that everything in specie has been handed over to the trustee. It was pressed on us that Messrs. Chaplin had advanced money for the purpose of carrying on this business, and were therefore entitled to have their advances allowed them by way of set-off, the deed being set aside. In my opinion, we ought not to do that. Probably this is not very material, if we strike out the inquiries as to the debtor's dealing with the property. But if any sums were *bona fide* advanced by Messrs. Chaplin, either before the execution of the deeds or after, they will be entitled to prove in respect of them. I do not say they are entitled to prove, but in respect of any sums properly paid they will be entitled to prove. I think it would not be right to give any special directions as regards any sums which, either before or after the execution of the deeds, they may have paid for the purposes of the debtor's business. They may establish any right of proof which they can, but in my opinion we ought not to give them any preference as regards these payments.

Bowen, L.J.—I am of the same opinion. The effect of these two deeds was to assign all the debtor's property. I do not think it necessary to decide whether the deeds were fraudulent and void under the statute of Elizabeth, and within the principle of which *Twyne's case* (3 Rep. 80, b.) is a familiar example. It is sufficient for the present purpose to say that, in my judgment, they are clearly fraudulent and void under the Bankruptcy Act. The principles which relate to mortgages have been stated by Mellish, L.J., in *Ex parte Ellis* (34 L. T. Rep. N. S. 705; 2 Ch. Div. 798), and the result of the authorities,



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according to him, is this, that where a debtor assigns his whole property as security for a past debt only, it is an act of bankruptcy, whatever the motives of the parties may have been. If there is also a further advance it is not a question whether the further advance is great or small, but whether there was a *bona fide* intention of carrying on the business. In the present case there could not have been any *bona fide* intention of carrying on the business as the business of the debtor, because the debtor was going out of it, and it is impossible therefore to apply the particular test which Mellish, L.J. indicates as appropriate in a large number of cases. This is an out-and-out sale, a sale of all the debtor's property for a past debt *plus* something additional, about which we have to decide. What is that extra something which prevents the deed from being a pure and simple assignment for a past debt? There were some payments made by the grantees at the time, which I will pass by, because there still remains the question, What was the character of the residuum after you have allowed for all the past debts which had been satisfied and all the present payments which were being made? What is the residuum? Is it a fair equivalent which the debtor gets for what he gives? It seems to me in this particular instance that what the debtor gets is a pure question of business and fact. He gave up all his property; he got the payment of past debts to a certain extent, and besides that he got a promise—a verbal promise—made to himself, without any record of it in any paper or in any deed, to the effect that the persons to whom he was assigning his property would, when occasion should arise, come forward and pay his debts. Now, what is the business value of that sort of promise, looked at from the point of view of either the debtors or the creditors; a promise not contained in the deed, which is the natural record of the transactions, but a collateral verbal agreement, which at any moment the creditor who was receiving the property from his debtor could, if he was dishonest, deny? And if he had denied it, what could the creditors have known about it? What had the debtor to show for it? Absolutely nothing. The deed contradicted it, because, though it professed to contain the whole transaction, it stated that there was a debt of over 3000*l.* due to Messrs. Chaplin, instead of the true amount of the debt owing to them, which was about half that sum. Looked at from the point of view of the debtor, it was a most unsatisfactory arrangement. I do not for a moment mean to say that a debtor who got only a *chase in action* in exchange for such an assignment might not get a most valuable equivalent. It might be a bill of Messrs. Rothschild, or a promissory note of a millionaire, or a verbal promise of a man whose word was as good as his bond; but the verbal promise under the circumstances of this particular case appears to me to have been a mere sham. And from the point of view of the creditors also it was a sham. The substance receded into the hands of a favoured creditor, and that which was left behind was not even a shadow, because it was invisible to the eyes of the general body of creditors. They had no reason to know that the verbal promise had been made, and they were absolutely at the mercy of

the favoured creditor and the debtor, because unless they could have got the debtor to come forward there were no means of proving or even of surmising the existence of the verbal promise, on which all depended. It was not a verbal promise to them; it was a verbal promise to the debtor. The debtor's property (independently of the bankruptcy law) was disappearing, and in its place there is left a secret promise, made by word of mouth to the debtor himself and not to the body of creditors. I think the necessary effect of the deeds was to defeat and delay the creditors, and I do not hesitate to say that this was the intention of the parties, although I am quite sure that, as honest men, they did not intend to defraud them. With regard to the rest of the case, I entirely agree with what the Lord Justice has said.

Fry, L.J.—I have arrived at the same conclusion as the other members of the court, but while I in no way dissent from the views they have expressed, it appears to me that the shortest road to their conclusion is by means of the statute of Elizabeth. That statute is very familiar to us all, but I think it as well to refer to the precise words of it. The preamble recites that “grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions,” and so forth. Now, I emphasise the word “or” because it shows the intention of the Legislature to deal separately with the “intent to delay, hinder, or defraud” creditors. The operative part of the statute proceeds to set aside every conveyance made “to or for any intent or purpose before declared or expressed.” Now, what was the real bargain between Messrs. Chaplin and Mr. Sinclair? According to the evidence it was this, that the debt which Mr. Sinclair owed to Messrs. Chaplin should be extinguished, and that they should undertake the burden of paying his other creditors—whether it was to be all his creditors or his trade creditors only is a matter in dispute. Now, how were the deeds drawn? It appears the total amount which would have been due from Sinclair to Messrs. Chaplin, if they had paid all the trade debts which were made known to them, was a sum of 327*l.* Now, the two deeds were prepared in this way. The assignment of the leasehold is represented to be in consideration of 50*l.* paid by Messrs. Chaplin to Sinclair; and the assignment of the stock-in-trade and other chattels is represented to be in consideration of a debt of 327*l.* due from Mr. Sinclair to Messrs. Chaplin. No such debt existed at that time. Why was the deed drawn in that form? It appears to me it was so drawn for the purpose of concealing the real facts of the case, representing to any persons to whom the deed might become known that that sum was at the time of the execution of the deed due from Sinclair to Messrs. Chaplin, to conceal from any such person the fact that there was a contract between them and him that they should pay Mr. Sinclair's debts, so that if the deed came to the eye of any of the creditors he would have no means of knowing or suspecting the existence of any contract beneficial to him which Mr. Sinclair could enforce. Then I ask myself, why was the deed drawn in that way? Was it a mere conveyancing



blunder, or was the end and intent to put it in such a form so that the remedies of the creditors might be delayed? I must confess that I did at one time feel some doubt as to this. But when I look not merely at the form of the deed and the falsity of its statements, but consider, as I am bound to do, the conduct of the parties under it, I come distinctly to the conclusion that the intention was to do that which the deed in fact did, namely, to hide from the creditors the real facts of the case, and thereby, not to defraud them, but to hinder and delay them in enforcing their legal rights. Now, what was the conduct of the parties? It was this: The deed was kept secret; the trade was carried on in the name of Sinclair; the debts, so far as they were paid, were paid not in the names of the persons who were bound to pay them, but in the name of Sinclair, and when one particular creditor pressed Sinclair and he applied to Messrs. Chaplin, they, instead of coming forward and offering to give security to the creditor or satisfying him, induced Sinclair in his own name to give the creditor promissory notes, and thereby conceal the real facts of the bargain. I think, therefore, these deeds were executed with intent to delay and hinder the creditors in their remedies, and that they are, therefore, plainly void under the statute of Elizabeth.

*Appeal dismissed.*

Solicitors for the appellants, *Badham and Williams*.

Solicitor for the trustee, *G. B. Norman*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Thursday, July 3.*

(Before BACON, V.C.)

PAGET v. MARSHALL. (a)

*Mistake—Lease—Annulment or rectification of.*

*Where there has been a mistake in the parcels contained in an executed lease, although it may be a mistake by the plaintiff only, the court will order the annulment, or, at the option of the defendant, the rectification of the lease.*

THIS was an action to have a lease rectified or annulled on account of a mistake in the description of the premises demised. The plaintiff, Caroline Matilda Paget, was a widow, and lessee from the Goldsmiths' Company of premises at Nos. 48, 49, and 50, Aldersgate-street, in the city of London, where she carried on business with her sons under the name of R. G. Paget and Son, as tent, rope, line, and twine manufacturers.

In the latter part of 1883 Richard William Paget, acting as her agent, entered into negotiations with the defendant Wesley Marshall, a wholesale manufacturing furrier, with the view of a lease being granted to him of portions of Nos. 48, 49, and 50, Aldersgate-street. In her statement of claim the plaintiff alleged that it was verbally agreed that the defendant should accept a lease for twenty-one years at 500*l.* a year, of the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50, Aldersgate-street, and that the agreement should be put into writing.

On the 13th Nov. 1883 R. W. Paget wrote to the defendant as follows:

Dear Sir,—We will let you on lease for seven, fourteen, or twenty-one years the upper part of Nos. 48, 49, 50, Aldersgate-street, consisting of first, second, third, and fourth floors (reserving for our own use one of the closets on the second floor landing, also the right of passage to roof) for the sum of 500*l.* per annum and taxes. We await your acceptance of the above terms.—Yours obediently,  
R. G. PAGET AND SON.

It was alleged that the first floor of No. 48, Aldersgate-street was included by inadvertence, and contrary to the intention of the plaintiff or her agent, and that the defendant knew it to be so.

On the 14th Nov. 1883 the defendant wrote accepting the offer contained in the letter of the previous day. The indenture of lease of the premises was dated the 21st Dec. 1883, and by it the plaintiff demised to the defendant "all those the first, second, third, and fourth floors of and in the messuages or warehouses and premises situate on the east side of Aldersgate-street, in the city of London, and having a frontage of 52ft. 9in. (more or less), and known as Nos. 48, 49, and 50, Aldersgate-street aforesaid," from the 25th Dec. 1883, for twenty-one years, except and reserved out of the same premises the lavatory between the first and second floors of the said premises, and the sole right of passage to the roof (which said lavatory and right of passage it was thereby declared were for the exclusive use of the plaintiff) at the yearly rent of 500*l.*

The first floor of No. 48 was separated from the premises intended to be leased by a closed partition; and the only access thereto was through the premises occupied by the plaintiff on the ground floor of the same building. And moreover, by the terms of the lease under which the plaintiff held, she was precluded from making any openings in the partition.

The plaintiff offered to amend the lease or to accept a surrender of the term and indemnify the defendant against loss. On the defendant refusing, the plaintiff instituted the action on the 9th Jan. 1884, and claimed a declaration that the indenture of the 21st Dec. 1883 ought not, according to the true intent of the parties, to have comprised the first floor of No. 48, and that the defendant might be ordered to elect between the annulment of the said indenture and its rectification.

By his defence the defendant denied the alleged verbal agreement, and stated that he had offered during the negotiations to take a lease either of the first, second, third, and fourth floors of Nos. 48, 49, and 50, or a lease of the second, third, and fourth floors of No. 48, and the first, second, third, and fourth floors of Nos. 49 and 50, together with some other room which he could use as a packing-room, and that he considered the letter of the 13th Nov. to contain an offer naturally arising from the previous negotiations. The defendant further submitted that the partition between Nos. 48 and 49, being only lath and plaster, could easily be removed on a licence being obtained from the original lessors without any structural damage; that there was no mistake, but that if there was it was a unilateral mistake and not common to both parties. By his counter-claim he asked for compensation and damages if the lease should be annulled, and reduction of rent if it should be rectified. It was in evidence that the

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defendant considered a packing-room of great importance, and would not have taken the premises on the terms of the lease without one; that he wished to have a board with his name on it placed all round the first floor of Nos. 48, 49, 50, but that the plaintiff's agent replied that he would not allow it to be put up round the first floor of No. 48. It appeared that when the draft lease was sent to the defendant's solicitors an objection was made to the covenant for the lessee to do external repairs. A note was made by Messrs. Prideaux and Sons, the plaintiff's solicitors, in the margin of the draft, in these words: "The lessee is taking all but the ground floor, and in such cases in our experience it is usual for him to do external repairs." Evidence was also adduced as to the value of the premises, exclusive of and including the first floor of No. 48. A model of the building was produced in court, in which the whole of the first, second, third, and fourth floors of the building, exclusive of the first floor of No. 48, were coloured blue, and the first floor of No. 48 was coloured brown.

*Hemming, Q.C. and H. J. Hood* for the plaintiff.—The court will correct a mistake in an instrument, even though the mistake may not be common to both parties, but we have evidence to prove that it was a common mistake here:

*Harris v. Pepperell*, 17 L. T. Rep. N. S. 191; 1 L. Rep. 5 Eq. 1.

The plaintiff here made a manifest blunder in the description of the premises contained in the letter of the 13th Nov. 1883, and he now asks to have that mistake rectified. The evidence shows that 500l. a year is a moderate rent for the premises, exclusive of the first floor of No. 48.

*Marten, Q.C. and J. D. Davenport* for the defendant.—The mistake here was unilateral and was entirely occasioned by the plaintiff. For such a mistake there can be no relief by rectification or annulment of the lease. The court will only interfere where there has been mutual mistake, or one which might have been reasonably known to both parties, but not where it is on one side only and the contract has been completed:

*Sells v. Sells*, 1 Dr. & Sm. 42;  
*Earl of Bradford v. Earl of Romney*, 30 Beav. 451;  
*M'Kenzie v. Heskest*, 38 L. T. Rep. N. S. 171; 7 Ch. Div. 675.

If it should be held that there was mutual mistake, and rectification be ordered as claimed, the rent should be reduced. In any case the plaintiff should pay the costs occasioned by his blunder.

*Hemming, Q.C.*, in reply, distinguished the cases cited by the other side, and referred to the case of *Webster v. Cecil* (30 Beav. 62).

BACON, V.C.—In all these cases on the law of mistake it is very difficult to settle a principle, because you have to rely upon the statements of parties interested, and upon the not very accurate recollections of what took place between them. But the law I take to be as stated this morning by Mr. Hemming. If it is a case of common mistake—a common mistake as to one stipulation in many provisions contained in a settlement or any other deed—that, upon proper evidence, may be rectified. The court has the power to do so, and it is very often exercised. The other class of cases is one of what are called unilateral mistakes; and there, if the court is satisfied that the true

intention of one of the parties was to do one thing, or omit to do one thing; that will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. That I take to be the clear conclusion to be drawn from the authorities. The old law is very much as was stated in that very excellent treatise by Mr. Kerr, and anybody who has read that book must be well satisfied with the diligence, industry, intelligence, and sagacity with which he has acquitted himself of the task he undertook, but of course I cannot consider it as an authority upon which I can rely, although I listen to it with interest and respect. The case before me is in a very narrow compass. The plaintiff has taken the lease of a site of property from the Goldsmiths' Company, upon a contract to build upon it a very valuable and commodious structure, and he did so; and his plans are in evidence, and it is quite clear what his intention was. He built two separate tenements, which were let to two separate tenants; he kept a third, intending to occupy it for himself; and the fourth part, that coloured blue on the model, he had to let, when the negotiation commenced with the defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things, as separate as if they had been in some other street; and the third, No. 48, was equally separate and distinct, built by the plaintiff for his own occupation, and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. To that end he built on the ground floor of No. 48 a staircase communicating with the first floor of No. 48, and he partitioned off the first floor of No. 48, so that it became in its turn just as distinct a building, just as distinct a tenement, as Nos. 49 and 50, and the purpose was equally distinct. Then the part coloured blue being still available, and the plaintiff being willing to let it, he constructed a staircase which led from the street, past the first floor of No. 48, and landed upon the blue part, as I will call it, for that is a sufficient description: no communication whatever in fact being made, or, according to the evidence, ever intended to be made, between the part coloured brown and the part coloured blue. That was the state of things when these parties met to negotiate. The partition which effectually severed the lower part of No. 48 from the upper part of No. 48, coloured blue, had been completely settled and arranged. The defendant upon his first visit looked over all that was then to let, ascertained what the plaintiff meant to let, saw the first floor over No. 48, and said that it would make a very handsome ware-room, but knew at the same time that it was not to be let, because, to use his own expression in his own evidence, the plaintiff told him, "We mean to use that for ourselves." That is the evidence which the defendant has given on this occasion. He says that he was satisfied to some extent with what he looked at, and he desired to acquire it; but he said that he must have a packing-room. He could not mean the first floor of No. 48. Still he insists more than once on the necessity of having a packing-room. I am mentioning these facts in order to ascertain, as it is my duty to do, what I must take to be proved to have been the intention of the parties when they entered into the negotiation. He hunts about

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for a packing-room; the brother goes with him down into a cellar under No. 48, in the basement of No. 48; they looked about there, and the brother comes in and says, You cannot have it. No wonder, because there can be no access to it but from the floor of No. 48, that coloured brown; and that negotiation accordingly went off. Now, it would be impossible for me to connect—and there was a very faint attempt made to connect—the necessity which was present in the defendant's mind to have a packing-room with the magnificent first floor which he now says he had in his mind when he was present. The statement about putting up the inscription by no means encourages any such notion. The defendant desired to advertise to the public, by means of a large inscription on the front of that which was to be his, the trade which he was carrying on. He wished also to have a similar inscription over No. 48, and that was resisted. It was the subject of discussion between them, and the reason that it was resisted was explained to him to be this, because, said the plaintiff, "if we granted you that, it would look as if you were carrying on your business in our warehouse." But, in order to accommodate him, an offer was made to him that he might insert a tablet (providing it did not interfere with the architectural decorations of No. 48) containing his name and business. These facts are beyond all question; both parties are agreed. Then the plaintiff writes a letter in which he speaks of the floor above No. 48, among other things. This is answered very readily by the defendant, who accepts the offer. Instructions are sent to the solicitors, instructions consisting only of this letter. Mr. Marten made a point that the plaintiff in his pleadings said that they had no other instructions. They must have had some other instructions. I should read the word "other," used by him in the pleadings, as meaning no different instructions, no variation in form or otherwise from the words that appear in the letter. Under the circumstances, the facts being as I have stated, am I, because the lease has been executed under seal demising to the defendant that which the plaintiff never meant to let to him—that which the defendant says he knew the plaintiff intended to keep for himself, that which he has never claimed at any period—am I to say that this agreement is to be held to be irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. So far, therefore, as it may be said to be a common mistake—and it looks very like common mistake, if it was true, as the defendant says in his defence, that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of the 13th Nov. 1883. Certainly he never said so until it is so stated in the defence which I am looking at now; and he has never said in his evidence that he intended to take that floor—the argument addressed to me has been this: The separation of No. 48 brown and No. 48 blue is effected solely by means of a brick-on-end partition, and that is easily removed. People building brick-on-end partitions do not mean them to be easily removed, unless there is some purpose to remove them; and here, using the defendant's own evidence on this

occasion, at that time the partition was effectually finished, and the defendant knew that the plaintiff intended to reserve it for his own use in his own business. The law being such as I have said, it is not necessary to say anything about how easily you can make holes in a partition, and how you can knock down a partition. You can pull down the front of a house with equal ease, if you have proper appliances and proper workmen to do it. What forces itself upon my attention is the reason why the partition was first made, why it was found to be in existence when the defendant first inspected it? Why, he knew from that time, as well as he knows now, that it never was the intention of the plaintiff that he should have that magnificent room, which formed one or two rooms which constituted the business place intended by the plaintiff for his own use, and to which the access was made by one staircase communicating with nothing but the upper room. But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—such a one as would induce the court to strike out of a marriage settlement a particular provision or limitation—whether it was that kind of common mistake or not, that there was to some extent a common mistake, I must, in charity and justice to the defendant, believe; because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the first floor of No. 48 was intended to be let to him, with all which I have nothing to do; but, whether there was a common mistake or not, it was plain and palpable that the defendant was mistaken, and that the plaintiff had no intention of letting his own shop, that which he had built and carefully constructed for his own means and ends. It is quite clear that he was mistaken. Upon that ground, therefore, upon unquestioned testimony, I must say that the contract ought to be annulled. I think it would be right and just, and perfectly consistent with other decisions, that the defendant should have an opportunity of choosing whether he would submit (as the plaintiff asks that he should) to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled. [The defendant having elected rectification, his Lordship concluded.] The decree will therefore be that the lease be rectified by omitting from it all mention of the first floor of No. 48, coloured brown on the model. The decree will be without costs.

Solicitors for the plaintiff, *Prideaux and Sons*.  
Solicitors for the defendant, *Phelps, Sidgwick, and Biddle*.

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THE COLONIAL BANK v. WHINNEY.

[CHAN. DIV.]

Monday, July 28.

(Before BACON, V.C.)

THE COLONIAL BANK v. WHINNEY. (a)

*Bankruptcy—Partnership firm—Shares in name of one partner—"Goods"—Reputed ownership—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 44, sub-sect. 3; sect. 168.*

*B., one of the partners in a firm of stockbrokers, purchased railway shares with moneys of the firm, and registered the shares in his own name. Calls were made upon him, and paid out of the moneys of the firm, and dividends credited to the firm. B. subsequently deposited the certificates of the shares with a bank as security for advances made to the firm. Upon the bankruptcy of the firm, the bank claimed a charge upon the shares so deposited.*

*Held, that the shares were "goods at the commencement of the bankruptcy in the possession, order, or disposition" of the firm, "in their trade or business," within the meaning of the Bankruptcy Act 1883, s. 44, sub-sect. (iii.), and belonged to the trustee in bankruptcy of the firm.*

This was a motion by the defendant, the trustee in bankruptcy of the firm of P. W. Thomas, Sons, and Co., for the appointment of a receiver of 7018 shares in the Forth Bridge Railway Company, with liberty to him to pay an overdue call upon the said shares, and to raise the amount by sale or mortgage of the same. The question was raised as to whether the shares came within the reputed ownership clause of the Bankruptcy Act 1883, and it was arranged between the parties that the question of law should be decided upon the motion, which was treated as the trial of the action. The facts were not in dispute. For several years prior to 1884 the Colonial Bank were in the habit of making large advances from time to time to the firm of W. P. Thomas, Sons, and Co., and the firm deposited securities as "cover" for the advances, the securities being varied from time to time.

The firm consisted of two partners, Mr. William Evan Blakeway and Mr. Percy William Thomas, the former being the senior member of the firm, and also a member of a syndicate formed to float the Forth Bridge Railway Company. The business was regulated by a deed of partnership of the 2nd Nov. 1874, made between the father of P. W. Thomas and W. E. Blakeway; and by it the parties agreed to carry on the business of stock and share brokers. At the time of the transactions next stated W. E. Blakeway had the sole management of a loan business, which formed part of the business of the firm.

On the 1st April 1880 William Evan Blakeway deposited with the bank as security for certain advances the certificates of 7018 shares, of the nominal value of 10*l.* each, of the Forth Bridge Railway Company, together with a transfer in blank executed by himself. W. E. Blakeway was at that time the registered proprietor of the said shares, the purchase money for which, amounting to 28,072*l.*, had been paid by him out of the assets of the firm. It was stated in evidence that it was the regular course and practice of the firm that stocks and shares belonging to the firm should be held in the name of one of the partners, and

also that money should be borrowed upon the security of such stocks and shares, and lent again at a higher rate of interest. On the 15th March 1883 a further sum of 7058*l.* 7*s.* 7*d.* was paid out of the assets of the firm for a call of 1*l.* per share upon the above-mentioned shares. On the 13th Nov. 1883 a further call was made, payable on the 1st Feb. 1884, but was not paid. On the 29th Jan. 1884 Mr. W. E. Blakeway absconded. On the 30th Jan. the firm suspended payment, and gave notice to their creditors. On the 31st Jan. a bankruptcy petition was presented by Mr. P. W. Thomas, a receiving order was made, and a special manager appointed. On the same 31st Jan. notice of the deposit of the shares and the transfer was sent by the Colonial Bank to the Forth Bridge Railway Company, and was received by them on the 1st Feb. The transfer was then filled up with the names of nominees of the bank.

On the 5th Feb. 1884 the firm was adjudicated bankrupt, and Frederick Whinney was appointed trustee on the 18th Feb. 1884.

On the 25th June 1884 the above notice of motion was given.

*Marten, Q.C.* and *Buckley* for the trustee in bankruptcy.—These shares are "goods in the possession, order, and disposition of the bankrupt in his trade or business" within the meaning of the order and disposition clause in the Bankruptcy Act of 1883, s. 44, sub-sect. (iii.). By sect. 168 of the same Act, "goods" includes all personal chattels. The insertion of the words "in his trade or business" in the 3rd sub-section of sect. 44 of the Act of 1883, instead of the words "being a trader" in the corresponding section (sect. 15, sub-sect. 5) of the Act of 1869, make no substantial difference. These shares were distinctly used in the loan business, which was part of the "trade or business of the firm." As to the alleged transfer of the shares, by the Companies Clauses Consolidation (Scotland) Act 1845, incorporated in the Forth Bridge Railway Act, it is declared by sect. 14 that every transfer of shares must be by deed; and by sect. 17 no shareholder shall be entitled to transfer any share after any call shall have been made until he shall have paid such call. Here there was no deed of transfer. The deposit of the blank transfer is not enough:

*Hibblewhite v. McMorine*, 6 M. & M. 200.

Further, these shares are not *choses in action*, and so do not come within the proviso at the end of sub-sect. (iii.) of sect. 44:

*Ex parte Union Bank of Manchester; Re Jackson*, L. Rep. 12 Eq. 354.

*Rigby, Q.C.* and *Northmore Lawrence* for the Colonial Bank.—The question is purely one of the construction of the Act of 1883. We submit that neither the firm nor Mr. Blakeway were the reputed owners of these shares. But if Mr. Blakeway was the reputed owner, then it cannot be said that the shares were used in the business of the firm. They were the separate property of Mr. Blakeway. The alteration of the words of the old Act were purposely made, and effect an alteration in the law of reputed ownership. The words "goods in the trade or business of the bankrupt" restrict the goods to such as are actually used and employed in the trade or business. Formerly, goods belonging to a trader

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were liable to seizure, which by no stretch of imagination could be said to be used in his trade or business. That is to be so no longer. These shares being in the name of Blakeway, as trustee for the firm, were choses in action within the meaning of the Act:

*Ex parte Barry*; *Re Fox*, 29 L. T. Rep. N. S. 620; L. Rep. 17 Eq. 118;

*Re Pryce*, 36 L. T. Rep. N. S. 117; 4 Ch. Div. 685.

They were not in the order and disposition of the firm:

*Ex parte Lovering*; *Re Murrell*, 49 L. T. Rep. N. S. 242; 24 Ch. Div. 31;

*Great Eastern Railway Company v. Turner*, 27 L. T. Rep. N. S. 697; L. Rep. 8 Ch. 149.

They also referred to

*Ex parte Dorman*; *Re Lake*, 27 L. T. Rep. N. S. 528; L. Rep. 8 Ch. 51;

*Re Bainbridge*, 38 L. T. Rep. N. S. 229; 8 Ch. Div. 218;

*Ex parte Hayman*, 38 L. T. Rep. N. S. 238; 8 Ch. Div. 11.

BACON, V.C.—Although this case has been argued with such ability and such ingenuity, I cannot entertain the slightest doubt about it. It is very old familiar law, although the circumstances of this case are by no means of very frequent occurrence; it has been the law ever since the reign of James I., as to order and disposition. It has undergone very little change. The Act of 1869, by the 15th section, says this: "All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader"—at that time the difference between being a trader and a non-trader had been recently, to some extent, abolished, and it was necessary to make a distinction between them and the rights of their creditors—"being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner." All those things, or the value of them when they have been realised, become distributable in the bankruptcy. Then there comes a proviso that things in action shall not be deemed goods and chattels, with this one exception, namely, debts due to him in the course of his trade or business. It was by no means uncommon for a trader to assign his book-debts, and there are many cases in which there have been questions raised of nicety, as to whether they were book debts, and all that the law does is to establish the old, antiquated principle of order and disposition, and to except from it the debts which are due to him in the course of his trade or business. The new Act of Parliament is in these terms: "All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action other than debts due, or growing due to the bankrupt, in the course of his trade or business, shall not be deemed goods within the meaning of this section." Why those words are expressed in a somewhat different way from those in the former Act of Parliament I do not know. The meaning is precisely the same. The debts due to him as "a trader" and the debts due to him "in the course of

his trade or business" are identically the same, and no conjuration can make any difference between them, nor do I think that there is the slightest substantial difference between the Act of 1869 and this Act of 1883. All that is in the order and disposition of the bankrupt passes to his assignee in bankruptcy. The history of this case is beyond dispute. Blakeway, being a partner in a stock-broking business, part of which was to lend money, had occasion to borrow money for the partnership from their bankers, and perhaps from other people, because, owing to the nature of their dealings, they could borrow on security at a low rate, and they could then lend it (I suppose on security also, but whether or not does not signify) at a much higher rate, and that was the business they carried on. In the year 1880 comes this joint-stock company (the Forth Bridge Company), and Mr. Blakeway, who was to some extent a managing partner—at least, a partner having equal authority with Mr. Thomas—took out of the partnership assets 28,000*l.*, or some such sum, and with it buys shares in the bridge company. Having got those shares into his possession, bought with the money of the firm, he borrows for the firm from the bankers of the firm a certain amount—how much does not signify, there being successive charges of security and successive borrowings. He borrows it for the firm. It is entirely a firm transaction, the firm's money buying the shares and the firm having the benefit of the borrowing on the security of those shares. The shares are registered in the name of Blakeway. They are not transferred to him, as it seems that he bought them from what is called a syndicate. He got the shares at all events. He got them registered in his own name in the books of the company, and he was the true owner of them, with the consent, no doubt, of his partner, or, at any rate, without any opposition on the part of his partner. He borrows the money, as I have said; he deposited the certificates of the shares with the bank; he hands over to them at the same time a form of transfer, in which there is neither date nor name of transferee, nor the consideration for the transfer, nor a specification or enumeration of the shares, nor is there any stamp upon it, and that remains in the possession of the bankers, the lenders of the money, as it is said upon the security of the shares deposited, and no doubt it was so. But, as the shares remained in his name as the registered owner, he is called upon to pay the calls, and out of the partnership money the calls are paid. So matters go on until Mr. Blakeway's disappearance. The bankruptcy of Mr. Thomas in consequence of that takes place in the beginning of this year. Mr. Blakeway is made a bankrupt, and when he is made a bankrupt he is the owner of the shares. There is no single step taken by the bank to assert their equitable right to the shares; no notice is given to the company till long after notice could be of any use, because, by adjudication in bankruptcy, Mr. Blakeway's assets of every kind became a part of the estate administrable in bankruptcy. Mr. Rigby has drawn a distinction between that which was Mr. Blakeway's property and the firm's property. What does it signify? What have I to do with that here? It is possible there may be some such question raised between the separate creditors of Blakeway in the bankruptcy and the joint creditors of the firm of

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Re SAWYER AND BARING'S CONTRACT.

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Thomas and Co. When that question arises they will settle that for themselves. In the meantime, the only question before me is whether, at the date of the bankruptcy, when the statute came into operation, the shares are exempted from the 44th section of the present Act—the Act of 1883? Can anything be plainer? "All the goods," which in the interpretation clause (sect. 168) is called "all the personal chattels," belonged to the assignee in bankruptcy. This is no *chose in action*. This is a positive possession by Blakeway. The whole of the assets are distributable in bankruptcy. Both the partners have become bankrupt. Whether it is called a joint bankruptcy or not does not signify. The trustee may be ordered to keep separate accounts when necessary, so as at all times to do justice to the several creditors. Then, what was done here? These mortgagees—the bankers, the present plaintiffs—come and state a case by which, according to their own showing, they never had anything except the deposit of the certificates, and this scrap of paper, which I have looked at. Now, the claim raises a great variety of points, which have been argued at great length, and I should not like to pass it over without paying attention to it. The 7th paragraph of the statement of claim is as follows: "The defendant as such trustee as aforesaid claims to be entitled to the said shares, under the provisions of sect. 44, sub-sect. 3 of the Bankruptcy Act 1883." There is no foundation for such claim. "The said shares were, at the date of the deposit of the said certificates and transfer, with the plaintiffs, and thenceforward down to and at the commencement of the said bankruptcy, the private and separate property of the said William Evan Blakeway"—that is exactly what the trustee in bankruptcy says, that they were his property, and therefore are administrable in the bankruptcy—"and were not used or employed in or in any manner in connection with the said business of P. W. Thomas, Son, and Co., and the said firm had never any right, title, or interest"—a question not to be decided on this occasion—"in the shares or any of them. The said shares are not goods within the meaning of the aforesaid section of the Bankruptcy Act 1883"—which I cannot possibly adopt, I say that they were, emphatically—"and, even if they are goods within the meaning aforesaid, they were not, nor was any of them at the commencement of the said bankruptcy, in the possession, order, and disposition of William Evan Blakeway, in his trade or business, nor with the consent nor permission of the plaintiffs, nor under such circumstances that he was the reputed owner thereof." Mr. Blakeway does not seem to be a very delicate person, therefore I may suppose this case: that had he presented himself to the company, and said, "I have unluckily lost the certificates which you gave me for these shares, I dropped my portmanteau out of the boat as I was going to Boulogne; I have lost them; give me another set of shares;" they would have given them to him directly, upon his indemnity, no doubt. But what was there to prevent him selling them the next day on the Stock Exchange if he liked? These plaintiffs could not have interfered, they had not even the certificates. They could not have given the numbers. If they were the true owners, and asserting their mortgage, it was with their full

consent and permission that Mr. Blakeway, from 1880 until his departure in 1884, was the reputed owner of these shares, and paid the calls when they were asked for, or received the demands for calls, although he did not pay them. Then the claim suggests further that, "If, however, the court should be of opinion that the shares were in the possession, order, or disposition of Blakeway at the commencement of the bankruptcy, in his trade, or business, by the consent and permission of the plaintiffs, under some circumstances that he was the reputed owner thereof, the plaintiffs will contend that the shares are things in action within the meaning of the proviso to the said 44th section, sub-sect. (iii.)." I have heard very little said about that, but I take it to have been decided over and over again that such things as these—shares, bills of exchange, and securities of various kinds—are distinctly, substantially, and positively, not things in action. They are clearly within the definition of the Act of Parliament, and I think, therefore, that the plaintiffs' claim here wholly fails, if this is the time to decide it; if not, then the plaintiffs fail in asking for an injunction. [Counsel on both sides having agreed that the whole matter should be decided upon the motion, his Lordship proceeded:] On this application, in point of form, I have declared that the plaintiffs are not entitled to any valid charge on the 7018 shares in the Forth Bridge Railway Company for an amount due from Thomas and Co. to the plaintiffs, with interest thereon; and that the plaintiffs are not entitled to have the shares transferred into their names, nor an order on the defendant to do all acts and assurances necessary or proper for the transfer of the shares into the names of the plaintiffs or their nominees. There is no right to ask for any such thing, or to have the mortgage or charge enforced, nor to have a receiver, nor to have an injunction to restrain the defendant and his agents from transferring.

*Action dismissed with costs.*

Solicitors for plaintiff, *Druces, Jackson, and Atiles.*

Solicitors for defendant, *Lawrance, Plews, and Baker.*

Monday, Aug. 11.

(Before KAY, J.)

Re SAWYER AND BARING'S CONTRACT. (a)

*Vendor and purchaser—Trustee vendors—Equitable tenant for life—Limited covenants for title—Condition of sale.*

*Certain property having been purchased by a company from trustees who had a power of sale, the purchasers required that the equitable tenant for life of the property, at whose request the sale was made, should enter into covenants for title.*

*One of the conditions of sale was that "the vendors, being trustees, are to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees."*

*Held, that the purchasers were entitled to require the equitable tenant for life to enter into the usual limited covenants for title, and that the condition of sale stated above did not deprive them of this right.*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

THIS was a summons, under the Vendor and Purchaser Act 1874, asking, on the part of the Prudential Assurance Company Limited, that it might be declared that F. W. A. Bowyer, the equitable tenant for life of certain property (which the company had purchased at an auction) mentioned in the contract for sale, a party to the conveyance of such property to the company, should therein enter, by statutory implication or otherwise, into covenants for title, and that Bowyer, or Sawyer and Baring (the trustees), might be ordered to pay the costs of the application.

There was a condition of sale as follows :

8. The vendors being trustees are to be required to give only the statutory covenant against incumbrances implied by reason of their being expressed to convey as trustees.

The sale was to be with the assent, or on the request, of the equitable tenant for life, and he gave or made it.

It was contended that Bowyer was not a necessary party to the conveyance, and, though his concurrence ought not to have been required, he assented to it, and, having assented, that was just as good as any covenant would be, being under seal.

It was not disputed that a purchaser had a right to require that a legal tenant for life should enter into covenants for title, but it was contended that it was otherwise where the legal estate was in trustees.

Philip S. Gregory, for the applicants, referred to

*Re The London Bridge Acts; Ex parte The Clothworkers' Company*, 13 Sim. 176;

*Earl Poulett v. Hood*, 17 L. T. Rep. N. S. 486; L. Rep. 5 Eq. 115;

*Sugd. V. & P.* 14th edit. p. 575;

1 *Dart V. & P.* 5th edit. pp. 130, 547.

E. Widdrington Byrne for the respondents.

KAY, J.—The question is whether, in circumstances of this kind, the purchasers can insist upon having covenants for title, from some time or other, by this gentleman, who is a tenant for life. The property which has been purchased is vested in trustees, who have power to sell at the request of the tenant for life, who of course has only an equitable life estate, because the estate is vested in the trustees. He has given the request, and the estate has been sold, and the question is, first of all, whether, independently of any condition, the purchasers have the right to say, in that state of things, "We must have covenants for title from the equitable tenant for life." The point seems to me clearly determined by the case of *Re The London Bridge Acts; Ex parte The Clothworkers' Company* (13 Sim. 176), where the estate was vested in two trustees in fee simple upon trust for sale. Shadwell, V.C., in giving judgment, said that "the question was, what was the rule as to the obligation of tenants for life, in cases like the present, to enter into covenants for title; that he apprehended that, where the only persons who were immediately interested in the estates were tenants for life, it was the usual course to make them covenant for the title; that the tenants for life in this case stood in the same situation as if there had been a power to sell the estates with their consent, in which case it would be a matter of course for them to enter into the covenants." Now, that has been adopted by Lord St. Leonards in his *Treatise on Vendors and Pur-*

*chasers* (14th edit. p. 575), and by Mr Dart in his work on the same subject (5th edit. vol. i. p. 130), and it has been followed practically in the subsequent case of *Earl Poulett v. Hood* (486 L. T. Rep. N. S. 17; L. Rep. 5 Eq. 115). Therefore, I cannot hesitate to say that this is a case which comes precisely within that statement of the law. It is a case in which the sale is with the assent, or at the request—which for this purpose is the same thing—of the equitable tenant for life, and accordingly the purchasers have a right to require covenants for title by the equitable tenant for life. Well, then, the next question is whether that is not avoided by the conditions of sale in this case. The only condition which applies to it is the 8th. [His Lordship read it and continued:] It is said that that means that the only covenant which the purchasers are to get is a covenant against incumbrances by the trustees. If it means that, it certainly does not say so. It says nothing about its being the only covenant the purchasers are to get. All it says is that that is the only covenant which the trustees, as vendors, are to enter into. It is not asked that the trustees should enter into any other covenant. What is asked is not that the trustees should do anything, but that the tenant for life, who is not referred to in the conditions, should enter into the usual covenants. How can I say that the condition excludes the purchasers from requiring the usual covenant by the tenant for life? In my opinion it does not. But, if there were more doubt, the general rule is quite plain that a vendor, if he wants to deprive the purchaser of one of the usual incidents of the purchaser's contract, is bound to express it in the clearest possible manner. No one can say that this condition, in the clearest possible manner, excludes the right, which I hold the purchasers have, to require covenants for title by the tenant for life. Accordingly, the result will be this: The purchasers do not require anything except the covenant, limited in the manner mentioned in Dart's *Vendors and Purchasers*. I determine nothing as to the form of the covenant. That will be settled by the conveyancing counsel. All I hold is, that this is a case in which the purchasers are entitled to have the covenants for title from the tenant for life, and the costs of the application.

Solicitor for the applicants, D. Wintringham Stable.

Solicitors for the respondents, Paterson, Snow, Bloxam, and Kinder.

Friday, July 11.

(Before CHITTY, J.)

HAMPDEN v. WALLIS. (a)

*Practice—Trusts—Admissions before and after action—Evidence—Order for payment into court.*

An action had been brought by the cestuis quo trust against a sole trustee of a marriage settlement for an account, and the court was moved for an order directing him to pay into court sums which he had received as such trustee. It appeared that the defendant before the issue of the writ had written letters which contained

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.



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admissions that he had received the sums for which an account was asked, that the settlement contained a recital that he had received the sums, and that there was an affidavit showing that he had accepted the trust, also that he had been ordered to deliver accounts, that he had failed to comply with it, and an order for his attachment had been obtained; also that he had failed to comply with an order for inspection, and that his defence had been struck out. He submitted that his letters written before the action could not be held to be admissions, as they were not admissions in the proceedings.

Held, that a trustee would be ordered to pay trust funds into court upon admissions contained in letters written by him, either before or after action brought, that he has received the money, and upon a recital to that effect contained in a settlement, his execution of which had been proved, although there was not any actual admission on the pleadings that he had received and was in possession of the money; and that, as the defence had been struck out, the allegation in the statement of claim, that he was accountable for the money, was uncontradicted, and must be held to be admitted, and that the court would make the order asked for.

*Dunn v. Campbell*, before Jessel, M.R., Jan. 1879 (unreported) followed.

By a settlement dated the 3rd May 1879, and made on the marriage of the plaintiffs, it was recited, that the intended husband had transferred 250 Egyptian Unified Obligations into the names of the trustees named in the settlement, to be held by them upon the trusts of the settlement. The trustees were one A. E. Fyler and the defendant. The 250 obligations were handed over to the defendant shortly after the execution of the settlement, and the plaintiffs also paid him a sum of 2000*l.* to be held by him on the trusts of the settlement. From the evidence it appeared that A. E. Fyler had never executed or acted in the trusts of the settlement, and that the defendant had accepted the trusteeship, and executed the trusts of the settlement, and was consequently sole trustee thereof. Some correspondence took place between the plaintiffs and the defendant in the year 1879, which in the opinion of the court amounted to an admission by the defendant that he had received the 2000*l.* and the securities.

On the 15th Feb. 1884 a writ was issued, to have the trusts of the settlement carried into execution, and for an account, and an inquiry; but, though pleadings had been delivered, there was no formal admission on the face of them that the defendant had received the trust funds.

On the 10th March 1884 an order was made for an account of the trust property, and for an inquiry what had become of the said trust property. The defendant, however, failed to obey the order to account, and consequently an order for attachment against him was obtained on the 23rd May 1884, but he had succeeded in evading arrest.

On the 28th May 1884 the defendant wrote to the plaintiffs a letter, of which the material part was as follows:

As for the trust moneys, these proceeding have given rise to the question as to whether the 2000*l.* you sent me is trust property at all. Had I not been frustrated in the arrangements I made for looking them up for the three years agreed upon between you and me, this question

would probably never have been raised. With regard to the securities, as I have looked them up for the period arranged, if I am compelled to produce cash, then I must go outside and raise it from my other resources. I expect to receive nearly double the amount in the course of the next six weeks or two months, in which case you are welcome to the cash and I will stick to the securities, which I have calculated will be worth in about two years about one-fifth more in value, i.e., 5000*l.* will be worth 6000*l.*, and so on; but I object to mention what they are (except that they are within the powers of the settlement), and where they are until some settlement is made between us, for fear of your solicitors interfering with them and imperilling my arrangements. I may mention that I have been kept a prisoner in London by these legal proceedings, and unable entirely to attend to my continental business; but the inconvenience of detention in prison affords me a plea to absent myself, and absent I shall be until you say I may come back with safety.

On the 17th June 1884 the plaintiffs gave notice of motion that the defendant might be ordered to pay into court 2000*l.*, and deposit 250 Egyptian Unified Bonds of the nominal value of 5000*l.*, and on the 8th July 1884 an order was made to strike out the defence in consequence of the defendant not having obeyed an order for inspection.

*Whitehorse*, Q.C. and *Tremlett*, for the plaintiffs, now brought on the motion, of which notice had been given on the 17th June 1884.—The letters written before and after action, together with the recital already mentioned in the settlement, constitute admissions sufficient to give the court jurisdiction to order payment into court:

*Freeman v. Cox*, 8 Ch. Div. 146;

*London Syndicate v. Lord*, 38 L. T. Rep. N. S. 329; 8 Ch. Div. 84.

*Oswald* for the defendant.—This motion must be tried as if the defence were not struck out. The admissions must be in the action, and clear and distinct. In *Freeman v. Cox* and *London Syndicate v. Lord*, the facts were very dissimilar to the present case. The letters written before action brought do not contain admissions sufficient to support an order for payment into court. [CHITTY, J. referred to an unreported case before Jessel, M.R. in Jan. 1879, entitled *Dunn v. Campbell*.] The plaintiffs have no ground to stand on, because the defendant's letter of the 28th May 1884 shows on the face of it that there was admittedly a dispute as to whether or not the defendant had ever received the 2000*l.* at all.

CHITTY, J.—This is a motion to compel the defendant to pay into court the sum of 2000*l.*, and deposit in court 250 Egyptian Unified Bonds, based upon admissions not being admissions made in the action. The first admission is contained in the deed of settlement in a form of recital that one of the plaintiffs had transferred 250 Egyptian Unified Obligations into the names of A. E. Fyler and the defendant. That admission is supplemented by an affidavit, which shows that Fyler did not accept the trusts of the settlement, and that the defendant is the sole trustee. The execution of the settlement by the defendant has been proved. In regard to the sum of 2000*l.* there is a plain admission in a letter written before the action that that sum had been received. That sum of 2000*l.* is an additional sum paid by the plaintiffs to the defendant, to be held by him upon the trusts of the settlement. There is one letter written subsequently to action brought. The passage on which the defendant relies is in these terms: [His Lordship read the letter of the

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28th May 1884 as above set out.] There was an attempt made by the defendant's counsel to show that that amounted to a denial; but, it seems to me, it is an additional admission made after action. The late Master of the Rolls held that one mode of admission was as good as another. The old practice was not to order money into court unless an admission was found in the answer. That practice was modified, and admissions in the proceedings were held to be sufficient. In *Dunn v. Campbell*, which was a partnership action, the facts were as follows: Before action brought the defendant Campbell sent an account to the plaintiff which showed a balance due to himself. On this account the late Master of the Rolls ordered Campbell to pay money into court. He went as far as this: he looked at the account, and for the purposes of the motion, rejected certain items, and turned the balance against Campbell and ordered him to pay in 10,000*l*. I understand that there was some appeal against that order, but nothing came of it. That is a plain decision that it is not necessary that the admissions should be in the defence, or in the proceedings, and it is a decision which is binding upon me. The late Master of the Rolls also decided in *Freeman v. Cox* that, where a defendant did not answer an affidavit or appear, the admission was sufficient. I think therefore that it would be right to make the order on the admissions. But the matter does not stand there. There has been an order for an account which brings the case within the decision of the Court of Appeal in the case of *London Syndicate v. Lord*. There is no substantial difference between an order and a decree for an account. In this case the defendant has not brought in the account, and there is an attachment out against him in consequence. But the case does not even rest there. There is a further point which is fatal to the defendant. Pending the motion there has been an order to strike out the defence. That order having been made before the motion was finally disposed of, I think I am entitled to say there is an admission of the allegations contained in the statement of claim. Pending the motion, the defendant asked for time to put in an affidavit. The motion stood over. The defendant did put in an affidavit, but his counsel, Mr. Oswald, very properly admitted that he had not attended, though ordered to do so for the purposes of cross-examination, and that therefore the affidavit could not be entered as read. The result is that, in all these circumstances, there is a sufficient admission.

Solicitors for the plaintiffs, *Eardley Holt and Richardson*.

Solicitors for the defendant, *Eldred and Big-nold*.

## QUEEN'S BENCH DIVISION.

Tuesday, June 10.

(Before FIELD, MANISTY, and LOPES, JJ.)

LINE AND OTHERS (pets.) v. WARREN AND OTHERS (resps.). (a)

*Municipal election—Election of town councillors—Four candidates elected—Three only petitioned against—Mayor's allowance of objections appealed against—Practice—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 87, 88, 93—Sched. 3, part 2, rr. 3, 10, 14.*

*At a municipal election to fill four vacancies in the office of town councillor, A., B., and C. (the respondents), and D. were elected, and a petition was subsequently presented against the election of A., B., and C. on the ground of the alleged improper allowance by the mayor of objections to the nomination papers of certain other candidates, who were thereby prevented from going to the poll.*

*An application by the respondents for an order to strike the petition off the file, on the ground that D., to whose election the same objection equally applied, was not made a respondent to the petition, and that no relief could therefore be granted under it, as it did not pray that the election, as a whole, should be set aside, having been refused by Mathew, J. at chambers, the respondents appealed therefrom to this court, when it was*

*Held (Lopes, J. dissentiente), by Field and Manisty, JJ. (dismissing the application), that, under the Municipal Corporations Act 1882, a petition might be presented against the election of any one or more of the individuals elected, and that it was not necessary to petition against all of them, or to seek to avoid the election as a whole; and, therefore, to take the petition off the file would contravene the theory and spirit of the Act, which pointed directly to proceedings by petition against the election of any individual elected.*

*Sed aliter, per Lopes, J.: The petition should have included all the four elected candidates, as the election must stand or fall as a whole, and the election of three of the elected only cannot be set aside under this petition. But for the mayor's decision the result of the election might have been very different, and, as no relief can be granted under the petition, it should be struck off the file.*

*Per totam Curiam: Where it is clearly shown on the face of an election petition that no relief can be granted under it, the court has power under the Act of 1882 to take it off the file.*

*APPEAL from an order of Mathew, J. at chambers, refusing to make an order to strike a petition, by certain burgesses of the municipal borough of Daventry, against the election of the three respondents to the office of councillors for the borough, off the file, on the ground that it had not been presented in the prescribed manner, and did not pray that the election should be declared void, but only that it might be declared that the respondents were not duly elected, and that their election and return were null and void.*

*The facts of the case, and the grounds on which the election and return of the respondents were sought to be set aside, are fully set forth in the following petition of the six burgesses of the borough who subscribed the same:*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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The petition of William Line, William Henry Hence, William Webb the elder, Samuel George Leigh, William Dickens the elder, and John Gardner, whose names are subscribed:

1. Your petitioners are persons all of whom voted, and had a right to vote, at the above election.

2. And your petitioners state that the said election was held on the 24th day of October and the 1st day of November, A.D. 1883, when the respondents and Edward Brooks, William White, Thomas Harris, John Merrifield, Charles Rodhouse, and William Edward Rodhouse, were candidates; and the respondents and the said Thomas Harris were declared to be duly elected.

3. The said borough of Daventry is not divided into wards.

4. On the 16th of October 1883 the town clerk of the said borough duly signed and published a notice of an election for four councillors, to fill four vacancies in the council thereof. By the said notice it was also announced that the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more; and notice was also thereby given of the time before which nomination papers were to be delivered.

5. Pursuant to the said notice, and relying thereon, nomination papers, properly subscribed by a sufficient number of burgesses, were duly delivered to the town clerk in proper time on behalf of each of the persons mentioned in paragraph 2 hereof; and none of such burgesses subscribed more nomination papers than there were vacancies to be filled up; nor did any one of them subscribe more nomination papers than one of any candidate.

6. The mayor attended at the proper time and place, pursuant to the said notice, for the purpose of hearing objections to the said nomination papers. An objection was raised by the said Edward Brooks on behalf of himself and the said respondents to the nomination paper delivered on behalf of the said Thomas Harris, on the ground that the persons subscribing his nomination paper had also subscribed other nomination papers of candidates at the said election.

7. The like objection was taken by and on behalf of the same persons to the nomination papers of each of them the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse.

8. The mayor, after hearing evidence, declared himself unable to decide which of the said nomination papers had been first delivered, and gave no decision on that question; but the said Edward Brooks offering to withdraw the objection to the nomination paper of the said Thomas Harris, the mayor gave no decision upon the objection to the nomination paper of the said Thomas Harris, but permitted the objection to be withdrawn, and wrongfully allowed the objection raised to the nomination papers of the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse, and refused to allow them to become candidates, or to publish their names as candidates at the said election. The names of the other persons mentioned in paragraph 2 hereof were published as candidates by the town clerk, and the said Thomas Harris and the said respondents were, after a poll, declared duly elected.

9. By reason of the matters aforesaid the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse were prevented from being candidates at the said election.

10. Your petitioners allege and contend that the said election was conducted irregularly, and not in accordance with the principles laid down by the Municipal Corporations Act 1882; and that the mayor ought not to have allowed the objections, and that the same were bad in law; and that the evidence in fact showed that one of the nomination papers to which the objection was allowed was in fact the first delivered; that the mayor refused to give any decision on that question; that the said John Merrifield, Charles Rodhouse, and John Edward Rodhouse were duly nominated, and that they, or some or one of them, ought to have been permitted to be candidates at the said election; or, if they were not so duly nominated, that they and the burgesses purporting to nominate them, and the burgesses generally, were misled by the said notice so published by the town clerk as aforesaid, and that the said election and return of the said respondents was and is wholly null and void. Wherefore your petitioners pray, &c.,

That it may be declared that the said respondents were not duly elected, and that their said election and return was and is wholly null and void.

(Here follow the signatures of the six petitioners above named.)

The following sections of the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) and the rules laid down in the third schedule to the Act with respect to the nomination in elections of councillors, were cited and referred to in argument, and are material:

Sect. 87.—*Power to question municipal election by petition.*—(1.) A municipal election may be questioned by an election petition on the ground . . . . (c.) That the person whose election is questioned was at the time of his election disqualified; i.e., (d.) That he was not duly elected by a majority of lawful voters. (2.) A municipal election shall not be questioned on any of those grounds except by an election petition.

Sect. 88, sub-sect. 2.—Any person whose election is questioned by the petition . . . . may be made a respondent to the petition.

Sect. 93, sub-sect. 4.—At the conclusion of the trial, the election court shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void, and shall forthwith certify in writing the determination to the High Court, and the determination so certified shall be final to all intents as to the matters at issue on the petition.

*Third Schedule, Part II.—Rules as to nomination in elections of councillors.*—3. Each candidate must be nominated by a separate nomination paper; but the same burgesses or any of them may subscribe as many nomination papers as there are vacancies to be filled, but no more . . . . 10. Where a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered.

14. The decision of the mayor shall be given in writing, and shall, if disallowing an objection, be final; but if allowing an objection shall be subject to reversal on questioning the election or return.

*Coward* for the respondents, the applicants, contended that three-fourths only of a municipal election could not be declared void on a ground which equally affected also the fourth candidate, and that such fourth candidate, viz., Thomas Harris, should have been joined as a respondent with the other three, because the election must stand good or be declared void, if at all, as a whole. The petition was bad on the face of it, and could not be amended. This objection goes to the root of the whole matter, and, if the mayor's decision was wrong, this court cannot split up the election and declare the election void as to three only of the four persons elected. By voiding the election of the three, the election of the fourth must necessarily also be avoided; yet that cannot be done, as that fourth man is not a party to the proceedings, and there is no power to unseat a person whose election is not petitioned against. Were the mayor's decision to be upset on this petition, the whole election would be null and void of necessity, inasmuch as, had the rejected candidates been allowed to stand the poll, *non constat* that Harris would have been elected. That alone has been held, under the Municipal Corporations Act of 1872 (35 & 36 Vict. c. 94)—the words of sect. 12 in which are identically the same as in the present Act—to be a sufficient ground for declaring an election to be void:

*Budge v. Andrews and others*, 39 L. T. Rep. N. S.

166; 47 L. J. 586, C. P.; 3 C. P. Div. 510;

*Houes and another v. Turner and another*, 35 L. T.

Rep. N. S. 58; 1 C. P. Div. 670; 45 L. J. 550, C. P.

This is a preliminary objection going to the root of

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the petition, and the object of it is to save the expense of proceeding with the special case; for, assuming the petition not to be struck off the file and the petitioners to succeed at the trial, the court would not be able to give the only relief which it was competent to them to give, namely, to declare the whole election to be void.

*Yarborough Anderson and Montague Shearman*, for the petitioners, *contra*, argued that, unless the petition were shown to be an abuse of the process of the court, it could not be struck off the file. The court should dismiss the respondents' application as being concluded by the consent order made by Field J. for a special case. The respondents might have petitioned against Harris's election had they chosen to do so; but the petitioners are not compelled by any statute to object to or question the election of a person with whose election they are satisfied. It had been said that the rejected candidates were disqualified by rule 10 of schedule 3 of the Act of 1882, which says that where a burgess subscribes more than one nomination paper, all the papers shall be inoperative except the one first delivered. But that is contradicted by rule 3, which permits a burgess to subscribe as many nomination papers as there are vacancies, but no more. The town clerk's notice followed that rule. This dilemma may be put: if the notice be good, the mayor's decision was wrong, or the petitioners are entitled to upset it on the ground of being misled, which is one ground of the petition. Another ground was that the persons petitioned against were not elected by a lawful majority. The petitioners have complied with all the statutory requirements, and the relief prayed for can be given on the petition. Sect. 87, sub-sects. (c.) and (d.) and sect. 88, sub-sect. 2, are very important and clearly show that a petition against individuals whose election or return is complained of is well warranted. [FIELD, J. referred to and read rule 14 in schedule 3, part 2.] The case of *Howes v. Turner (ubi sup.)*, cited for the respondents, does not support the proposition for which it was cited, for there all the elected persons were respondents, and so the court had power to declare the whole election void. The petition should not be removed from the file unless no relief can be given under it; but it is clear from sect. 87 that relief can be obtained, whilst sect. 93, sub-sect. 4, shows plainly the intention of Parliament to enable the court to declare on petition the election of individuals to be void, thus giving, necessarily, the right to petition against some only of the elected candidates.

*Coward* in reply.—The court has no jurisdiction to entertain the point. No doubt, one or more persons might be picked out and petitioned against for bribery, but here the objection goes to the root of the whole election, and all the candidates were equally disqualified. A case in 2 O'Malley & Hardcastle's Rep. 77—178, and the *Tipperary case* (3 Ib. 81), cited in Leigh and Anderson's Election Law Guide, 3rd edit., show authority enough for taking the petition off the file.

LOPES, J.—I regret to say that in this case I cannot agree with my learned brothers in the decision at which they have arrived with regard to it. An application to take this petition off the file was made at chambers before my brother Mathew, and he has made no order, and thereupon

it comes before us on appeal from the learned judge. Now it appears that on the 24th Oct. and the 1st Nov. last year there was an election at Daventry for the office of councillor for that borough, and it appears that there were four vacancies and nine candidates. A poll was taken. The three respondents, Samuel Warren, George Checkley, and James Bromwich were elected, and also a man named Harris, who is not a respondent, and who has not been petitioned against. It appears that at this election objections were taken to three out of the nine candidates, and that these objections were allowed by the mayor. Consequently, as it appears to me, the electors had no opportunity of voting for those three candidates, and it may be that if those candidates had gone to the poll they might have been elected, and that some of the respondents might not have been elected; and it is even possible that Harris himself might not have been elected. The mayor having allowed the objections it was open to any of the electors to petition against the election. I use that word advisedly—to petition against the election. The petitioners, however, have not petitioned against the election; or, in other words, they have not petitioned against the four candidates who were elected, but have only petitioned against three of them, omitting Mr. Harris altogether. Harris, it appears, happened to entertain the same views as the petitioners, and I presume that is the reason that he has not been petitioned against. Now the question which arises is this: Can a portion of the elected body be petitioned against, or must the petition be against the whole of them? In my opinion you must petition against the whole number of the elected body, and the petition must seek to set aside the whole election, and it cannot seek to set aside a part of it only. If you could petition against certain individuals and not against all those elected, this might happen: Harris might in this case stand elected when it may be he never would have been elected if the mayor had not erroneously allowed the objections taken to the other three candidates; or, in other words, Harris might stand elected without the names of the three other candidates against whom the mayor allowed the objections having been submitted to the constituency at all. It appears to me that this was not the intention of the Act, and I think that it cannot be done. In my opinion the petitioners are bound to seek to set aside the whole election, and cannot seek to set aside the election of certain individuals only. Then the question is, if I am right in that, whether or not this petition ought to be struck off the file. I think it should be for this reason. It appears to me that, if this petition is permitted to proceed, the court who heard it would have no jurisdiction to grant the prayer of it, and could not grant any relief under it. I think, therefore, that it would be a great waste of time, a great waste of trouble, and a great waste of expense, to permit the matter to proceed further, and therefore I think that the application made at chambers was improperly disallowed, and that this petition ought to be struck off the file.

MANISTY, J.—I am always sorry when there is a difference of opinion on the bench; but I confess that, in this case, I cannot agree with my brother Lopes in the view which he has taken. In the first place, I entertain no doubt that the court has jurisdiction to take a petition off the file if a

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proper cause is made out; that is to say, if on the face of it the court has no jurisdiction, or (which is to my mind the same thing) if on the face of it the court can grant no relief it would be an idle waste of time and money to go on with a petition which can have no result. It is enough to say that there are cases in which the court would take the petition off the file; but I am not satisfied that this is a case in which relief may not be granted. It would be quite enough if I stopped here. It would be quite enough to say that this is too doubtful a case in which to interfere. But I do not stop there, because, as at present advised, I think relief can be granted. It would, in my judgment, be a very serious and strange consequence if, in the case of a number of candidates who had been nominated, and where the whole body of electors are perfectly satisfied with nine-tenths of them, the election, without any application to set it aside *in toto*, could nevertheless be set aside, and no relief could be granted. It is said that, if anyone objects to the election of any one of those who have been returned, the whole election is void. It seems to me that the whole spirit of the Act is founded upon this, that the court gives relief to the extent to which parties object to the election. If in this case no one had objected it could not be contended for a moment that all the four candidates who were returned were not duly returned. It is not as if it were illegal. That would be a totally different thing. If it were illegal then it would be all by law void, and every act done would be void. But that is not so. The Act of Parliament has provided relief in case of objection, and the objection here is against three. Mr. Harris, the fourth candidate elected, is not before the court. The court, therefore, could not deal with him. But it is said you must have all the elected candidates before the court, and that an election cannot be declared void without making all respondents; so that all of them must be made respondents though the whole constituency is perfectly satisfied with say nine-tenths, because in their absence you cannot declare the election void. It would take a great deal to convince me that that is the law; and when I look to the terms (I do not propose to go through them) in which all the subsections of sect. 87 are couched, and the rules which have been framed in pursuance of the authority of that Act, they all, in my opinion, point to objections to certain individuals. You may object to all, but it seems to me that, subject to objection, the court cannot inquire into the right of those who are absent. I think there is a great deal in the argument that it was never intended, by changing the form of proceeding, to take away a right which existed previously, namely, the right under *quo warranto*. We must look to the whole scope of the Act of Parliament, and the spirit in which it is framed, with a view and for the purpose of questioning elections. It is said that a municipal election may be questioned by election petition; but that clearly does not mean that you must of necessity object to everyone and to the whole election. A single individual may be the subject of an objection to a municipal election. Therefore, looking at the whole of the provisions, and to the most serious consequences which would follow if the contention of the applicant in the present case is correct, I think it is not by any means a case in which we cannot

give relief. There is another point which has been adverted to, namely, the effect of that order by consent as to the special case. I think there is something in that. I cannot decide that this is by no means such a case as ought to induce the court to interfere and stay proceedings by taking the petition off the file.

FIELD, J.—I am of opinion that my brother Mathew's order was perfectly well founded and ought to be affirmed. I do not altogether share the regret which my brethren express that there should be a difference of opinion on the bench. I think it is a most valuable quality in our administration of justice, because it shows that each judge exercises his own individual independent view, and gives his judgment according to what he thinks to be right, and every view is thus considered and disposed of. Although, of course, the difference of opinion of my brother Lopes tends to make me doubt the correctness of my own opinion, it does not do so to the extent of making me think I ought not to give the judgment I am about to give. I think my brother Mathew's order was right on the ground that Mr. Coward has no *locus standi* here by reason of his having consented that this should be turned into a special case. I think he has deprived himself by that consent of any other mode of questioning this election than such as he will be entitled to raise under the special case. If he is well warranted in his facts, and if he is well warranted in his law, he will raise all that by special case, and this court, when it hears that case, will decide every point which has been raised before us to-day. But we are asked to prevent that decision taking place and to take this petition off the file, and not to permit any argument before the court which shall be competent to decide it. I very much hesitate to do that in all cases. I require to be very well and clearly satisfied that a subject who comes to this court by way of petition can have no relief that he has prayed for, and, unless I am so satisfied, I, for one, will never take his petition off the file. Now, what are the material facts here? Municipal election, and objection taken to certain nomination papers on the ground that they have been subscribed by more than one person. Now by law the mayor is made the judge of all these objections. He must be treated as an official. It is not a question of other than a judicial decision which the Legislature wants in him for purposes very desirable, in order that there may be as little expense and trouble as possible. The Act of Parliament distinctly says that the mayor shall attend and shall decide the validity of every objection made in writing to a nomination paper. He is therefore a judge, and his decision is one which is to be taken to be sound. But there is a right of appeal given in a certain alternative, and that right of appeal is this: he shall give his decision in writing, and, if he disallows an objection, it shall be final. But, if he allows the objection, then his decision shall be subject to reversal. When? On petition. Questioning what? The election or return. It points, therefore, to two distinct and different things—the election or the return. In the present case the mayor did allow the objection. It is said by the petitioners that he was wrong in doing that. Whether right or wrong will be the question, of course, which will have to be decided upon the petition. But then it is said that upon

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this petition the petitioners are entitled to no relief, for the reason that there was another man, Harris, to whom the same objection would apply. We do not know whether it would or not. But assume that it would. It is said that, inasmuch as the petitioners have not made Harris a respondent, they cannot have, in any view of the case, the relief which they claim here. Well, I first of all shall ask, is there any law which says that? Mr. Coward says "No." He cannot put his hand on any section which says that, but he asks us to infer that that is the state of the law from the language of the Act, and from certain decisions which he has cited. Now he says (and says very properly) that, if this objection is not good (and this is the point upon which my brother Lopes seems to feel a difficulty, or rather founds his opinion upon), then the election ought to be declared void, and that it cannot be declared void because Harris is not a party respondent to the petition. But then I think we must all recollect that, in this country, we are very much in the habit of not correcting public evils by public people. Public evils are corrected by individual prosecutors, both in regard to crime and in election matters, and the Legislature has thought it right to trust to individuals to enforce the provisions of this Act. Her Majesty's Attorney-General cannot come here and make any complaint. It is left to the good feeling or bad feeling (very often the latter) of individuals whether they will put the law in force, just in the same way as it is left in the hands of a prosecutor whether a criminal should be punished or not. That is what we do. I do not say it is wrong, but that is what we do and what has been done here, and what has always been done in election matters. Now let us see what is the remedy, because an individual is put forward as the prosecutor to correct, it may be, a general evil, or it may be a local evil. What are his rights and powers? That is the only question we have to decide, and, if the statute does not provide for this case at all, I decline to take this petition off the file until I see a proper case made out. What powers has the statute given to individuals to prosecute for wrong proceedings? It has provided two distinct lines of conduct. Anybody may complain who is an elector. What may he complain of? Two distinct things. He may complain that the election is altogether void, or he may complain that certain persons have been improperly returned, and that distinction is taken in the very first words of the 87th section of the Act, which says: "A municipal election may be questioned by an election petition on the ground (a) that the election was, as to the borough or ward, wholly avoided by general bribery, treating, undue influence, or personation; or, (b) that the election was avoided by corrupt practices or offences against this part committed at the election." Those are the grounds upon which the election as a whole may be declared void, and this petition, as Mr. Coward properly remarked, does not come within either of those two grounds. I quite agree that it does not. It does not seek to avoid the election. He could not do it on any such grounds as he has alleged here, because he can only void it on the grounds of general corruption influencing the whole election. But now come the cases in which, under the

same section (87), returns are complained of. What are they? (c) "That the person whose election is complained of" (therefore he is the only person, the only defendant, if I may use that word) "was at the time of the election disqualified; or (d) that he was not duly elected by a majority of lawful votes." It therefore seems to me that the statute expressly gives to individuals the power to go against everybody, or to go against those individuals whose return they choose to question. It is said that Mr. Harris is a partisan of Mr. Anderson's clients. Very likely he is. But that is the whole basis of our system of representation and elections. From the House of Commons downwards it is the same thing. We elect those who are members of our party; we vote for members of our party, and that is considered the wholesome mode by which we arrive at the general opinion of the country, either at parliamentary or municipal elections, viz., by selecting those whom we think (if we exercise our franchise honestly) to be the best men to manage affairs either in Parliament or elsewhere. It is admitted that, if the facts on the petition are proved, and if the law contended for is correct, the petitioners are entitled to the relief they claim, subject only to this—that Harris has not been made a respondent. Then where is the law which says that they were bound to make Harris a respondent? Suppose Harris were your father, the best friend you had in the world, a man in whom you had the greatest possible confidence. Are you to be told, "No, although there are parties returned who in your judgment are scoundrels, yet you must not question their return unless you question Harris's return also." Is that so? Let us see what comes next. "A municipal election shall not be questioned on any of these grounds except by way of election petition." Then Mr. Anderson says, I do question it on those grounds. This is the only mode in which it can be done—by election petition, for *quo warranto* is gone. Therefore it seems to me clear that the Legislature intended to comprise in those four paragraphs all the relief which they intended to give. There is nothing in the subsequent clauses or sections that at all alters that, and I am unable to follow the authorities which have been quoted for it. In my judgment there is no ground whatever for saying, as far as I can judge at present, that this petition must fail. If I am wrong in that, it is a matter which will be settled when the petition comes on for argument. Till then, of course, I reserve my opinion upon it. I am so well satisfied with that view, or at all events I see such great difficulty in saying that it is wrong, that I cannot myself be a party to taking this petition off the file.

*Judgment for the petitioners, confirming the order of Mathew, J., and dismissing the respondents' application with costs.*

Solicitors for the petitioners, *Caister and Shearman*.

Solicitors for the respondents, *Kingsford, Dorman, and Co.*, agents for *Burton and Willoughby*, *Daventry*.



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THE UNITED LAND COMPANY v. THE TOTTENHAM LOCAL BOARD.

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Monday, May 26.

(Before HAWKINS and SMITH, JJ.)

THE UNITED LAND COMPANY v. THE TOTTENHAM LOCAL BOARD. (a)

*Local Authority—Highway—Expenses of diverting—Employment of solicitor by Local Board of Health—The Highway Act 1835 (5 & 6 Will. 4, c. 50), ss. 84, 85—The Public Health Act 1875 (38 & 39 Vict. c. 55), s. 144.*

By the 84th section of the Highway Act 1835 (5 & 6 Will. 4, c. 50) it is provided that, if any party shall be desirous of stopping up, diverting, or turning any highway, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and, if such inhabitants shall agree to the proposal, the surveyor shall apply to two justices to view the same, and in such case the expenses attending such view, and the stopping up, diverting, or turning such highway, shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under the Act.

By the 144th section of the Public Health Act 1875 (38 & 39 Vict. c. 55), it is provided that every urban authority shall, within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, and shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which, by the Highway Act 1835, are vested in and given to the inhabitants in vestry assembled of any parish within their district, and that all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.

The U. Land Company, being desirous of diverting certain public footways on their estate in the parish of T., requested the T. Local Board of Health to assent to such diversion and to take the necessary steps to have the said footways legally closed. The T. Local Board assented, and instructed their solicitors to take the necessary steps, and, these having been duly taken, paid the bill of costs presented by them in respect thereof, and recovered the amount thereof summarily as "expenses" within the meaning of the 84th section of the Act of 1835.

Held, on case stated, that the words of the 144th section of the Public Health Act 1875 "may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint," did not empower the local board to employ a solicitor to do the ministerial acts in question, and that therefore the solicitor's charges were not "expenses" payable by the land company under the 84th section of the Highway Act 1835.

THIS was a case stated by justices of the peace for the county of Middlesex, under 20 & 21 Vict. c. 43, s. 3, for the purpose of obtaining the opinion of the court upon the questions of law arising thereon.

The case was, so far as material, as follows :

At a court of summary jurisdiction sitting at the County Court at Edmonton, in the county of Middlesex, on the 2nd Aug. 1883, the appellants appeared before us to answer a complaint preferred by Edward Crowne, clerk to the respondents, that the respondents being the surveyor of the highways within their district, which comprises the parish of Tottenham, in the said county, and having on the 11th July 1883 duly required the appellants forthwith to pay to them as such surveyor the sum of 75l. 6s. 4d., being the expenses attending the view by two justices, stopping up, diverting, or turning a certain public highway or footway, situate in the said parish, in compliance with a written notice given by the appellants to the respondents as such surveyor as aforesaid, the appellants had neglected to make payment of the said sum, and the same was still due.

The following are the particulars of the said charges :

	£	s.	d.
Solicitor's charges.....	40	1	10
Paid for fixing notices .....	4	4	0
Printer's charges .....	0	17	6
Advertisements .....	9	2	8
Carpenter for boards .....	0	7	0
Magistrates clerk's fees .....	5	2	10
Counsel's fees.....	4	11	6
Clerk of peace's fees .....	10	16	8
Costs of taxation .....	3	17	10

£79 1 10

Taxed off ..... 3 15 6

£75 6 4

At the same time and place the appellants appeared before us to answer two further complaints also preferred by the said Edward Crowne, which last mentioned complaints were identical in terms with the one just set out, save that the sums alleged therein to be due from the appellants to the respondents were respectively 74l. 16s. 7d. and 74l. 6s., which said sums include payments to the like amounts in each case as those included in the previous mentioned sum of 75l. 6s. 4d.

The said three complaints were thereupon severally heard and determined by us, and the appellants have applied to us to state and sign a case in respect of our determination of each of the said complaints. The facts proved before us, the question of law raised by the parties, and the grounds of our adjudication thereon were the same upon each of the three complaints, and this case is by consent of the parties to be read and taken as though a separate case to the same effect had been stated and signed by us in respect of each of our said determinations.

The following facts were either proved before us or admitted by both parties :

The appellants are and have been since April 1881 the owners of an estate at Bruce Grove, Tottenham. The respondents are an urban authority under the Public Health Act 1875, and by virtue of sect. 144 of that Act execute the office of and are surveyor of highways within their district, which includes the parish of Tottenham.

In the month of Dec. 1881 the appellants, being desirous of diverting three public footways on their said estate within the said parish, requested the respondents to assent to such diversion, and to take the necessary steps to have the said footways legally closed. After some correspondence, and



after formal applications had been made and plans deposited by the appellants, the respondents passed a resolution assenting to the diversion of the said three footways, and conveyed their determination in the following letter to the appellants, dated the 1st Feb. 1882, and signed by their clerk:

I beg to acknowledge the receipt of your letter of the 29th ult., inclosing three separate applications and plans for the turning, diverting, or stopping up three several footpaths or highways crossing the above estate, and in reply to inform you that the same were submitted to the board at their meeting yesterday, when the proposed diversions were assented to, and I was directed to apply to the justices to view the highways proposed to be diverted. The board gave their assent and the above direction on condition that the entire expense in connection with the several diversions shall be defrayed by the company.

To this letter the appellants' solicitor, on the 2nd Feb. 1882, replied as follows:

I am in receipt of your letter of the 1st inst., and in reply may say that my clients, the above company, will pay the expenses in connection with the several diversions of footpaths herein.

The clerk of the respondents (who is not a solicitor) thereupon instructed the solicitors who usually acted for the respondents to take the steps necessary and required by the Highways Act 1835 to be taken in such cases. Such instructions were given by the said clerk, who *bonâ fide* considered he had a general authority to instruct the said solicitors when legal assistance was required in conducting the business of the respondents, and the instructions so given were afterwards approved and adopted by the respondents, but there was no express resolution of the respondent board directing or empowering the said clerk of the respondents so to instruct the said solicitors with respect to the particular matters in question. There was at the time when the expenses herein-after mentioned were incurred a surveyor in the employment of the respondents appointed by them under the powers conferred on them by the Public Health Act 1875.

In the course of the year 1882 and the early part of 1883 the notices, advertisements, views, and certificates of justices and other proceedings prescribed by the 85th section of the Highway Act 1835 were given and had by the said solicitors in respect of each of the three footways. While these things were being done, the said solicitors were in constant communication with the appellants with respect thereto, in the course of which they suggested that the appellants had better prepare the plans themselves; but the appellants declined to do so.

On the 12th April 1883 the appellants received a letter from the said solicitors asking for payment of their charges, and were subsequently furnished with a copy of a bill of costs previously delivered to the respondents, amounting to 185*l.* 9*s.* 4*d.*

After some correspondence, the appellants' board resolved that they could not recognise the claim nor pay the amount until the account had been taxed by the proper authority.

The appellants' said bill (the fees of the clerk of the peace having been added thereto) was taxed by the clerk of the peace of the county of Middlesex, on the 26th June 1883. The appellants' solicitor attended the taxation, and contested the said bill item by item. The said clerk of the

peace allowed upon such taxation the sum of 224*l.* 8*s.* 10*d.*

On the 29th June 1883 the said solicitors of the respondents informed the appellants' solicitor of the result of the taxation, and of the amount allowed thereon. And on the 11th July they, on behalf of the respondents, demanded at the office of the appellants payment of the said sum, which appellants refused.

The respondents thereupon paid to the said solicitors the said sum of 224*l.* 8*s.* 10*d.* being the amount of the said bill of costs, and at the same time directed summary proceedings to be taken under sect. 101 of the Highway Act 1835 for the recovery thereof from the appellants. The complaints mentioned in the 1st and 2nd paragraphs hereof were accordingly preferred on behalf of the respondents by their clerk, and summonses issued thereon, the sums severally claimed being the apportioned amount of the costs alleged to have been incurred in respect of each of the said three footways.

It was contended before us by the appellants that the respondents were not entitled to employ a solicitor for the purpose of performing the duties cast upon them as the surveyor of highways by the 85th section of the Highway Act 1835; that the said duties were for the most part, if not wholly, ministerial, and ought to have been performed by the respondents' surveyor; that in particular the charges made on the solicitors' scale for corresponding with the respondents' clerk, attending and instructing printers for advertisements and notices, and attending the view by the justices, were not authorised by the statute, and were therefore not "expenses" within the meaning of the 84th section, or recoverable summarily under that and the 101st section. We, however, were of opinion, and find as a fact, that the employment of the solicitors by the respondents was reasonable and proper, and that the costs of such employment were "expenses" properly incurred for the purpose of the view and the stopping up, diverting, or turning of the highways.

It was further contended by the appellants that the said costs were not recoverable as "expenses" by the respondents, inasmuch as there was no evidence that the said solicitors had been employed by the respondents to do the work charged for. We, however, are of opinion, and find as a fact, that the said Messrs. Heath, Parker, and Brett were employed by the authority of the respondents to do the work charged for.

The appellants further contended that many of the items in the bill of costs were excessive and unreasonable, and in particular that, though the diversion of the three footpaths was practically a single operation, much of the work done in connection therewith, such, for instance, as attendance on the printer and at the view, was charged for three times over, and that they were not excluded from objecting to such charges before us by the taxation of the bill and their attendance thereat. We, however, ruled that the taxation was conclusive evidence of the reasonableness of the charges.

The appellants further contended that there was no evidence of a demand of the specific sums payment whereof was stated in the several complaints to have been required. We, however, were of opinion that, having regard to the facts stated

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in the 12th paragraph hereof, no further demand was necessary.

We accordingly convicted the appellants of the three offences complained of, and by three separate convictions adjudged that for their said offences they should forfeit and pay the three sums sought to be recovered as stated in the 1st and 2nd paragraphs hereof.

The question for the opinion of the court is whether, having regard to the above mentioned contentions of the appellants, the said convictions were right.

*Asquith* for the appellants.—The question to be determined is whether a surveyor of highways is, whenever anyone desires to close a highway, entitled to delegate the duties imposed upon him by the 84th and 85th sections of the Highway Act 1835 (5 & 6 Will. 4, c. 50) to a solicitor, and recover the costs of so doing on the usual scale charged by solicitors, from the person desirous of closing the highway. The contention of the appellants is that he is not entitled to do so, but that the Act throws these duties upon him personally and that he is bound to discharge them without charge. In this case the duties of surveyor of highways have, by the 144th section of the Public Health Act 1875, devolved upon the respondents as urban sanitary authority of the district. [SMITH, J.—Does not the 84th section say that the expenses are to be paid to the surveyor by the party desirous of stopping up the highway? It says: “the expenses aforesaid,” meaning the expenses attending the view. [SMITH, J.—The words are, “the expenses attending such view, and the stopping up, diverting, or turning such highway.” Are not these expenses attending the stopping up of this highway? There is a distinction between the purely ministerial acts, which the surveyor was intended to perform, and the actual out-of-pocket expenses for conveying the justices to the view, and for printing. These charges are chiefly for performing the purely ministerial duties of fixing the notices, &c., and they come within the meaning of the last paragraph of the 144th section of the Public Health Act 1875, which says that “all ministerial Acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint.” [SMITH, J.—Do not the solicitors in this case come within the words “such other person as they may appoint?”] No; the meaning is that, if the board has no regular surveyor, they may appoint someone *pro tempore*. In any case these words do not authorise the board to employ an expensive person such as a solicitor to perform these simple duties. The words must be taken to mean “such other person of a like character.” The 189th section of the Act of 1875 provides what officers an urban sanitary authority may appoint, and makes no mention of the appointment of a solicitor. The Legislature cannot have intended that, in a case where there was no opposition, the surveyor of highways should be able to make the expense of stopping up a highway 75l. [SMITH, J.—Have not the justices found as a fact that the expenses were necessary? But they are not such as the section says the party stopping up the highway is to pay. [SMITH, J.—Who is to pay the expenses actually incurred at the quarter sessions? The surveyor

cannot be expected to be acquainted with the law of quarter sessions, and counsel must appear.] It is for the party closing the highway to support his application at quarter sessions or not as he chooses. The taxation has no bearing on this point. It is merely *prima facie* evidence that, assuming the solicitors were rightly employed by the respondents, the charges made are reasonable.

*Turner* for the respondents.—It is impossible for a surveyor of highways, who has no legal knowledge, to carry through without legal advice the intricate business of closing a highway, in which the omission of a single technical requirement may easily invalidate the whole proceedings. [HAWKINS, J.—But overseers of the poor and churchwardens frequently have most intricate duties to perform. Why should not a surveyor of highways? The matter being purely legal, the employment of a solicitor was reasonable, and was clearly justified under the general words of the section “such other person as they may appoint.” [HAWKINS, J.—The sections state very exactly what has to be done. What does the surveyor of the board do for his salary, if not such duties as these? If you have at their request done certain things which they might properly have done at their own expense, but which do not come within the expenses payable by them under the section, you may have an action in respect thereof, but this can give you no right to a penal order under the 101st section.] The costs have been duly taxed, the appellants being represented at the taxation, and the justices have found that the employment of a solicitor was necessary and reasonable, and, this being so, the expenses were expenses attending the stopping up of a highway within the meaning of the 84th section, and the convictions ought to stand.

HAWKINS, J.—I think that this appeal ought to be allowed. The order appealed from is an order for the payment of several sums of money alleged to be expenses incurred under the 84th and 85th sections of the Highway Act 1835 (5 & 6 Will. 4, c. 50), which deal with the stopping-up, diverting, and turning of highways. The 84th section provides that, when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or preserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act; and then it goes on to say that, “if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any for-

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feiture is recoverable under this Act," the effect of the section being that, if the matter originates with the vestry, a certain process is to be gone through, while if a private person is desirous of taking advantage of the section he brings it before the vestry, and, if they assent to it, the same process is gone through, the only difference being that the surveyor is to pay the expenses out of the money received by him for the purposes of the Act; while, in the case of a private individual, the "expenses aforesaid" are to be paid to the surveyor by the party or be recoverable in the manner prescribed by the 101st section of the Act for cases of penalty or forfeiture. Then the 85th section provides that, when it shall appear upon such view of such two justices of the peace made at the request of the said surveyor as aforesaid that any public highway may be diverted and turned so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule (No. 19) to the Act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, and also to insert the same notice in a newspaper, and a number of other steps are to be taken before the highway is effectually diverted. Now, in the present case, there is no doubt that the appellants made application to the respondents, who, as the local board of health for Tottenham, are substituted by the 144th section of the Public Health Act 1875 for the old surveyor of highways and for the inhabitants in vestry assembled, and that the respondents assented to their proposal that the public ways in question should be diverted, and gave their assent thereto on condition that all the expenses incurred should be defrayed by the appellants. Then, after they had assented, proceedings appear to have been taken to carry out what was proposed, and to have been successful; and it is on these proceedings that the question we have to decide arises. The local board of health, having been requested by the appellants to take the necessary steps, instructed their solicitors to take them, and, having taken them, they presented a bill of costs in respect of taking them; and the question we have to decide really is whether this bill of costs comes within the meaning of the words, "the expenses attending such view, and the stopping up, diverting, or turning such highway," in the 84th section of the Act. I am of opinion that these solicitors' charges are not within the meaning of this section. I think that the expenses spoken of in the 84th section, and made recoverable by it under the 101st section, were intended by the Legislature to be the expenses of attending the justices on the view, and the expenses of the plan, and other similar expenses; and I do not think that it was the meaning of the Legislature that solicitors should be instructed to carry out the various steps prescribed by the sections dealing with the subject. I say nothing as to the point whether the present appellants would be liable in an action on contract; it may be that

they would, and it may be that they would not, but I simply say that in my opinion these expenses are not such expenses as would rightly come under the 84th section of the Act. Then it is said that the Public Health Act 1875, which transfers the duties of the surveyors of highways to the urban authorities, alters the case. The 144th section of that Act provides that every urban authority shall, within their district, exclusively of any other person, execute the office and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, and that all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to "such other person as they may appoint." I think that the words "such other person as they may appoint" mean such other person of the same character as the surveyor of the authority, or of the same character as the other officials they are empowered by the Act to appoint. These are by the 189th section a medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer, and also such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Act. I do not think that there is any ground here for the employment of an independent firm of solicitors, and certainly I am of opinion that, looking back again to the 84th section, these are not expenses within the meaning of that section. I think, therefore, while purposely abstaining from commenting on the items of these bills of costs before me, that these expenses are not such as were contemplated by the Legislature in enacting the sections under our consideration, and that therefore our judgment must be for the appellants.

SUMNER, J.—The question left to us here by the justices is whether they were right in convicting the appellants, the United Land Company, and adjudging them to pay the three sums of 75*l.* 8*s.* 4*d.*, 74*l.* 16*s.* 7*d.*, and 74*l.* 6*s.*, claimed by the Tottenham Local Board under the circumstances set out in the case, the point really being whether these sums are expenses within the meaning of the 84th section of the Highway Act 1835, because, if they are not so, it is quite clear that the 101st section of the Act, which provides for the summary recovery of such expenses, cannot be brought into operation. In the first place I wish to say that I do not decide whether the Tottenham Local Board has got an action against the land company, because it does seem to me possible that an action might lie for money paid at the request of the land company—at any rate, that is a question which might reasonably be argued—but what I do say is, that these expenses are not expenses within the meaning of the 84th section of the Highway Act 1835. I agree with what Mr. Turner says, that where a man desires to stop a highway it would be very unwise for him to rely on the surveyor [of taxes, or the sanitary authority, because I think it is very possible that there might be some flaw in the proceedings which would be fatal to him when the matter came before the court of quarter sessions; but that does not settle this case. It is perhaps necessary under such circumstances to employ a solicitor to see that the neces-

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sary formalities are complied with, but that is not the point here, the question simply being whether such expenses are within the 84th section of the Act or not. Now the surveyors of highways constituted under the Highway Act 1835 are under the earlier sections (sects. 6-8) of the Act, under which they are appointed, obliged to take up the office on compulsion of a fine of 20*l.*, although, it is true, there are certain instances in which parishes may employ a paid surveyor. Then if a vestry want to stop up a highway, they are by the 84th section of the Act to direct the surveyor to apply to two justices to view the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway. These are the expenses which a surveyor would have to incur when he stopped up a highway. Then, if a private person wishes to stop up a highway, there is only one additional formality which he has to go through, and that is to require the surveyor to give notice to the churchwardens to assemble the vestry and to submit thereto the wish of such person, and then if the vestry agree to the proposal, the proceedings are exactly the same, except that "in such case the expenses aforesaid shall be paid to the surveyor by the said party." What are the expenses aforesaid? They are exactly the same expenses which a surveyor would have to incur when stopping up a road at the instance of the vestry, and I do not see that it is anywhere contemplated in this section that a surveyor should go and take the advice of an independent solicitor. Then we come to the Public Health Act 1875, by the last words of the 144th section of which Mr. Turner says the authority were entitled to employ an independent solicitor. The words he relies upon are to the effect that "all ministerial acts required by any Act of Parliament to be done by or to the surveyor of highways may be done by or to the surveyor of the urban authority, or by or to such other person as they may appoint." I read these words in conjunction with the 189th section, which gives the urban authority power to appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer, and such assistants, collectors, and other officers and servants as may be necessary and proper for the efficient execution of the Act. As to the point raised with respect to the taxation, I agree entirely with Mr. Asquith's argument thereupon, that it only applies to cases in which the local authority are making the application. I think therefore that these expenses are clearly not within the 84th section, and, that being so, that this appeal must be allowed with costs.

Solicitor for the appellants, *H. Smith*.

Solicitors for the respondents, *Heath, Parker, and Brett*.

## QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

June 18 and 19.

(Before *MATHEW, CAVE, and DAY, JJ.*)

*Re WALKER; Ex parte GOOLD*, Official Receiver.

THE LYNN DOCK COMPANY'S LEASE. (a)

*Lease—Forfeiture on bankruptcy—Receiving order under Bankruptcy Act 1883—Bankruptcy Act 1883, sect. 149—Fixtures.*

*In a lease there was contained a clause of forfeiture on bankruptcy of the lessees, who filed a petition for liquidation under the Bankruptcy Act 1883.*

*Held, that there had been a forfeiture, and (Day, J. dissenting), that a petition under sect. 149 of the Bankruptcy Act 1883 was equivalent to a bankruptcy under the Bankruptcy Act 1869.*

*In the same lease there was a clause that the articles mentioned in the schedule thereto should be the property of the lessees, and be removable by them; and also a clause that the said articles should be removed before the cesser or determination of the term.*

*Held, that the said articles were the property of the lessees irrespective of the time of removal.*

THIS was an appeal from the County Court of King's Lynn, holden at Norfolk.

In Oct. 1881 the King's Lynn Dock Company granted to the debtors a lease for twenty-one years of certain buildings, at a rent of 11*l.* 15*s.* 10*d.*, payable half-yearly. The material covenants of the lease were:

(1) That the several articles and things mentioned in the schedule hereto shall be the property of the said lessees, and shall be removable by them, the said lessees making good all damage done by such removal.

(2) That in case the said lessees shall during the said term be bankrupts or file a petition in liquidation, or make an assignment for the benefit of their creditors, the said term hereby created shall cease.

(3) That on the determination or cesser of the said term, the machinery room, warehouse, and chimney shall be and remain the property of the company, but all the machinery and also all the other buildings erected by the lessees shall be their property, and shall be removed by them previously to the determination or cesser of the said term.

On the 11th Dec. 1882 the lease was deposited with Messrs. Foster, bankers, of Cambridge, by way of equitable mortgage, all the fixtures except trade machinery being included in the deposit note. On the 13th March 1884 a receiving order was made against the debtors, the official receiver being Mr. H. P. Goold, and he immediately entered into possession. On the 7th April he was served with a notice by the lessors that they had resumed possession under the forfeiture clause in the lease, and the lessors did actually take possession. The County Court judge decided in favour of the lessors against an application by the official receiver that the lessors might be directed to give up the premises to him. This order was now appealed against.

June 18.—*Willsow, Q.C.* (with him *Yate Lee*), for the appellant, was proceeding to open the appeal, when

*Charles, Q.C.* (with him *Horace Browne*), for the lessors, lodged an objection to the jurisdiction, under sect. 102 of the Bankruptcy Act 1883; but it was intimated to him by the Court that the

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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company had been guilty of a contempt in ousting the official receiver, and could not now object to the jurisdiction. He therefore waived the objection, and elected to proceed on the merits.

*Winslow*, Q.C. continuing, referred to the proviso in the lease for forfeiture on bankruptcy. There has been no bankruptcy here, for under the Act of 1869, which is alone referred to in the lease, a man was not bankrupt until adjudication. Here there has only been a petition for liquidation. [CAVE, J.—The practical effect of a petition for liquidation under the Act of 1869 is the same as that of the debtor's petition under the Act of 1883. If the debtors had compounded with their creditors under the Act of 1869, there would have been a forfeiture.] The fixtures and machinery are within the decision in *Stansfield v. Mayor of Portsmouth* (4 C. B. N. S. 120), and are the property of the official receiver.

*Yate Lee*, following, read sect. 14 of the Conveyancing Act 1881, sub-sect. 1. An action of ejectment was the right course for the lessors to have taken, and the court will always construe forfeiture clauses strictly.

*A. Powell* (with him *Francis Turner*) for the mortgagees.—The argument used by Mr. Winslow is *a fortiori* applicable to the case of the mortgagees.

*Charles* Q.C. (with him *Horace Browne*) for the respondents.—A debtor's petition under the Act of 1883 and a petition for liquidation under the Act of 1869 are identical in their effects. [MATHEW, J.—We are with you on that point, and also on the point raised under the Conveyancing Act.] As to the fixtures, there is a long series of cases showing that the tenant loses his right to the fixtures unless they are removed during the term. [CAVE, J.—Here there is a proviso that the fixtures shall be the property of the lessee; ordinarily they are the property of the lessor, subject to the tenant's right to disannex them.] I submit that the words, "and shall be removable, &c.," restrict the operation of the prior words, and there is a positive agreement that these things shall be removed prior to the cesser of the term.

*Winslow*, Q.C. did not reply.

*MATHEW*, J.—In this case there was a question of jurisdiction which has been waived by Mr. Charles, and we have now to consider the question whether the official receiver ever really entered upon the premises. There is really no doubt upon this point; he had entered into possession, and as an officer of the court, was entitled to remain in possession until he was ordered to go. We are all clearly of opinion that the Dock Company were wrong in taking the matter into their own hands. But the County Court judge treated the whole matter, and the question of jurisdiction being waived, we are now called upon to consider the rights of the parties on the merits. The first question which arises is, Had the official receiver a right to the fixtures? and this depends upon the answer to the question whether there had been a forfeiture under the lease. The proviso is that "in case the said lessees shall during the said term be bankrupts, or file a petition in liquidation, or make an assignment for the benefit of their creditors, the said term hereby created shall cease." Upon this point Mr. Charles has argued that the steps taken by

the lessees justify the lessors in saying, by virtue of sect. 149 of the Bankruptcy Act 1883, that there has been a bankruptcy sufficient to cause a forfeiture. Mr. Winslow has argued that there was no real bankruptcy until adjudication, but, with the exception of my brother Day, we are of opinion that a petition for the appointment of a receiver under the new Act is analogous to the filing of a petition for liquidation under the old Act. Moreover, we are all of opinion that, independently of sect. 149 of the Bankruptcy Act 1883, the forfeiture would have been effected. There has, therefore, been a forfeiture. What are its effects? Mr. Charles says that the fixtures which have not been removed are the property of the landlord, and he says that the provisos and covenants in the lease, which certainly overlap one another, are of such a nature as to expunge one another. This, looking at the whole of the document, cannot, in my opinion, have been the intention of the parties. The effect of the provisos is largely to alter the ordinary relations of landlord and tenant, and the fixtures, in my opinion, belong to the lessees, irrespective of the time of removal, and the lessees were not deprived of their property because it was not removed during the term. The effect, therefore, is that the official receiver has a right to the articles in question. I should be prepared to go further; but, in deference to the opinions of my learned brothers, I confine my judgment to the points upon which I have already touched.

*CAVE*, J.—I entirely agree with the judgment which has just been delivered, in the interpretation of sect. 149. The language of the clauses differs. In the first it is said that "the several articles and things mentioned in the schedule shall be the property of the said lessees, and shall be removable by them;" and it may be that the lessees are entitled to enter and remove them. But then there is the third clause, in which it is provided that lessees shall remove the machinery, &c. previously to the cesser or determination of the said term; and I think it is open to grave doubt whether they are entitled to enter and remove those articles. However, it makes no practical difference. In the one case the lessees must remove, or the official receiver in their place, and in the other the removal must be effected by the lessors, who are perhaps less likely to do damage than the official receiver.

*DAY*, J.—I also agree that there has been a forfeiture; but I do not think that sect. 149, sub-sect. 2, applies. I do not, however, attach any importance to that section, for I think that there would have been a forfeiture irrespective of the words of that section, and that the words used in the lease must be construed in the ordinary and not the technical sense, so that liquidation would be equivalent to bankruptcy.

Solicitors for the appellant, *Waterhouse, Winterbotham, and Harrison*, agents for *Cozens-Hardy*, of Norwich.

Solicitors for the lessors, *Wedlake, Letts, and Wedlake*.

Solicitors for the mortgagees, *G. Whale*, agent for *Ginn and Matthew*, of Cambridge.

**Judicial Committee of the Privy Council.**

March 4, 5, 6, and April 7.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.)

CALDWELL v. McLAREN. (a)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Law of Ontario—Riparian proprietor—Right to float timber—Dams and slides in streams—Stat. 12 Vict. c. 87, s. 5.*

*The Ontario statute, 12 Vict. c. 87, s. 5 (Consol. Stat. Up. Can. c. 48, s. 15), enacts "that it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in Upper Canada, during the spring, summer, and autumn freshets.*

*Held (reversing the judgment of the court below), that this section does not apply only to such streams as are available at all places in their natural state for floating timber, and that where there is a natural obstacle in a stream, and a riparian proprietor owning the land on both sides of the stream has made artificial improvements in the stream for the purpose of overcoming such obstacle, the public have a right under the statute to avail themselves of such improvements for floating down their timber.*

*Boale v. Dickson (13 Up. Can. C.P. 337) discussed and disapproved.*

THIS was an appeal from a judgment of the Supreme Court of Canada, reversing a judgment of the Court of Appeal for Ontario.

The subject-matter of the case was the alleged right of the respondent to prevent the appellants from sending timber down certain streams from the tracts of land where it was felled on its way to the river Ottawa.

The appellants and respondent were engaged in the timber trade, and had their mills for the cutting of logs of timber at the village of Carleton Place, on the river Mississippi, in the province of Ontario. They held grants or licences from the Crown in the province of Ontario to cut timber on the Crown domains, situated at the head waters of the north branch of the Mississippi in that province.

The only way by which timber can be got out from the tracts of land embraced within the appellants' and respondent's licences was by the north branch of the Mississippi river. This river, from the head waters of its northern branch to the river Ottawa, into which it empties itself, is nearly 200 miles long; and the distance from the head waters of its northern branch to Carleton Place, following the course of the stream, is more than 100 miles. Parts of the whole river from its source to its outlet are known by separate names, and two of the parts which are near the head waters, of the river are known as (1) Mississippi or Louise Creek, (2) Buckshot Creek.

The river Mississippi runs through a rough and rocky country, and along its course there are rapids and falls.

The respondent was the owner of the land on both sides of the river Mississippi at several places along its course, and on this ground claimed the ownership of the bed of the stream at those places;

and contended that he had the legal right absolutely to prohibit the use of the stream at those places for the floating of logs of timber.

On the 4th May 1880 the respondent filed a bill in the Court of Chancery for the province of Ontario, in which he alleged that he was owner of the pieces of land abutting on the river Mississippi, therein specified (the title to which was derived from several Crown grants made between the years 1853 and 1879); that these places through which the waters of the river flowed were not in a state of nature floatable for logs and timber at any period of the year; that such places had been made floatable only by the expenditure and improvements made thereon in the way of clearing away obstacles in the stream, and erecting dams and slides by the respondent and his predecessors in title, and prayed for an injunction restraining the appellants from floating their logs and timber down the stream at these places, and also that an account might be taken of the compensation payable to the respondent by the appellants for their use theretofore of the stream and the improvements thereon.

The appellants filed their answer on the 11th May 1880. In it they denied that the stream in question was not floatable for timber or logs at any time of the year. They claimed a right under the statutes of the province of Ontario to float timber and saw logs down the stream in question, and further stated that they had offered to pay to the respondent any proper sum for the use of his improvements, but that this offer had been refused by the respondent.

At the hearing of the cause before Proudfoot V.C., a considerable body of evidence was brought forward on both sides on the question whether the stream at the place in question was, in a state of nature, floatable for timber and logs, or either of them.

Evidence was tendered, on behalf of the appellants, that at the time of the passing of certain statutes in force in Ontario, and particularly the statute 12 Vict. c. 87, a great proportion, if not all, of the streams of Upper Canada (except the St. Lawrence itself) were in the same condition as the Mississippi; that is to say, in their natural condition floatable for timber and logs only to a very limited extent, if at all. Objection was taken to the reception of this evidence, and the Vice-Chancellor refused to allow this part of their case to be completed by the appellants.

The appellants relied on the above-mentioned statute 12 Vict. c. 87 and certain other statutes in force in the province of Ontario, as conferring a right to use the stream in question in the way in which they had done. The important section of 12 Vict. c. 87 is the 5th, and is in the following words:

5. And be it enacted, that it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in Upper Canada, during the spring, summer, and autumn freshets, and that no person shall by felling trees or placing any other obstruction in or across such stream prevent the passage thereof: Provided always, that no person using such stream in manner and for the purposes aforesaid shall alter, injure, or destroy any dam or other useful erection in or upon the bed of or across any such stream, or do any unnecessary damage thereto or on the banks of such stream; provided there shall be a convenient apron, slides, gate, lock, or opening in any such dam or other structure made for the passage of all saw logs and other timber, rafts and crafts authorized to be floated down such stream as aforesaid.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



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The principal of the statutes, besides 12 Vict. c. 87, to which reference was made, are the following:—Statutes of the Legislature of Upper Canada, 9 Geo. 4, c. 4, and 2 Vict. c. 16; statutes of the Legislature of Canada, 7 Vict. c. 36; 10 & 11 Vict. c. 20; 14 & 15 Vict. c. 123; 16 Vict. c. 191; 18 Vict. c. 84; Consolidated Statutes for Upper Canada, cc. 47 and 48.

At the close of the evidence, the Vice-Chancellor expressed his opinion on the evidence that neither the Mississippi nor Louse Creek, nor Buckshot Creek, were floatable even at freshets or high water, and held, without requiring argument, that under these circumstances he ought to follow the case of *Boale v. Dickson* (13 U. C., C.P. 337), which in his view decided that, if improvements are necessary to render rivers and streams floatable, the statute 12 Vict. c. 87, embodied in the Consolidated Statutes of Upper Canada, c. 48, does not apply, and that the owner of the soil in that case has the right to prevent all intrusion upon the river. By the decree of the court, dated the 16th Dec. 1880, the appellants were restrained from using any portion of the streams where they passed through the lands of the respondent.

On appeal to the Court of Appeal of the province of Ontario, the decision of the Vice-Chancellor was reversed by that court (Spragge, C.J., Patterson and Morrison, J.J.A., Burton, J.A., dissenting). The three judges who were in favour of reversing the decision of the Vice-Chancellor did so chiefly on the ground that they considered the case of *Boale v. Dickson*, if it was therein held that the right conferred to float timber and logs down streams by the statute 12 Vict. c. 87, extended only to such streams as in their natural state, without improvements, during freshets, permit saw logs, timber, &c., to be floated down them, was erroneously decided. Burton, J.A., while agreeing with the remainder of the court that the above-mentioned construction supposed to be placed by the case of *Boale v. Dickson* on the statute was erroneous, held that the statute gave no new right, but merely declared the law to be such as it had been held to be in the United States of America, and conferred no power to use those particular parts of a stream which were in a state of nature unfloatable, but expressed his opinion that a conclusion other than that arrived at by the court "could not have been otherwise than disastrous to one of the most important industries in the Dominion."

On appeal to the Supreme Court of Canada the court (Ritchie, C.J., Strong, Henry, Taschereau, and Gwynne, J.J.) reversed the decision of the Court of Appeal, and affirmed the judgment of the Court of Chancery.

Special leave was given to appeal to Her Majesty in Council.

*Bothams*, Q.C. (of the Canadian Bar) and *Joune* appeared for the appellants.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *McCarthy*, Q.C. (of the Canadian Bar), and *Crump* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

April 7.—Their LORDSHIPS gave judgment as follows:—After going through the facts of the case, and the pleadings of the parties, as set out

above, their Lordships continued:—Strong, J., begins his judgment by saying: "The finding of the learned judge before whom this case was tried, that those parts of the river Mississippi and of Louse and Buckshot Creeks, at which the appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of saw logs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this court, that the finding of the judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible presumption in its favour. We must therefore assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely, 'That those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, when in a state of nature were not navigable or floatable for saw logs and other timber, rafts, and crafts down the same.' The appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed, and has been established by the production of his title deeds. The question for this court to determine is, therefore, purely one of law." To this their Lordships agree. The respondent cannot now contend that timber could be practically floated down those portions of the streams whilst in a state of nature, though not so well or so profitably as after the improvements were made; but the Vice-Chancellor cannot be understood to find that it was impossible to float any timber at all, over High Falls, for instance. The finding must be understood as meaning only that in a commercial sense it could not be done; the timber being so difficult to guide over the falls and so liable to be injured that no one could profitably do it, and consequently no one would do it. And it must be taken as admitted that at many places above High Falls, and for considerable distances, timber could be floated along the streams. Obviously this must have been the case wherever the streams expanded into lakes. So understanding the finding, the question, which though raised as to many places, may most conveniently be dealt with as if it related to one only, seems to be this. The waters have formed a stream or river, which for many miles is capable of floating logs and timber, at least during the freshets, down towards a market, but at a part of it where the soil on both sides of the stream belongs to the plaintiff there is a natural obstacle such as a rapid or a waterfall which renders it impracticable in any commercial sense to float timber down the stream at that part. The plaintiff, or those through whom he claims, have made improvements, consisting substantially of dams above the waterfall to keep the waters back so as to make the rapid deeper and slower, and made slides over the top of the dam and down to below the falls, so that timber can by means of those slides be carried safely over the waterfall. The defendant proposes to bring his timber from the part of the stream above the obstacle by



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means of these improvements. He does not claim to do this by any common law right, but by virtue of certain statutes of Upper Canada. And it cannot be disputed that the Legislature had full power to confer such a right; whether they have done so or not must depend on the construction of the statutes. The defendant has always been ready and willing to pay for the use of the improvements; this is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the Legislature to authorise him to pass over the obstacle by means of the improvements would have been quite clear. The absence of any such provision is strongly relied on as showing that the Legislature did not so intend. The plaintiff relies on his common law right, as owner of the soil, to prevent anyone from using his soil in any way which he does not choose to allow, unless by statute that right is abridged, as it may be. There has been a considerable diversity of opinion amongst the judges in the courts below. Their Lordships have perused their opinions with much advantage, and have with great care considered the reasons of those from whom they differ. In the result they come to the conclusion that the judgment of the Court of Appeal for Ontario is right and should be restored. They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, *prima facie* at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water has all the rights of a landowner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it. One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists the right of the millowner and the right of the public come into conflict. They may co-exist, but when they do one or other must be modified. The right of the public to navigate a stream may be created either by prescription or by dedication by the owner of the soil within time of legal memory. And in an old settled country like England, it could seldom be material to inquire further than as to those modes of creating such a right. But when the law of England was taken out to a new unsettled country, where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to inquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events, up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one which in England, if it existed at all, from the nature of the country, could not be

important; it never came in question in any case of which we are aware. It was one which, in a new wild country overgrown with timber, might be very important, and it must have been a question of doubt what was the right. The owner of the land covered with water over which a stream flows has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over such streams cast a doubt on the extent to which it was lawful to erect mill dams. It is obvious that it was very desirable that, for the purposes of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the Legislature of Upper Canada had full power to enact what should be the law in that country, the real question is what did they enact? The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are merely consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question. The first statute which it is necessary to notice is the Act of the 25th March 1828. After a preamble that 'it is found expedient and necessary to afford facility to the inhabitants of the province engaged in the timber trade in conveying their rafts to market (as well as to the ascent of fish) in various streams now obstructed by mill dams, it enacts that every occupier of "any mill dam which is or may be legally erected," where timber "is usually brought down the stream on which such dam is erected," shall, under a penalty, "construct and erect a good and sufficient apron to his dam." The 2nd section describes the kind of apron: "Such apron shall not be less than eighteen feet wide, by an inclined plane of twenty-four feet eight inches to a perpendicular of six feet, and so in proportion to the height, where the width of the stream will admit of it, where such stream or dam is less than fifteen feet wide, the whole dam shall be aproned in like manner with the same inclined plane." Without incumbering the case by considering any question relating to the fish the intention of the Legislature seems obvious. They contemplated that there might be mill dams then or thereafter legally erected on streams down which lumber was usually brought. And without inquiring what were the conditions necessary to make such an erection legal, the Legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the millowner to add to his mill an apron so as to let the rafts pass over it. This did, to some extent, impose on the owner of the dam, by supposition legally erected, the burthen without any compensation of building an apron; but it is clear that the Legislature did intend for the good of trade to impose that burthen on them. Probably it was not supposed to be very heavy. The Act, however, is in terms confined to those streams down which lumber was "usually" brought. Several statutes were referred to on the arguments, which their Lordships think do not much affect the question. Then comes the Act of the 30th May 1849. The preamble is: "Whereas it is necessary to declare that aprons to mill dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper

"Canada" (obviously referring to the Act of 1828 already cited) "should be so constructed as to allow a sufficient draft of water to pass over such aprons as shall be adequate in the ordinary flow of the stream to permit saw logs and other timber to pass over the same without obstruction." This clearly indicates an intention to throw upon those who have dams "legally erected" upon streams a further burthen. The 1st section with the object contemplated by the preamble cast upon them without any compensation the duty to erect and maintain waste gates, brackets, and slush boards, so as to keep the depth sufficient to allow the passage of "such saw logs, lumber, and timber as are usually floated down such streams," with a proviso that "no person shall be required to build aprons or slides on small streams unless required for the purposes of floating down lumber." The 5th section of this Act goes beyond the object mentioned in the preamble; it is, however, perfectly settled that, though the preamble aids in the construction of an Act, effect is to be given to the intention of the Legislature, if it sufficiently appears, though it goes beyond the object of the preamble. It is upon the construction of this 5th section that their Lordships think this case depends. In the Consolidated Statutes for Upper Canada, cap. 48, it is divided into two sections, sects. 15 and 16, and the meaning is made rather clearer by transposing the position of the two provisos at the end of the section which are made into sect. 16, but there is no alteration in the substance. The 5th section is in the following terms: [reads it.] This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1863, the case of *Boale v. Dickson* (13 Up. Can. C.P. 337) was decided in the Court of Common Pleas of Upper Canada. The question there was as to a claim for the use and occupation of a slide on the Indian river. The Court of Common Pleas thought that if the slide was on a stream within the meaning of the enactment their Lordships are now considering, the plaintiff must fail; whether, if the statute applies, this consequence would follow, their Lordships need not stop to inquire. So thinking, the Court of Common Pleas put a construction on the Act. The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the defendant's counsel: "I think, Mr. Bethune, that you stated that if I considered myself bound by the authority of *Boale v. Dickson*, there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a court of co-ordinate jurisdiction, though not in the same sense as I should be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale v. Dickson* be the construction this statute is to bear in regard to improvements upon rivers and their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids." The judges of the Court of Appeal for Ontario all agreed that Proudfoot, V.C., had correctly appre-

hended the construction put upon the statute by the court in *Boale v. Dickson*, and that he could not properly disregard the decision of a court of co-ordinate jurisdiction, but all four thought that construction wrong; Burton, J., though dissenting from his brothers, expressly saying: "I quite agree with them in their view of the doctrine laid down in *Boale v. Dickson*, and think there is nothing to warrant the qualified construction placed upon sect. 15 of the 12th Vict. c. 87, by the learned judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets, makes the entire stream *publici juris*, although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandise." The judges in the Supreme Court thought that the construction put upon the statute in *Boale v. Dickson* was right, and Ritchie, C.J. thought that, even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doed. Otley v. Manning* (9 East, 71) that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. This doctrine has often been recognised. The maxim *Communis error facit jus* is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale v. Dickson*, if wrong, should be followed. And their Lordships agree with the judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any court in construing the words "all streams" as meaning such streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a bullrush, is a stream within the meaning of the Act. But when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment exists, though that natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words. It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float saw timber rafts and craft down all streams in Upper Canada at all seasons," that the Legislature here confined the enactment to making it lawful "during the spring, summer, and autumn freshets." And that, it is argued, shows an intention to cut down the large words "all streams." Their Lordships do not assent to this argument. Probably the Legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may on the same part of the stream be entitled, on other grounds, to float at all times. Their Lordships do not think that the limitation of the right in the stream to one period of the year pre-

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vents that from being a part of the stream which would otherwise, in the ordinary use of language, be a part of the stream, even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. The respondent's construction of the enactment seems to them to require the introduction by implication of some such words as these, "except on such parts of the streams as are, owing to the presence of an impediment such as a waterfall, not practically available for the purposes of floating timber, until some improvements are made." There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification. It is quite true that it is not to be presumed that the Legislature interfere with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the Legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact." It is, however, quite true that no power is given by the statute to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil. There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable, which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so it becomes useless, and can only, if at all, be made useful by forming a joint-stock company for the purpose of doing so; and, if the Court of Common Pleas in *Boale v. Dickson* were right in thinking that, if the statute applies, a promise to pay slideage for the use and occupation of such works, in consideration that the plaintiff would allow the defendant to use them, could not be enforced, the Legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But though this may be so, the question remains whether the words of the Legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all

persons to use it. It does not seem to their Lordships that the private right which the owner of this spot claims to monopolise all passage there is one which the Legislature were likely to regard with favour, and in the earlier legislation they had, without scruple, cast on the owners of dams "legally erected" the obligation at their own expense, to make such dams passable for lumber; if the law was (contrary to what is laid down in *Boale v. Dickson*), that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship all; if the Legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words. Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed, and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that the costs of the appeal should be borne by the unsuccessful party, the respondent.

Solicitor for the appellants, *Jonas ap Jones*.

Solicitors for the respondent, *Johnston, Harrison, and Powell*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Feb. 1 and 20.

(Before SELBORNE, L.C., COTTON and LINDLEY, L.J.J.)

*Ex parte COOPER; Re MORRIS. (a)*

*Bankruptcy — Workmen's wages — Deduction for doctor's fund — Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 32 — Truck Act (1 & 2 Will. 4, c. 37), ss. 1-4, 23.*

*Employers and their workmen arranged, but not by any agreement in writing signed by the latter, that certain deductions should be made from the wages towards a "doctor's fund" established to pay a doctor who attended and supplied with medicines such of the workmen and their families as were sick.*

*The wages were paid monthly, and the sums deducted were from time to time handed by the employers to the doctor. There was no evidence that the doctor had accepted the liability of the employers.*

*Held, in the liquidation of the debtors, that the fund, so far as it had not been paid to the doctor, must be repaid in full to the workmen, as it was wages not validly paid (within the Truck Act), and to preferential payment of which the workmen were entitled under sect. 32 of the Bankruptcy Act 1869.*

In Dec. 1882 Messrs. Percy Harold Morris and Ebenezer Edgar Morgan, who carried on business at Briton Ferry, in Glamorganshire, as bar iron

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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and tin-plate manufacturers, under the firm of D. Morris and Co., filed a liquidation petition.

It had been the custom when the wages of their workmen were paid, which was done monthly, for the firm to make certain deductions for a "doctor's fund" and for another fund called the "reading-room fund." The doctor's fund was for the purpose of paying a doctor, who attended the workmen and their families and supplied them with medicines in case of illness; the other fund was for maintaining a reading-room for the use of the workmen. The sums thus deducted were intended to be handed over by the firm in lump sums to the doctor and the treasurer of the reading-room respectively. On the back of a ticket, which was given to each workman when he received his wages, were printed some "terms and regulations," among which were the following:

The payment to doctor's fund will be as follows: On wages under 2s. per day, 4d. per month; on 2s. per day and upwards, the gross earnings being under 4l. per month, 9d. per month; on earnings of 4l. per month and upwards, 1s. per month. The payments to reading-room fund will be 4d. per month, payable by all men and boys over sixteen years of age. These payments will be deducted from the wages.

At the time of the filing of the liquidation petition there were standing in the books of the firm to the credit of the doctor's fund and the reading-room fund respectively two sums of 149l. and 63l., which had arisen from deductions from wages, but which had not been paid over by the firm to the doctor or to the treasurer of the reading-room before the filing of the petition. The workmen, from whose wages the deductions had been made which were represented by these two sums, applied to the court for an order that the trustee in the liquidation should pay over to them the above sums, in proportion to the deductions made from their wages respectively, as wages due to them, and entitled to preferential payment under sect. 32 of the Bankruptcy Act 1869. In support of the application an affidavit was made by one of the workmen, on behalf of them all, in which he said:

The deductions were collected by the firm under a mutual arrangement with the workmen, and for convenience sake alone, in order to save the great trouble of otherwise collecting the same. This arrangement was embodied in the regulations indorsed on the back of the monthly pay ticket. It was the duty of the firm to hand over such deductions from time to time in their entirety.

There was no evidence of any contract in writing signed by the workmen authorising the employers to make the deductions from the wages, nor any evidence that the doctor had agreed to accept the liability of the employers in respect of his attendance on the workmen. One of the debtors deposed that there was no contract between the firm and the doctor.

Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy while the Bankruptcy Act 1869 was in operation, made the order, from which the trustee in the liquidation appealed.

A. T. Lawrence for the appellant.—The workmen cannot claim the fund, as they have had the benefit of the doctor's attendance, and, notwithstanding payment to them, the debtors would remain liable to the doctor. The intention was that the workmen in health should pay for those who were sick. The Truck Act (1 & 2 Will. 4,

c. 37) (a) does not apply. Sect. 23 only prevents the supply of things by the employer himself, and does not extend to a case like this when the doctor is a separate contracting party. [Lord SELBORNE, L.C.—Could the doctor have maintained an action against the men?] He could have sued them if they had refused to allow the deductions to be made. [Lord SELBORNE, L.C.—We ought to have clear evidence of any agreement between the man and the doctor.] The arrangement between the three parties amounted to a contract. The employers made no payment in kind, but paid the wages in cash, a deduction being then made by agreement. The deduction was not contrary to the Truck Act:

*Chavner v. Cummings*, 8 Q. B. 311;

*Archer v. James*, 1 L. T. Rep. N. S. 26; 2 B. & S. 61;

*Cutts v. Ward*, 15 L. T. Rep. N. S. 614; L. Rep. 2 Q. B. 357.

He distinguished

*Pillar v. Llynvi Coal and Iron Company*, 20 L. T. Rep. N. S. 923; L. Rep. 4 C. P. 752.

*Winslow, Q.C.* and *Herbert Reed* for the workmen.—The workmen only claim the amount paid

(a) By sect. 1 of the Truck Act: In all contracts hereafter to be made for the hiring of any artificer in any of the trades hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and if in any such contract the whole or any part of any such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void.

Sect. 2: If in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made, directly or indirectly, respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void.

Sect. 3: The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise, and every payment made to any such artificer by his employer, or in respect of any such wages, by the delivering to him of goods or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void.

Sect. 4: Every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm.

Sect. 14 enumerates the trades to which the Act is to apply, including "the working, casting, converting, or manufacturing iron or steel, or any parts, branches, or processes thereof."

By sect. 23: Nothing herein contained shall extend, or be construed to extend, to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer (*inter alia*) any medicine or medical attendance, nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of (*inter alia*) any such medicine or medical attendance: Provided always (*inter alia*), that such stoppage or deduction shall not in any case be made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer.

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into the funds but not actually applied. They could have claimed the amounts from the employers if the latter had remained solvent. They were under no liability by contract with the doctor, and are entitled to preferential payment under sect. 32 of the Bankruptcy Act 1869. As there is no evidence of any agreement in writing signed by the workmen, the deductions are illegal:

*Pillar v. Llynri Coal and Iron Company (ubi sup.).*

The Legislature intended payment in full in cash unless the workmen agreed otherwise in writing. No payment of the deductions has been made to the workmen or to the doctor at their request. [They were stopped.]

*Lawrence* in reply.—The agreement amounts to payment of the doctor. He could not have sued the workmen. The sums deducted are held by the employers as agents for the doctor, and payment to an authorised agent of the creditor discharges the debt.

Lord SELBORNE, L.C.—I think the registrar's order is right and must be affirmed. It is clear that the sums in question are workmen's wages, and equally clear that they have not been paid in current coin of the realm. It was suggested that certain sums were payable by the workmen under contracts, which were, in substance, their contracts, to the doctor, and for the purposes of the reading-room, and that by arrangement with the employers those sums were to be paid out of that part of the wages which had not been paid to the men. If that had been actually done, and a settlement upon that footing had taken place, I am not, as at present advised, prepared to say that such a settlement could have been treated as a nullity by reason of the Truck Act. We are not called upon to decide the question now, because the facts do not raise it. All that appears by the evidence is, that the workmen were desirous that what was in substance due from them to the doctor, and for the reading-room, should be paid through the machinery of a retainer out of their wages, the amount thus retained being paid over by the employers. The employers have retained the amount out of the wages, but they have never paid it over, and there is no evidence to satisfy me that anything equivalent to payment to the workmen has taken place. Therefore, I think the registrar's order is right. The argument has turned upon a point which appears not to have been raised in the court below, and under these circumstances, and looking to the general nature of the case, and the large number of persons who are represented, we think there should be no costs of the appeal.

COTTON, L.J.—I am of the same opinion. The order is for payment to the respondents of their respective proportions of two sums of 149*l.* and 63*l.* as having been deducted from their wages under the arrangement which has been referred to by the Lord Chancellor. But those sums so deducted from their wages have never in fact been paid over by the employers to the doctor or to the treasurer of the reading-room, and therefore payment in cash of those sums has never been made. Now the Act provides that payment of wages shall be made only in cash, and so much of any wages as has not been paid in cash may be recovered by the workmen as wages. That being so, as regards these particular sums, which,

though deducted by the employers from the wages of the workmen, have never been paid over to anyone, in my opinion the proof must prevail. But we do not in any way encourage the idea that our decision would apply (I desire to guard myself in this way, and I understand the Lord Chancellor intended to do so) to any deduction made from the wages, and in fact applied by the employers by the direction of the workmen, or in pursuance of an arrangement made with them, in discharge of a debt for which they were liable. That might possibly amount to a payment in cash, not to them, but to their agent or a person appointed on their behalf to receive it. If again there had been evidence that the employers had made themselves liable to the doctor, and he had accepted their liability, and had consequently no claim at all against the men, the case might have stood very differently. But I cannot find any evidence of that.

LINDLEY, L.J.—I am of the same opinion. It appears to me that the sum of 149*l.* now standing to the credit of the doctor's fund, and the sum of 63*l.* now standing to the credit of the reading-room fund, are mere paper entries. They are sums in the hands of the employers carried to the credit of these accounts. They have not been paid to anyone. They have not been paid to the workmen; they have not been paid to the doctor, or to the treasurer of the reading-room. They have not been paid to any agent of the workmen, but they are still in the hands of the employers. Under those circumstances it seems to me that sects. 3 and 4 of the Truck Act apply to these deductions.

*Appeal dismissed.*

Solicitors for the trustee, *Hollams, Son, and Coward.*

Solicitors for the workmen, *Marsland, Hewitt, and Co.*

Friday, June 20.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte REVELL; Re TOLLEMACHE (No. 1). (a)*

*Bankruptcy—Evidence—Allegation against interest by bankrupt in statement of affairs—Judgment—Inquiry as to consideration.*

*An admission of a debt in the statement of affairs of a bankrupt made after bankruptcy proceedings have commenced, is not, after his death, evidence of the debt as against other creditors.*

*The Court of Bankruptcy has jurisdiction to inquire into the consideration for a debt, although judgment in respect of it has been recovered against a bankrupt.*

IN 1842 William Lionel Felix Tollemache, commonly called Lord Huntingtower, was adjudicated a bankrupt as a horse-dealer, coach proprietor, dealer, and chapman, the fiat being dated the 2nd Sept. 1842. He had only attained the age of twenty-one years on the 4th July 1841.

In Dec. 1841 he left the country to avoid his creditors, but shortly returned to England, and remained in hiding till June 1842, when he was arrested and sent to the Queen's Bench Prison, where he remained until he obtained his certificate.

In the meantime many judgments were ob-

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

tained against him, none of the actions being defended, and one of these judgments was obtained by Henry Phillips, for 2262*l.* 10*s.* damages, and 38*l.* 7*s.* 6*d.* costs, on the 26th Jan. 1842.

Several creditors proved their debts immediately after the adjudication, but no proof was then tendered in respect of the judgment debt of H. Phillips, and there being no available assets the bankruptcy proceedings dropped.

On the 21st Dec. 1872 the bankrupt died, and his father (the sixth Earl Dysart) died in 1878, whereupon certain shares in large estates came into the hands of the assignees in the bankruptcy, and the proceeds of sale became available as assets among Lord Huntingtower's creditors.

A number of claims were made by persons alleging themselves to be creditors, and in Dec. 1883 Isaac Newton Edwards, as the sole executor of Henry Edwards, deceased, claimed to prove for 2250*l.* for money lent by H. Edwards to Lord Huntingtower, and for interest thereon, for money paid to his use, and for horses sold and delivered to him.

In his affidavit of proof I. N. Edwards, after stating that he was the son and sole executor of H. Edwards, late of St. Albans, and that the latter was the same person as the H. Edwards referred to in the statement of affairs of the bankrupt as a creditor on his estate for 1500*l.*, deposed that H. Edwards died on the 22nd Dec. 1874; that the bankrupt before and at the date of a promissory note for 2250*l.*, dated on or about the 7th Oct. 1841, was indebted to H. Edwards in the sum of 2250*l.* and interest thereon, the particulars of the indebtedness being set forth in an account-book in his father's handwriting which the deponent had discovered among his father's papers; that in respect of this indebtedness the bankrupt, on or about the 7th Oct. 1841, gave the promissory note to H. Edwards; that the defendant had discovered that one H. Phillips, who for many years acted as solicitor to his father, brought an action in his own name against the bankrupt on the promissory note, and on the 26th Jan. 1842 recovered judgment against him for 2262*l.* 10*s.* debt and interest and 38*l.* 7*s.* 6*d.* costs; that the deponent was informed and believed that Phillips lent 200*l.* to his father on the promissory note, and had every reason to believe that the advance was made to enable Phillips to sue the bankrupt in his own name, his father being on friendly terms with the bankrupt, and that Phillips was a trustee for his father of the judgment and the proceeds thereof; that the deponent had searched his father's papers, but had been unable to find the promissory note or any reference to it except the account-book and a letter (which was produced) dated the 8th Dec. 1841 and signed by H. Phillips, which was as follows:

I beg to give you notice that the promissory note for 2250*l.* drawn by Lord Huntingtower, and indorsed by him to yourself, became due yesterday, was presented for payment, and dishonoured, and, unless the same be immediately taken up, I shall institute proceedings for the recovery of the amount;

that the deponent was only three years old at the time of the bankruptcy, but that he had often heard the subject of the bankruptcy talked about during his father's lifetime in the family circle,

and that his father used to allude to the loss sustained by this bankruptcy.

In the Register of Judgments in the Court of Common Pleas for 1842 there was an entry of a judgment recovered in an action in the Court of Exchequer on the 26th Jan 1842 by Henry Phillips against Lord Huntingtower for damages 2262*l.* 10*s.*, and costs 38*l.* 7*s.* 6*d.*

Mr. Hodding, the claimant's solicitor, deposed that he had discovered some books which formerly belonged to and were kept by Phillips, and were in the possession of Mr. Gibson, the administrator of Phillips, who died on the 26th March 1875, viz., a cash-book of Phillips, which contained entries of cash transactions in 1841, 1842, and 1843, and a letter book containing copies of letters written by Phillips to his clients during the same years. In the cash-book, under the date of the 6th Dec. 1841 there was this entry: "Lent Mr. Edwards on bill of L. H. 200*l.*" Under the dates of the 11th Dec. 1841, and 3rd, 6th, 14th, and 18th Jan. 1842, there were in one book copies of letters informing H. Edwards of the progress of the proceedings in the action brought by Phillips against Lord Huntingtower to recover the amount of the promissory note. Under the date of the 10th Feb. 1842 there was in the same book a letter purporting to be written by Phillips to H. Edwards, as follows:

Yourself v. Lord Huntingtower.—The judgment against Lord Huntingtower has been completed, and nothing remains to be done but to put it in force when an opportunity presents itself. As you promised to return the 200*l.* in the middle of January if it was required, I now write to say that, having a large sum of money to invest on the 19th of this month, I shall be obliged by your remitting the same on or before that day.

Gibson deposed that he had caused search to be made among all the papers in his possession as administrator of Phillips, but was unable to find the promissory note. He said he believed the statements referred to by the other deponents to be true, and that he consented to the money alleged to be due from Lord Huntingtower's estate being paid to the claimant, to whom he believed it properly belonged. There was no one living who was competent to speak to the facts from his own knowledge.

In the bankrupt's statement of affairs (verified by his oath, but *ex parte*, and without cross-examination) mention was made of a debt under the name of Edwards, as follows:

Edwards, H., St. Albans. 1500*l.* This arises out of a debt incurred during minority, but since majority I have given bills. The amount I have received is about 200*l.* before majority, and 500*l.* since. The particulars of the bills I cannot give: some are before and some since majority.

Mr. Registrar Pepys allowed the proof for 2300*l.* 17*s.* 6*d.*, and from this decision the official assignee and the creditors' assignees appealed.

*Winslow*, Q.C. and *Yate Lee* for the appellants.—The judgment is the only evidence in support of the proof, and the court can go behind the judgment and require the debt to be proved:

*Ex parte* Bryant, 1 V. & B. 211;

*Ex parte* Maberley; *Re* Young, 2 Mont. & Ayr. 23;

*Ex parte* Kibble; *Re* Onslow, 32 L. T. Rep. N. S. 138;

L. Rep. 10 Ch. App. 373;

*Ex parte* Marston; *Re* Ridsdale, 3 M. & A. 444.

[BAGGALLAY, L.J. referred to *Ex parte* Banner; *Re* Blythe, 44 L. T. Rep. N. S. 908; 17 Ch. Div. 480.]



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*Ex parte* REVELL; *Re* TOLLEMACHE (No. 1).

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*Bigham*, Q.C. and *Herbert Reed* for the claimant.—The judgment is *prima facie* evidence of the debt, and the onus is on the person who seeks to impeach it:

*Ex parte Bryant* (*ubi sup.*);

*Ex parte Mudie*; *Re James*, 3 M. D. & De G. 66;

*Ex parte Rizzo*; *Re Rizzo*, 48 L. T. Rep. N. S. 376; 23 Ch. Div. 529.

In *Ex parte Banner* there had evidently been a fraud. Delay is all that can be urged against this claimant, but that was occasioned by there being until lately no assets for distribution. The claim ought at any rate to be admitted to the extent admitted by the bankrupt in his statement of affairs. This statement is admissible in evidence inasmuch as it was made by the bankrupt in discharge of his duty, and he is now dead. It is a statement against the interest of the bankrupt:

*Price v. Earl of Torrington*, Salk. 285; 1 Sm. L. C., 8th edit. 344.

BAGGALLAY, L.J. (after stating the facts and the evidence in support of the claim) continued:—The first observation which naturally occurs to one is, Why was not this proof tendered forty-two years ago? It is said that the value of the bankrupt's assets was then so small, and the amount of his debts so large, that it was not worth while to incur the expense of establishing the claim to prove at that time, but that such proceedings would have been throwing away good money after bad. The creditor chose to act upon that view of the case, and now, forty-two years afterwards, his legal personal representative comes forward to make this claim, which is supported to a great extent by evidence of the information and belief of the creditor's son, who was only three years old at the time of the bankruptcy. Having regard to the authorities, I think a case has been shown for inquiring into the consideration for the judgment debt. It is unnecessary to deal with the proposition of Mr. Winslow that in every case the Court of Bankruptcy is entitled to inquire into the consideration for a judgment debt. The rule is very plainly stated by James, L.J. in *Ex parte Kibble*. He says: "It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relatives without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation." As at present advised I do not wish to decide that, as a rule, the court should inquire into the consideration for a judgment debt. Unless something is shown to justify such an inquiry, I am disposed to think that *prima facie*, a judgment ought to be considered as binding. But if a proper case is made I think the court ought to direct an inquiry into the consideration for a judgment debt. The judgment of James, L.J. in *Ex parte Kibble* appears to me to be consistent with all the previous cases. I think that, if this proof had been tendered at the commencement of the bankruptcy proceedings, it would have been within the power of the commissioner, and it would have been his duty, to

direct an inquiry into the consideration for the judgment debt. But no such investigation took place, because the creditor did not then think it worth his while to prove. The time has gone by, and I do not think any further evidence could now be obtained. In my opinion, upon the evidence as it stands, the proof ought not to be admitted.

COTTON, L.J.—I am of the same opinion. The proof is founded simply on the judgment, for there is no evidence of any indebtedness by the bankrupt independently of the judgment. What is the law on the point? In bankruptcy a judgment certainly stands in a different position from that in which it previously stood as against the debtor himself, because the rights of the other creditors of the bankrupt have supervened. Where a person is *sui juris*, a judgment against him is very strong *prima facie* evidence against him of the existence of a debt; if he disputes it, he must satisfy the court that there is some reason which requires that the judgment should be set aside. It has been contended that in bankruptcy a judgment ought to be entirely disregarded, but it is unnecessary to decide the point now. I will deal with the case on the footing that the judgment cannot be disregarded, but that there may be other facts which entitle the court to go behind it. What are the facts? The judgment was obtained by Phillips in 1842, but he made no attempt to prove in the bankruptcy. The present claimant says that his father, having obtained this promissory note for 2250*l.* from the bankrupt, handed it over to Phillips, who paid 200*l.* for it, and that he held the note as a mere trustee for Edwards. It is impossible to shut one's eyes to this, that the payment of 200*l.* was not a real transaction, and that it was made to enable Phillips to say that he was holding the note for value. It shows that, for some reason or other, Edwards was unwilling himself to sue the bankrupt upon the note. In my opinion, if the proof had been put forward at the commencement of the bankruptcy, it would have been the duty of the court to make inquiry into the consideration for the judgment debt, and we ought not to deal with the matter on any other footing now. We ought not to put Edwards or his estate in any better position, because he has allowed the time to go by until those persons who could have told us the real facts of the case are dead. It is said that the proof ought to be admitted for the 1500*l.* which is mentioned in the bankrupt's statement of affairs. I am of opinion that that statement, being made after the bankruptcy, is not such an admission against the interest of the bankrupt as is admissible evidence against his creditors.

LINDLEY, L.J.—I am of the same opinion. It is rather a startling thing to be asked to admit a proof of a debt forty-two years after the commencement of the bankruptcy, no one having heard anything of it until now. It is true the Statute of Limitations has not run; but, if we carry ourselves back to the year 1842, could the court then have allowed Edwards, the father, to make this proof without any investigation into his claim? I think not. Looking at the circumstances, which throw a great deal of suspicion on the defendant, it would not then have been just to the other creditors to allow the proof until



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after investigation, and I think it would not be any more just now.

*Appeal allowed, and leave to appeal to House of Lords refused.*

Solicitors for the appellants, *Still and Son*.  
Solicitor for the claimant, *M. T. Hodding*.

Friday, July 4.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte REVELL; Re TOLLEMACHE (No. 2). (a)*

*Bankruptcy—Judgment obtained after act of bankruptcy committed—Delay in proving on judgment—Onus of proof as to notice—Bankruptcy Act 1849 (12 & 13 Vict. c. 106), s. 165.*

*T. was adjudicated a bankrupt in 1842. A judgment was entered against him a few days after he had completed the act of bankruptcy on which he was adjudicated, by lying in prison for twenty-one days. There being no available assets at the time, the bankruptcy proceedings were dropped for over twenty years, at the expiration of which time, some assets having become available for distribution among the creditors, a proof was brought in for the amount of the judgment debt. Held, that the onus of proving that when the judgment was obtained the creditor had no notice of the act of bankruptcy lay on the claimants, and that, on their failure to sustain the burden, the proof must be disallowed.*

THE Honourable W. L. F. Tollemache, commonly called Lord Huntingtower, was adjudicated a bankrupt in 1842, the fiat being issued on the 2nd Sept. 1842. The particular act of bankruptcy on which the adjudication was founded was that he had lain in prison for debt for more than twenty-one days. He was arrested for debt on the 12th July 1842, and lodged in the Queen's Bench Prison, where he remained till the 2nd Sept. 1842. Judgment was recovered against him on the 9th Aug. 1842 in an action brought by R. S. Bassill. The assets being very small, only a few creditors, not including Bassill, proved their debts, but shortly before the date of this report large assets became distributable among the creditors.

B. S. Bassill died in 1849, and his representatives claimed to prove for 1516*l.* 8*s.* 3*d.*, the amount of the judgment debt and interest.

The bankrupt died on the 21st Dec. 1872.

The bankruptcy proceedings had been carried on under the Bankruptcy Act 1869.

The only evidence was the judgment itself, and there was no evidence to show whether Bassill had notice before the judgment of the act of bankruptcy, which was complete a few days before the judgment.

Mr. Registrar Pepys admitted the proof on the 6th Feb. 1884.

The assignees appealed.

*Winslow, Q.C.* and *Yate Lee* for the appellants.—The judgment is the only evidence of the debt; it was obtained a few days after the act of bankruptcy had been completed, and the onus of proving that judgment was obtained without notice of the act of bankruptcy lies on the claimants. They cited

*Ex parte Vale; Re Bannister*, 45 L. T. Rep. N. S. 200; 18 Ch. Div. 137;

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

*Ex parte Schulte; Re Matanlé*, 30 L. T. Rep. N. S. 478; L. Rep. 9 Ch. App. 400;  
*Bankruptcy Act 1869*, s. 95;  
*Bankruptcy Act 1849*, s. 165;  
6 Geo. 4, c. 16, s. 47.

*Herbert Reed* for the claimants.—There is nothing to cast suspicion on the judgment. It is impossible, after a lapse of time, to show that creditors had not notice of an act of bankruptcy. Under 46 Geo. 3, c. 135, s. 2, it was decided that the onus of proving notice of an act of bankruptcy lay on the person alleging it:

*Robinson v. Vale*, 2 B. & C. 762.

The decision in *Ex parte Schulte* does not apply to a creditor seeking to prove in a bankruptcy. Assuming there was notice, there is no merger of the prior debt:

*Ex parte Lloyd; Re Lloyd*, 1 Rose, 4.

Consideration may be presumed from the fact of judgment having been obtained.

BAGGALLAY, L.J. (after stating the facts and referring to sect. 165 of the Bankruptcy Act of 1849) continued:—That section was in substance a repetition of sect. 47 of the Act 6 Geo. 4, c. 16, which again was a repetition of sect. 2 of the Act 46 Geo. 3, c. 135. Assuming, therefore, everything else in favour of the right of the claimants to prove, the question is whether Bassill had, at the time when he obtained his judgment, notice of the prior act of bankruptcy on which the adjudication was founded. I am clearly of opinion that, in a case like this, where a person is claiming the benefit of the protection given by the Act, the onus is on him to show that he had no notice of the prior act of bankruptcy. *Ex parte Schulte* is a direct authority that, under the corresponding section (sect. 95) of the Bankruptcy Act 1869, the onus was on an execution creditor to prove that he had no notice of a prior act of bankruptcy, and I think the principle of that decision equally applies to the present case. No doubt there is great difficulty, after so many years, in proving this absence of notice, but that difficulty arises from the creditor's abstaining from taking steps to establish the claim. No blame attaches to the original creditor for not coming forward to prove in the first instance; it was not worth his while to throw good money after bad. But if he had attempted to establish this claim, he would have been bound to prove that he had no notice of the act of bankruptcy committed prior to the date of his judgment. The proof must be rejected, and the appeal allowed.

COTTON, L.J.—I am of the same opinion. The act of bankruptcy upon which adjudication was made was complete on the 2nd Aug. 1842. The proof is on a judgment, but we do not know whether it was founded on tort or on contract. I agree with Baggallay, L.J. that as the respondents are coming forward to prove under the provisions of an enabling section, it is for them to bring themselves within the protection or benefit conferred by the section. On the very terms of the section I am of opinion that the person who claims the benefit of it must assume the burden of proving the facts which entitle him to it. At any rate he must give some *prima facie* evidence of them. This view is supported by *Ex parte Schulte*, which was decided under the Bankruptcy Act 1869. It is said that case is distinguishable from the present because there the claim was

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to property which would otherwise have vested in the trustee by reason of the relation back of his title to the act of bankruptcy. I am of opinion that there is no real distinction between the two cases. Here the alleged creditors are seeking to prove in competition with the other creditors. The trustee claims the assets for the purpose of distribution among the creditors, and the respondents are seeking to lessen the dividend payable to the other creditors. Why should the respondents not have thrown upon them the same onus as is thrown on an execution creditor who is seeking to diminish the assets available for distribution among the creditors? In my opinion there is no distinction between the two cases, but I rest my decision on the construction of sect. 165 of the Bankruptcy Act of 1849. It is urged that there must have been something to support the judgment which is *prima facie* evidence, therefore, of a debt; but there is nothing to show that it was obtained in respect of a debt at all.

LINDLEY, L.J.—I am of the same opinion. The claimants say they are entitled to prove this debt, although judgment was obtained after an act of bankruptcy had been committed. In order to avail themselves of this exceptional privilege the respondents must comply with the statutory requirement, i.e., they must prove that the judgment creditor had at the date of the judgment no notice of the prior act of bankruptcy. This they cannot do.

*Appeal allowed.*

Solicitors for appellants, *Still and Son*.

Solicitors for claimants, *Russell, Iliffe, and Cardale*.

Tuesday, July 15.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re MARCH; MANDER v. HARRIS. (a)

*Will—Husband and wife—Gift to husband and wife and a third person—Gift divisible in moieties—Joint tenancy—Separate estate—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), ss. 1, 5.*

A testatrix, who died in April 1883, by her will, dated the 8th Dec. 1880, gave all her property, both real and personal, unto M. and J. H., Esq., and E., his wife, to and for their own use and benefit absolutely, and appointed the same persons executors of her will.

The Married Women's Property Act 1882 came into operation on the 1st Jan. 1883.

Held, that the rule by which, prior to the passing of the Act, M. would, under such a gift, have taken one moiety, and Mr. and Mrs. H. the other moiety, was a rule of construction, and not a rule of law; that there was nothing in the Act requiring the court to construe a will made before the Act came into operation otherwise than such a will would have been construed if the Act had not been passed; and, therefore, that M. was entitled to one moiety, and Mr. and Mrs. H. to the other moiety.

But held, that the effect of the Act was, that the moiety of Mr. and Mrs. H. belonged to them as joint tenants just as if she were unmarried, he taking in his own right, and she for her separate use.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

*Quære, whether the effect would not have been the same if the making of the will and the death of the testatrix had both taken place after the 1st Jan. 1883.*

*The decision of Chitty, J. (49 L. T. Rep. N. S. 168; 24 Ch. Div. 222) reversed.*

FANNY ELIZABETH MARCH, widow, by a holograph will, dated the 8th Dec. 1880, after directing the payment of her debts and funeral and testamentary expenses, gave, devised, and bequeathed all her household furniture, linen, wearing apparel, books, plate, moneys, stocks, and securities, and all and every other her estate and effects, whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy, "unto my residual legatee (*sic*) Charles James Mander, Esq., No. 9, New-square, Lincoln's-inn, London, and James Harris, Esq., and Eliza Maria his wife, of Knowle Green, Staines, Middlesex, to and for their own use and benefit absolutely, and I nominate, constitute, and appoint Charles James Mander, Esq., 9, New-square, Lincoln's-inn, London, and James Harris, Esq., and Eliza Maria Harris his wife, of Knowle Green, Staines, Middlesex, to be executors of this my last will."

The testatrix died on the 26th April 1883, possessed of personal estate only.

Mr. and Mrs. Harris were married in 1864.

The present action was brought by Mander, against Mr. and Mrs. Harris for a declaration that, according to the true construction of the will, the estate of the testatrix was divisible into moieties, and that the plaintiff was entitled to one of such moieties.

The question was raised, on demurrer to the statement of claim, whether the property was divisible in moieties, Mr. and Mrs. Harris taking one moiety, and the other legatee, the plaintiff Charles James Mander, the other moiety, or whether, having regard to sect. 1 of the Married Women's Property Act 1882, Mrs. Harris was entitled to a separate share, the property being divisible in thirds, and each legatee taking one-third.

On the 18th June 1883, Chitty, J. held that the property was divisible in thirds, each legatee taking one-third, and that the share of Mrs. Harris belonged to her for her separate use: (49 L. T. Rep. N. S. 168; 24 Ch. Div. 222.)

Mander appealed.

Rigby, Q.C. and R. F. Norton for the appellant. No new capacity of acquiring property is given to a married woman by the Married Women's Property Act 1882; she could always acquire property. All the Act does is to affect the property after it has been acquired. Under the law as it stood before the Act Mr. Mander would have taken one moiety, and Mr. and Mrs. Harris the other moiety:

*Bricker v. Whatley*, 1 Vern. 233;

*Warrington v. Warrington*, 2 Hare, 54;

*Re Wyldes*, 2 De G. M. & G. 724;

*Dias v. De Livera*, 42 L. T. Rep. N. S. 267; 5 App. Cas. 123;

*Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547; Co. Litt. 187a and 187b.

There is no hardship in applying the old law, for, even under that law, the property might be made divisible by using express words. The old rule arose, not from necessity, but from applying the subtle metaphysical doctrine that each of them, the husband and wife, had the whole estate. The

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scholastic reasoning was, that if the husband and wife had two-thirds given to them, as each had the whole estate in each third, they had together four-thirds. The Married Women's Property Act was not intended to alter the rights of third parties. It only affects the rights of husband and wife *inter se*. Moreover, this is a rule of construction, not a rule of law, and the Act does not affect rules of construction. The will ought to be construed according to the law existing when it was made:

*Jones v. Ogle*, 28 L. T. Rep. N. S. 245; L. Rep. 8 Ch. App. 192.

That case is not in conflict with *Hasluck v. Pedley* (L. Rep. 19 Eq. 271):

*Constable v. Constable*, 40 L. T. Rep. N. S. 516; 11 Ch. Div. 681.

*Macnaghten*, Q.C., and *Bardwell* for Mr. and Mrs. Harris.—What is the difference between a rule of law and a rule of construction? Which-ever the old rule was, it is altered by the Act. The old rule was founded on husband and wife being only one person in the eye of the law. It was originally laid down with regard to real estate, and for the sake of convenience was applied to personality as well. Husband and wife are now for most purposes two persons. It is said the Act ought not to interfere with the rights of third persons, but what would have been the effect if the marriage had been dissolved by a competent court before the testatrix died? It is admitted that whatever the wife takes is for her separate use, and this does away with the reason for holding that the husband and wife are tenants by entireties.

*Rigby*, in reply.—The rule in *Shelley's case* (1 Co. 93 b.) is a rule of law, not a rule of construction, for the testator cannot alter it by saying that it shall not apply. In *Dias v. De Livera* the will was not an English instrument.

*Cur. adv. vult.*

July 15.—LINDLEY, L.J.—The will in this case was executed in 1880, and came into operation in April 1883. In the interval the Married Women's Property Act was passed, and we have to consider the effect, if any, of that Act upon this will. By the will the testatrix bequeathed her residuary personal estate to Mander, and Harris and Eliza his wife, to and for their own use and benefit absolutely, and she appointed them executors of her will. If this will had come into operation before the 1st Jan. 1883 the testatrix's residuary personal estate would have been divisible into moieties. Mander would have taken one-half, and Harris and his wife would have taken the other half as one person. This we think clear upon the authorities, and was in fact hardly disputed. But it was contended that the Married Women's Property Act had the effect of altering the law in this respect, and of giving to the residuary legatees one-third share each. This, moreover, was the view taken by the learned judge in the court below. Chitty, J. examined at considerable length the effect which the Married Women's Property Act would have had upon this will if it had been made after that Act came into operation, and he came to the conclusion that if the will had been so made the residuary legatees would have taken in thirds. It is not necessary for us to decide this point, and we express no opinion upon

it. We have to deal with a will made before the statute in question came into operation, and we confine our observations to wills so made. Now, in applying the Married Women's Property Act to wills made before the Act was passed, care must be taken not to make it operate retrospectively further than is unavoidable. There is no section in the Act, unless it be sect. 5, which requires us to construe a will made before the Act came into operation otherwise than such will would have been construed if the Act had not passed. Sect. 5 of the Act does not require this to be done. It does not require it in terms, nor does it by necessary implication. Sect. 5 provides for women married before the commencement of the Act, and by force of that section Mrs. Harris is entitled to have and to hold and to dispose of in manner previously mentioned in the Act—i.e., by deed or will—as her separate property, whatever accrued to her under the will in question. What then did she acquire under the will? That depends upon the proper construction of the will; and for purposes of construction those rules which prevailed when the will was made, and with reference to which wills may be fairly presumed to have been framed, must be observed. The reasoning of the Lord Chancellor in *Jones v. Oyle* upon this point appears to us unanswerable, and we do not regard the case of *Hasluck v. Pedley* as really inconsistent with this view. In that very case the Master of the Rolls said: "The Act does not affect the meaning of the will, it only alters its legal operation." The construction is not altered, though the legal effect may be different, as was pointed out by Fry, L.J., in *Constable v. Constable*. In this case, and as regards the share given to Mr. Mander, we are unable to distinguish the construction of the will from its legal effect. The testatrix by her will, construed as it would have been when she made it, gave Mr. Mander one-half of her residuary estate. We can find nothing in the statute to alter this construction, or to diminish the share given to him. Neither does it enlarge or diminish the share given to Mr. and Mrs. Harris. But the statute has a very important effect on her interest in that share. The moiety given to her and her husband is in effect given to her and him as joint tenants as if she were unmarried. Practically, therefore, Mander will take half, Mr. Harris will take a quarter, and Mrs. Harris will take a quarter for her separate use. This appears to us to be the necessary consequence of sect. 5, but we cannot construe that section as having any other operation on this will. In this respect we think the decision of the court below erroneous. The order appealed from ought, therefore to be discharged, and, in lieu of it, the order should be that the court, being of opinion that the three residuary legatees are entitled to the residuary estate as joint tenants, and that Mander is entitled to half, and that Mr. and Mrs. Harris are entitled to the other half—he in his own right, and she for her separate use—overrule the demurrer.

COTTON, L.J.—I am of the same opinion as regards the result, and I only add anything to what has been said by Lindley, L.J., because I wish to state the rule more fully than it is expressed in the judgment delivered by him. The old rule, that a gift to A. and B. and C. his

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wife gave one moiety to A. and another moiety to B. and C., is a rule of construction, and not a rule of law operating on the construction of a will. I admit that, although it is a rule of construction, it was laid down having regard to the state of the law at the time. But that it is a rule of construction is shown by the fact that very slight expressions of opinion to the contrary have led the court to depart from the rule. I say this because the view that this is a rule of construction was to some extent lost sight of during the argument, and also in the judgment of Chitty, J. If ever the case arises, it will no doubt be very important to remember this when the will has been made since the passing of the Married Women's Property Act 1882. I only say this that it may not be supposed that we have decided that question, but that the question may be left open when that case arises. In my opinion, the Act was not intended to alter any rights except those of husband and wife *inter se*. What the effect will be when words similar to these occur in a will made after the coming into operation of the Act I do not say.

BAGGALLAY, L.J.—The judgment of Lindley, L.J. entirely expresses my view, but I do not at all dissent from the opinion expressed by Cotton, L.J.

LINDLEY, L.J.—Nor do I.

*Appeal allowed.*

Solicitor for the appellant, *F. Fitz-Payne*.

Solicitors for the defendants, *Burton, Yeates, Hart, and Burton, for Horne and Engall, Staines.*

*July 15 and 17.*

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)  
Re ADAMS AND THE VESTRY OF ST. MARY ABBOTTS,  
KENSINGTON. (a)

*Lease—Option to purchase freehold reversion—Intestacy of lessee—Benefit of covenant—Personal estate—Will—Construction—Precatory trust—Absolute interest.*

*The benefit of a covenant, contained in a lease, that the lessor will sell the freehold reversion at a fixed price, is an integral part of the lease, and forms part of the personal estate of the lessee.*

*A lease of lands contained a covenant by the lessor that if at any time after the date of the lease the lessee, his executors, administrators, or assigns should desire to purchase the freehold, the lessor would sell and convey the same to him, his heirs and assigns, or as he or they should direct and appoint, at a fixed price. The lessee died intestate, and without having exercised the option.*

*Held (affirming the decision of Pearson, J., 48 L. T. Rep. N. S. 958; 24 Ch. Div. 199), that the benefit of the covenant passed to the administrator of the lessee, and could only be exercised for the benefit of the next of kin of the lessee.*

*Lawes v. Bennett (1 Coz, 167) distinguished.*

*Edwards v. West (33 L. T. Rep. N. S. 481; 7 Ch. Div. 858) approved.*

*It is the tendency of the modern authorities to restrict rather than to extend the doctrine of precatory trusts.*

*A testator gave all his property unto and to the absolute use of his wife, her heirs, executors, ad-*

*ministrators, and assigns, "in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will after her decease."*

*Held (affirming the decision of Pearson, J.), that the wife took an absolute interest free from any trust.*

*Lambe v. Eames (25 L. T. Rep. N. S. 175; L. Rep. 6 Ch. App. 597) and*

*Re Hutchinson and Tennant (39 L. T. Rep. N. S. 86; 6 Ch. Div. 540) approved.*

In this case a summons was taken out before Pearson, J. by the Vestry of St. Mary Abbots, Kensington, asking for a declaration that Charles Adams could not make a good title to certain property comprised in an agreement for sale by C. Adams to themselves without the concurrence of certain other persons.

By a lease dated the 30th Sept. 1819, and made between John Smith, of the one part, and Ralph Adams, of the other part, certain parcels of land, situate at Notting Hill, Kensington, in the county of Middlesex, were demised unto the said Ralph Adams, his executors, administrators, and assigns, for the term of sixty years from the 24th June 1819, at a rent of 60*l.* per annum.

In the lease was contained a covenant by the said John Smith, for himself, his heirs, executors, and administrators, with the said Ralph Adams, his executors, administrators, and assigns, as follows:

And further that if the said Ralph Adams, his executors, administrators, or assigns, shall at any time or times hereafter be minded and desirous of purchasing the fee simple and inheritance of the said piece or parcel of land and premises hereby demised or intended so to be, and of such desire shall give notice in writing to the said John Smith, his heirs or assigns, then that he the said John Smith, his heirs or assigns, shall and will within one calendar month next after the receipt of such notice, at his own expense, make out a title to the said piece or parcel of land and premises, and also accept and take the sum of 1200*l.* in full for the purchase of the said fee simple and inheritance, and on receipt thereof shall and will, at the costs and charges of the said Ralph Adams, his executors, or administrators, convey the said fee simple and inheritance free from incumbrances to the said Ralph Adams, his heirs and assigns, or as he or they shall direct or appoint.

The reversion in fee in the land expectant upon the determination of the said indenture of lease of the 30th Sept. 1819 became, and was at the time of his death, vested in George Smith.

George Smith made his will dated the 20th Feb. 1861, as follows:

This is the last will and testament of me George Smith, of No. 37, York-terrace, Regent's Park, and of No. 10, Great Portland-street, in the county of Middlesex: I give, devise, and bequeath all my real and personal estate and effects whatsoever and wheresoever unto and to the absolute use of my dear wife, Harriet Smith, her heirs, executors, administrators, and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease, and I appoint my sons George Horace Smith and Sidney Stephens Smith executors hereof.

The testator died on the 20th Feb. 1861, leaving his wife, the said Harriet Smith, and several children him surviving, and his will was proved on the 4th April 1861 by George Horace Smith and Sidney Stephens Smith.

Ralph Adams died intestate on the 14th Jan. 1858, leaving Ralph Adams, his eldest son, Charles Adams, the vendor his second son, and

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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nine other children, and also a wife, him surviving. Ralph Adams, the son, died in March 1866, unmarried and intestate, leaving Charles Adams, the vendor, his heir-at-law, and as such also the heir-at-law of Ralph Adams the father, and letters of administration to the estate of Ralph Adams, the father, were, on the 17th Aug. 1876, granted to the said Charles Adams, the vendor.

By an indenture, dated the 6th July 1877, and made between the said Harriet Smith of the one part, and the said Charles Adams, the vendor, of the other part, after reciting the lease and fully reciting the covenant to convey the fee simple, and that the fee simple and inheritance of and in the parcels of land comprised in the lease of the 30th Sept. 1819 as aforesaid were then vested in the said Harriet Smith, subject to the said lease and to the said covenant for sale therein contained, and reciting that the said Charles Adams, as the heir-at-law and legal personal representative of the said Ralph Adams deceased, was the person then entitled to exercise the option to purchase the said fee simple and inheritance, and reciting that the said Charles Adams had, in pursuance of the said covenant for sale thereinbefore mentioned, given to the said Harriet Smith a notice in writing that he was desirous of purchasing the fee simple and inheritance of the said pieces of land for the sum of 1200*l.*, and that the said Harriet Smith had agreed to perform the said covenant for sale, and to convey the said pieces of land unto the said Charles Adams, his heirs and assigns, in manner thereinafter appearing, it was witnessed that, in pursuance of the said covenant for sale, and of the notice and agreement thereinbefore recited, and in consideration of 1200*l.* then paid by the said Charles Adams to the said Harriet Smith, the said Harriet Smith granted unto the said Charles Adams and his heirs the said parcels of land comprised in and demised by the lease of the 30th Sept. 1819, to hold the same unto the said Charles Adams, his heirs and assigns, subject to, but with the benefit of, the said lease of the 30th Sept. 1819.

The said sum of 1200*l.* was paid by the said Charles Adams, the vendor, out of his own moneys, and the said Charles Adams claimed to be absolutely entitled to the said parcels of land in fee simple. The lease expired on the 24th June 1879.

By a contract dated the 25th Nov. 1882, and made between the said Charles Adams, the vendor, of the one part, and the vestry of the parish of St. Mary Abbots, Kensington, in the county of Middlesex, the purchasers, of the other part, the vendor agreed to sell, and the purchasers agreed to purchase, for the sum of 1525*l.*, a piece of land, being part of the parcels of land comprised in the lease of the 30th Sept. 1819 and the said indenture of the 6th July 1877, for an estate of inheritance in fee simple in possession free from all incumbrances whatsoever.

Upon investigation of the vendor's title it was objected on behalf of the purchasers that the benefit of the option to purchase the freehold of the property comprised in the lease was personal estate, which descended to the next of kin of Ralph Adams, the father, and had been exercised by his administrator for their benefit, and that the consent of the persons now constituting or representing such next of kin must be obtained

and evidenced by joining them as parties to the conveyance.

It was further objected that the will of George Smith created a precatory trust over all his property in favour of his children, and that they were also necessary parties to the conveyance in order to give to the purchaser a good title to the freehold.

The purchasers consequently took out the summons, and on the 7th July 1883 Pearson, J. held that the benefit of the option passed as part of the lessee's personal estate to C. Adams as administrator, and that he could not make a good title unless the next of kin of the lessee concurred in the sale. His Lordship also held that Mrs. Smith took an absolute interest in the reversion, and that no precatory trust existed: (48 L. T. Rep. N. S. 958; 24 Ch. Div. 199).

The vendor appealed from the former decision, and the purchaser from the latter decision.

*F. Pownall* in support of the vendor's appeal.

—The interest actually demised is of course leasehold, but the benefit of the option to purchase the fee is of the nature of freehold, and descends to the heir-at-law. There is no limit of time within which the option of purchase is to be exercised, and although it is to be exercised by the executors, administrators, or assigns of the lessee, the fee is to be conveyed to Adams, "his heirs and assigns." This is a real covenant; the remedy on which belongs to the heir-at-law. [COTTON, L.J.—There is no covenant with the heir-at-law, or of which he can take any advantage.] In 1 Shep. Touchs. 7th edit. p. 175, there is this passage: "If A. covenant with B. and his heirs to enfeoff B. and his heirs of land, and B. die before it is done; in this case his heirs [though not named] shall take advantage thereof." [COTTON, L.J.—The executors are not named there.] A real covenant is defined in Comyn's Digest (Covenant A. 2, 5th edit. p. 263), and in the same work it is stated that the heir may have an action, "though the covenant be with the lessor, his executors and administrators, and does not name the heir:" (Com. Dig. B. 2, 5th edit. p. 267). The authority for this and for the proposition in Sheppard appears to be *Lougher v. Williams* (2 Lev. 92), and *Winter v. D'Erveux* (3 P. Wms. 6th edit. 188, n.) is an authority in the same direction. The right to call for a conveyance of land is an equitable interest or equitable estate. Jessel, M.R. said that there was no doubt about this in the ordinary case of a contract for purchase, and that an option of repurchase was not different in its nature; in fact, that there is no substantial distinction between a contract for purchase, an option for purchase, and a conditional limitation:

*London and South-Western Railway Company v. Gomm*, 40 L. T. Rep. N. S. 449; 20 Ch. Div. 563.

The moment the option is created, the person who can exercise it has an equitable interest in the fee simple, which is quite distinct from the leasehold interest which he takes under the demise, and on his death descends to his heir-at-law. If it were otherwise, a man might by creating an option make an interest in freehold pass to the next of kin. The covenant does not say that the executors or administrators are to find the purchase money. Perhaps the executor or administrator is the person to give notice, but it would be as trustee for the heir-at-law. [BAGGALLATY, L.J. referred to

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*Keech v. Sandford* (Sel. Ch. Ca. 61; 1 W. T. L. C. 4th edit. 44). LINDLEY, L.J.—If the heir is to take the fee, why should the charges of the conveyance be thrown on the executor? If the covenant had not been contained in a lease, but in a separate deed, there could be no doubt about the right of the heir, and the effect is the same when it is contained in the lease:

*Green v. Low*, 22 Beav. 625.

When the option is exercised it relates back to the date of the lease, so that the lessor becomes as from that time a trustee for the lessee, his heirs and assigns:

*Lawes v. Bennett*, 1 Cox, 167;

*Daniels v. Davison*, 16 Ves. 249;

*Townley v. Bedwell*, 14 Ves. 591;

*Collingwood v. Reid*, 29 L. T. Rep. O. S. 191; 3 Jur. N. S. 785.

It is true that Fry, J. has in *Edwards v. West* (38 L. T. Rep. N. S. 481; 7 Ch. Div. 858) declined to extend the principle laid down in *Lawes v. Bennett*, but his observations were mere dicta. If the exercise of the option relates back at all, it does so for the benefit of both parties. A trustee of a term who purchases the reversion of a lease can hold it against his *cestuis que trust*:

*Randall v. Russell*, 3 Mer. 190;

*Hardman v. Johnson*, 3 Mer. 347.

He also referred to

*Kingdon v. Nottle*, 1 M. & S. 355;

*Rayner v. Preston*, 44 L. T. Rep. N. S. 787; 18 Ch. Div. 1;

*Dart's V. & P.* 5th edit. 265.

*Smart*, for the purchasers, was not called upon.

BAGGALLAY, L.J.—I think, perhaps, it will be more convenient if we first dispose of this appeal, which has been ably argued by Mr. Pownall. It appears to me that the question turns upon the proper construction of the covenant contained in the lease of 1819, and that the cases to which Mr. Pownall has referred, although they bear upon a very important branch of the law, do not aid us in the decision of the case we are now dealing with. [His Lordship read the covenant and continued:] The reversion in fee of the property demised became vested in Mr. George Smith, who died in 1861, having made his will. [His Lordship stated the effect of the will and continued:] Upon that gift in the will of Mr. Smith the second question arises, as to which I say nothing now, because it will be the subject of Mr. Smart's argument presently. [His Lordship then stated the other facts set out above down to the grant of letters of administration to the estate of R. Adams, the father, and continued:] Now, we have got George Smith, the original testator, dead; all his real and personal estate bequeathed to his wife, and, in the events which have happened, Charles Adams, as the heir-at-law, and also administrator of Ralph Adams, the father. Now, I take it that the effect of the decision in *Lawes v. Bennett* is, as it was very well put by Fry, J. in *Edwards v. West*, "that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the proceeds of the sale go as part of his personal estate and not as part of his real estate." The effect of that would be, as applied to the case we are now dealing with, that the 1200*l.* purchase money would form part of the personal estate of George

Smith, and not part of his real estate; and upon this principle, that he being a party who created an option, the contract would have a retrospective action—that is to say, would relate back to the time when he created the option—and therefore the purchase money, although not paid till after his death, would form part of his personal estate and not part of his real estate. In the events which have happened that, however, is immaterial. Of course there would be a difference as regards the effect of the exercise of the option after the death of Ralph Adams, the father. Although the option was created in his lifetime it was not exercised till after his death, and therefore, according to the view which I take of it, there would be no retrospective action whatever, there would only be a binding contract when the option was exercised, and that is the period to which we have to look. In *Edwards v. West* it was endeavoured to extend the principle of *Lawes v. Bennett* to the case of a person exercising the option, *Lawes v. Bennett* being only a decision as regards the party giving the option. In that case Fry, J. thought that the real question was, when could any proceedings for specific performance be taken? and that no proceedings whatever for specific performance of the contract could be taken until the option was exercised. That appears to me to be a very cogent argument in favour of the view which he took. After the death of Ralph Adams, the father, and Ralph Adams, the son, the option was exercised, and the property was conveyed to Charles Adams in the manner appearing by the conveyance of the 6th July 1877. The Vestry of St. Mary Abbots have entered into a contract to purchase this property from Mr. Charles Adams, and the question is raised whether he can alone make a good title to the property. It is said that if he alone was entitled to make a purchase for his own benefit, he alone can make a good title to the property in conveying it to the vestry. The vestry say: "No; you are not entitled to take the property for your own benefit. You could only exercise the option of purchase as the administrator of your father, who died intestate. As administrator of your father you had to deal with the personal estate for the benefit of all his next of kin. As administrator of your father you had no power of sale; and therefore it is necessary that your *cestuis que trust*, those for whom you are acting as trustee, should join in the conveyance." I think that contention of the vestry is correct. This property being leasehold, in the absence of any notice converting it into freehold being given in the lifetime of Ralph Adams, the father, would, on his death, belong to his executor, if he appointed one, or, if he did not appoint one, to his administrator, as part of his personal estate. Ralph Adams, the father, having died intestate, and without having given any notice in his lifetime, it can hardly be disputed that his leasehold property passed to his administrator upon administration being taken out. Therefore, the person who had the right to exercise the option after the death of Ralph Adams, the father, was his administrator, and no one else. No doubt we have also to bear in mind that the administrator who had to exercise the option was likewise the heir-at-law; but, as heir-at-law of his

father, Mr. C. Adams had no right whatever to exercise the option. It was only in his capacity as administrator, and subject to the equities and duties which his position as administrator imposed upon him that he could exercise the option. I think the party who exercised the option had to take into consideration whether it was an option to be exercised for his benefit, or for that of the beneficiaries, and only exercise the option if they should at any time or times be minded or desirous of purchasing the fee simple. Of course, if the option had been exercised by Ralph Adams, the father, in his lifetime, it would have been an exercise simply because he was desirous of acquiring the freehold; but it cannot be supposed that his executor or administrator after his death was minded and desirous of exercising the option if it was not for the benefit of those whom he represented in his capacity of executor or administrator, or that he was desirous of exercising it for the benefit of another person, or one who might be another person, namely, the heir-at-law of Ralph Adams, the father. In that view of the case it appears to me, first, that the right of option passed with the leasehold estate, as part of the benefits stipulated for by the provisions contained in the lease, to the administrator, upon his taking out administration to the deceased intestate; in other words, part of the leasehold interest which passed was the right of exercising the option of purchase. It was only in the capacity of administrator of the deceased intestate that Ralph Adams had the right to exercise this option, and to call for a conveyance of the freehold estate; and, inasmuch as he exercised that option and called for a conveyance of the freehold estate in the same way as he held the leasehold interest, so the benefit to be derived from any exercise of that option by him in his capacity of administrator, must be for the benefit of the same parties as those for whom he held the leasehold interest. On these grounds it appears to me that Pearson, J. has arrived at the right conclusion, and that the appeal of Mr. Adams must be dismissed.

CORRON, L.J.—I am of the same opinion. The case was very fully and ably argued by Mr. Pownall, but I quite agree with Baggallay, L.J. that this question depends upon the terms of the contract. The contract was entered into with the lessee, "his executors, administrators, and assigns," and I agree that this is a covenant, the benefit of which passes with the assignment of the lease, because it provides that either the lessee or his executors, administrators, or "assigns" may exercise the option of purchase by giving notice to the lessor. The word "assigns" must mean the assigns of the lease, and this case is entirely different from that of *Green v. Low*, cited by Mr. Pownall, in which there was not a lease, but an agreement for a lease. Superadded to the agreement for a lease was an independent contract that, if the person who had the right to a lease required a conveyance of the fee, the lessor, the owner of the estate, would sell it to him; and Romilly, M.R. held that, though the right to the lease was gone by reason of an act causing forfeiture having been committed by the tenant, the agreement by the landlord to grant the fee, if demanded within a certain time, was an independent agreement. What Romilly, M.R. said in that case shows that the question depends upon the particular form of

the contract in each case, and upon the true construction to be given to it. The report states that he held, "upon the construction of the contract that the right to purchase was independent of the right to a lease, and he decreed a specific performance" of the agreement to sell. That case is of course entirely different from this, where the option given is to the lessee, "his executors, administrators, or assigns." There the Master of the Rolls recognised the principle, which of course could not be disputed, that in such a case what is the true effect of the contract must depend upon the construction of the particular document. If Ralph Adams, the father, had during his lifetime exercised the option of purchase, undoubtedly his heir would have been entitled to the fee simple estate which would have been the result, because Ralph Adams would have made himself the owner of the inheritance by exercising the option. But he did not exercise it, and therefore by the terms of the contract it could after his death be exercised by his executors, administrators, or assigns. They may, by giving notice, obtain the right to have the fee simple estate on payment of 1200*l*. It is very true here that the person who gave the notice was not only the administrator, but also the heir-at-law of Ralph Adams, the father. He was not the assign of the leasehold interest as heir-at-law; he was *prima facie* exercising that option, having regard to the terms of the contract, simply as administrator and not as heir-at-law, and therefore he acquired what he got by virtue of the notice in the character in which he was entitled to give, and did give, the notice. Then it is pointed out that the contract provides that if the notice is given the owner of the inheritance will convey the fee simple free from incumbrances to "Ralph Adams, his heirs and assigns." Undoubtedly, if Ralph Adams the father, had exercised the option, his heir-at-law would, on his death intestate, have been entitled to the estate which by that exercise of the option would have been equitably that of Ralph Adams. The provision that the fee simple should be conveyed to Adams, his heirs and assigns, contemplates an exercise of the option by Ralph Adams in his lifetime, and then a conveyance to him, his heirs and assigns, and does not in terms apply at all to the event which has happened, namely, the exercise of the option, not by Ralph Adams, but by his administrator. The proper way of expressing what was to be done, so as to cover the event of the option being exercised by anyone other than Ralph Adams, would have been to say that the fee simple and inheritance was to be conveyed to "the person who gave the notice, his heirs and assigns." But a provision that the property is to be conveyed to a certain person does not of itself determine who is entitled to the beneficial enjoyment of the property. The administrator, by virtue of a notice which he gives in his character of administrator, gets a right to the fee simple, and of course the conveyance must be to him, his heirs and assigns, but he nevertheless will hold for the benefit of those who are entitled to the personal estate, and, therefore, in my opinion the decision of Pearson, J. on this point was right. I have not thought it necessary to go through the other cases cited, because they really do not apply, and of course a very different principle is applicable



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where persons are claiming under a person who is the owner of the inheritance entitled to take the benefit of the contract in the shape of purchase money, from the principle which applies in a case like this, where an option of purchase is given to a lessee, his executors, administrators, or assigns, and a man claims under the person who exercised the option. The word "assigns" means in this case the assigns of the leasehold interest. The executors and administrators are pointed out as the persons who are to have the capacity to exercise the option of purchase, and, although the same person happens in this case to be both heir and administrator, his position is divisible, and he exercises the option as administrator, with all the consequences which attach to that office.

LINDLEY, L.J.—I am of the same opinion. It appears to me that the question in this case must be decided with reference to the peculiar language of the covenant. The covenant by Smith is entered into with Adams, his "executors, administrators, and assigns." There is not a word about heirs until we come quite to the end of the covenant. I apprehend that the word "assigns" in that part of the covenant which provides that the executors, administrators, or assigns, may exercise the option, means the assignees of the lease; the context I think shows that. In the event which has happened there has been no assign, and we may therefore leave that word out. If Ralph Adams, the father, did not exercise the option, his administrator did. The covenant is, that if R. Adams, his executors, administrators, or assigns, shall at any time be desirous of purchasing the fee, and of such desire shall give notice to Smith, then he (Smith) will "accept and take 1200l. in full for the purchase of the fee simple and inheritance." Stop there. There is nothing so far which gives the heir any right whatever. The right is given to the lessee, his executors, administrators, or assigns, and it is given to them in language which is very peculiar. If they be minded and desirous of buying the fee-simple—not if the heir is—the freeholder is to sell. I cannot possibly construe this covenant as meaning that the heir is to be at liberty to set the executors, administrators, or assigns in motion, and that the heir is a person who may be minded and desirous of buying. The executors, administrators, or assigns are the persons who are to be minded to purchase, and they are to say whether they will buy or not. Then the covenant does not say by whom the 1200l. is to be found, but upon receiving that sum the lessor is to convey the fee simple of this property at the costs and charges of Adams, "his executors or administrators." So that, if they are minded to give the notice, they are to give it, and to pay the purchase money and the expense of the conveyance. It is not said in so many words that they are to pay the purchase money, but it is upon receipt of the purchase money that the vendor agrees to convey the fee simple. So far it is perfectly intelligible. Now come the only words which are embarrassing, namely, those which provide that the conveyance is to be "to the said Ralph Adams, his heirs and assigns, or as he or they shall direct or appoint." That is the first time that the word "heirs" occurs. Does it allude to any connection with the purchaser? It is not heirs "or" assigns. The fee simple is to

be conveyed to Adams, his heirs "and" assigns; that is, to Adams in fee, the covenant not providing at all, as I understand, for the event which has actually happened, of the notice being given by the administrator, or for the case of the notice being given by the executor, and requiring the conveyance of the fee to be made to the administrator or executor. That is omitted. It is an imperfect expression. The covenant does not exhaust all possible cases, and it is simply because the word "heir" is there introduced that this heir says that, contrary to the true construction of this covenant, he is entitled to buy and to keep the fee himself. This contention appears to me to be quite contrary to the language of this covenant.

Smart in support of the appeal of the purchasers.—The will of G. Smith imposed a trust upon his widow in favour of the children. It is argued that the words "to the absolute use" prevent a trust from attaching, but if it were not for *Lambe v. Eames* (25 L. T. Rep. N. S. 175; L. Rep. 6 Ch. App. 597) and *Re Hutchinson and Tenant* (39 L. T. Rep. N. S. 86; 6 Ch. Div. 540) there would clearly be words sufficient to create a trust. But the real ground of the decision in *Lambe v. Eames* was, that the trust had been complied with—it was unnecessary to decide whether there was a trust—and the decision of Jessel, M.R. in *Re Hutchinson and Tenant* is not binding on this court. The cases do not show that the widow is entitled to have the whole property absolutely, and the older authorities are altogether in my favour:

*Briggs v. Penny*, 18 L. T. Rep. O. S. 101; 3 Mac. & G. 546;

*Wood v. Cos*, 2 My. & Cr. 684;

*Wace v. Mallard*, 21 L. J. 355, Ch.;

*Webb v. Woods*, 2 Sim. N. S. 267;

*Palmer v. Symmonds*, 2 Drew. 221;

*Gully v. Cregos*, 24 Beav. 185;

*Shovelton v. Shovelton*, 32 Beav. 143;

*Irvine v. Sullivan*, L. Rep. 8 Eq. 673;

*Curmick v. Tucker*, L. Rep. 17 Eq. 320;

*Le Marchant v. Le Marchant*, L. Rep. 18 Eq. 414;

1 Jarm. on Wills, 4th edit. 385, 388.

Pownall, for the vendor, was not called upon.

BAGGALLAY, L.J.—The question involved on this appeal is whether, having regard to the trusts of the will of George Smith, a trust is created in favour of his children. [His Lordship read the will, and continued:] I think that, if it were not for authority, or alleged authority, no one would have any difficulty in construing this will according to what would appear to be the plain and evident intention of the testator. The observations of Jessel, M.R. in *Re Hutchinson and Tenant* appear to me to apply as clearly to the form of devise and bequest in this case as to that which was before him. Referring to the words, which are alleged to imply a precatory trust, he says: "In my opinion, these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to anyone she may think fit; she is to be complete owner of the property, but he expects her to dispose of it among his family, that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift

to her. If you make the power override the absolute gift the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word 'wife.' If you do not put in that word, you make her a trustee for the testator's family, that is, his children only; for there is no reported case in which the word 'family,' when used by a married man, has been held to include his wife as well as his children." Those words appear to me to be as fully applicable to the will which is now under consideration as to that which was then under consideration. There can be no doubt, as stated by Pearson, J. when this case was before him, that there is some conflict on subjects of this kind between the modern authorities and the older authorities, and the question arises, which authorities ought to be followed. In this case many of the older authorities had been cited before him, as they have been cited before us to-day, and he came to the conclusion that the principle enunciated by James and Mellish, L.J.J. in *Lambe v. Eames* is applicable to the case under consideration. Now, James, L.J., in the course of his judgment in *Lambe v. Eames*, made an observation in which I thoroughly and entirely concur. He said: "The question is, whether those words create any trust affecting the property, and in hearing case after case cited I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise." Now a somewhat curious circumstance in this case is, that we are actually called upon to construe this will in the absence of the parties on both sides, who may be interested in having this construction decided. We have neither the wife nor the children here, but the wife having sold the property in the capacity, or assumed capacity, of being able to sell, the purchaser from her has sold the property to other purchasers, and they say that the former purchaser has not got a good title. Fully concurring as I do with the observations of the learned judges in *Lambe v. Eames*, I agree with Pearson, J., and I think he was right in considering that the principles enunciated in that case were applicable to that which we are now considering, and that there is nothing in the authorities which militates against this decision. At the same time I agree with him that, a different view being adopted by courts of equity in more recent years from that which was adopted some years ago, as regards what have been called precatory trusts, it has long been decided that the old views were not to be extended; and I think we should be extending them if we were to apply them to the case now under consideration. I think the conclusion at which Pearson, J. has arrived is the true view.

CORROD, L.J.—I am of the same opinion. The question before us is, whether upon the true construction of the will of George Smith a trust was

imposed upon his widow. It is unnecessary even to spell out the will, as it appears to me to be perfectly clear what the testator intended. He left his property to his wife absolutely, but what was in his mind was this: "I am the head of the family, and it is laid upon me to provide properly for my children. My widow will succeed me when I die, and I wish to put her in the position I occupy, the person who is to provide for my children." He does not entail upon her any trust so as to bind her, but by his will he simply expresses to her, and calls to her attention, the moral obligation which he himself had, and which he feels that she is going to discharge. The motive of the gift is, in my opinion, not a trust imposed upon her, but a confidence that she will do what is right. He leaves the property to her, knowing her, and also knowing that she will do what is right and carry out the moral obligation, which he thought was in himself, and in her if she survived him, to provide for the children. In my opinion it is perfectly clear on the mere construction of the will, independently of any authority, that what the testator has expressed is not a trust, but merely an expression of confidence. But it is said that the testator would be very much astonished if he found that he had given his wife power to leave the property away. I should say rather that he would be much surprised if the wife to whom he had left his property absolutely should so act as not to provide for the children, that is to say, not do what was right. That is a very different proposition. He would probably say: "I expected that my wife would do what was right, and therefore I left the property to her absolutely. I find she has not done what I think is right, but I cannot help it, though I am very sorry that she has not done so." That would be the surprise, I think, that the testator would express, and feel, if he could do either, if the wife did what was unreasonable as regards the children. But then it is said that there is authority against that opinion, and I am in no way disposed, if there be any definite established canon or rule of construction, to depart from it, because such a course would introduce great uncertainty. But, undoubtedly, to my mind, in the later cases, especially *Lamb v. Eames* and *Re Hutchinson and Tenant*, the Courts, both the Court of Appeal and Jessel, M.R., showed a desire to find out what, upon the true construction, was the real meaning of the testator, rather than to lay hold of certain words which in other wills had been held to create a trust. I have no hesitation in saying that I think many of the older authorities went a great deal too far in deciding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust; but we have to look at the whole of the will which we have to construe, and if the confidence is that the widow will do what is right as regards the disposal of the property, I cannot say that, on the true construction of that will, a trust is imposed upon her. According to the later decisions, we must not extend the doctrine as to precatory trusts in any way, or rely upon the mere use of any particular words; but, having regard to all the words which are used, we must consider what is their true effect, and what was the intention of the testator as expressed in his will. In my opinion the testator

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has expressed his will in such a way as not to show an intention of imposing a trust on the wife, but, on the contrary, he has shown an intention to leave the property, as he says he does, to her absolutely.

LINDLEY, L.J.—I am entirely of the same opinion. If we look at the will with a view and a desire to understand it, and see what the testator has expressed to be his intention, I cannot come to any other conclusion than that he intended to leave this property to his wife absolutely. It is very true that he goes on to say in terms that which, having regard to the cases, he had better not have said, that is to say, that he trusted her to do what was right as to the disposal of his property between his children. Of course it is clear that a man trusts his wife if he leaves all his property to her, but he has been unfortunate enough to say so, and we are asked, because he says so, to construe this will in such a way as to turn his wife into a trustee for the children. I quite agree that some cases have been wrongly decided, and in many cases the courts have imposed upon words a meaning beyond that which they would bear if looked at apart from the authorities. I am glad to see that James, L.J. had the courage to stem the tide, and I find, in the last case I know of, the Privy Council had taken the same way. The case I refer to is *Mussoorie Bank v. Raynor* (46 L. T. Rep. N. S. 633; 7 App. Cas. 321), in which a man gave his widow the whole of his real and personal property, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." Of course the words there are not quite the same as in this case, but what the Privy Council said there was this: "Passing to the merits of the case, their Lordships are of opinion that the current of decision now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended." I am glad to see that the current is the other way, and that people are not to be made trustees unless the intention to make them such is shown by the language of the testator. We cannot find such an intention here, and the appeal must therefore be dismissed.

#### Appeals dismissed.

Solicitors for the vendor, *Pontifex, Hewitt, and Pitt.*

Solicitors for the vendor, *Lucas and Son.*

Friday, July 18.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Ex parte BROAD; Re NECK. (a)

*Bankruptcy — Specific appropriation — Bill of exchange.*

*T., a merchant in Sweden, was in the habit of drawing bills upon N., a banker in London, who accepted them for the accommodation of T. T. was in the habit of remitting to N. other bills on firms in London to give him funds to meet the acceptances when they became due. N. discounted these bills and placed the funds to the credit of his current account at his banker's.*

*In his yearly accounts with T., N. used to credit T. with interest on the amounts of the remitted bills*

*from their due dates, and to debit T. with interest at the same rate as the amount of the payments he made on behalf of T.*

*On the 19th April 1883 T. drew a bill for 450l. on N., payable three months after date, which N. accepted. This bill became due on the 21st July 1883.*

*On the 13th July T. remitted to N. a bill on W., of London, for 450l., payable at sight; and in the letter inclosing the bill T. wrote: "Inclosed I beg to remit 450l. at sight on W., which please encash to my credit." This bill was received on the 17th July by N., who wrote acknowledging the receipt of the bill, "which," he said, "is noted to the credit of your account."*

*In N.'s bills-receivable book the bill was entered as received on T.'s account. The remitted bill was accepted by W. and paid, the proceeds being paid by N. to the credit of his account as usual. N. stopped payment on the 20th July, and, in consequence, the bill for 450l. which N. had accepted was not paid at maturity, and T. had to pay it. N. having filed a petition for liquidation:*

*Held (following Re Gothenburg Commercial Company, 44 L. T. Rep. N. S. 166), that the remitted bill was not specifically appropriated to meet the acceptance for 450l., and that T. could only prove for the amount he had paid under the acceptance; but that, if the remitted bill had remained in specie when the liquidation commenced, T. would have been entitled to the return of it.*

THIS was an appeal by the trustees in the liquidation of J. F. Neck from an order of Mr. Registrar Hazlitt, directing him to pay to J. Thomsen, out of the assets of the debtor, the sum of 450l., the amount of a draft drawn by Thomsen on Westenholtz Brothers, of London, dated the 13th July 1883, and payable at sight, which was remitted by Thomsen to Neck for the purpose of taking up a bill of exchange, drawn by Thomson on Neck, dated the 9th April 1883, and accepted by Neck.

Neck, who was a foreign banker and merchant in the city of London, had for some years been in the habit of accepting for the accommodation of Thomsen (who carried on business as a merchant at Bergen, in Sweden, under the firm of Gottlieb Thomsen) bills drawn on Neck by Thomsen.

Thomsen, in an affidavit, thus describes the course of business:

For some years past I have been accustomed from time to time to draw bills upon Neck at three months date, which he has accepted, and before the due dates of such bills it has been my invariable custom to remit funds to Neck to cover my drafts as they respectively matured.

On the 19th April 1883 I drew a bill for 450l. on Neck, payable to the order of Bergen's private bank, at three months' date, which bill was accepted by Neck, and was made payable at his bankers in the city of London. The said bill matured on the 21st July 1883 (the 22nd of that month falling on a Sunday). On the 13th July 1883 I remitted to Neck a draft for 450l. upon Westenholtz Brothers, of London, at sight, which I am informed and believe was received by Neck on the 17th July 1883. I am also informed and believe that the draft upon Westenholtz Brothers was accepted by the firm, and was paid by Neck to his account with his bankers on the day it was received, and that it was duly collected.

On the 20th July 1883 Neck stopped payment, and when the bill for 450l. which he had accepted was presented the next day to his bankers for payment, payment was refused.

In an affidavit made by Neck he said :

Thomsen was well aware from time to time when he remitted to me bills to meet my acceptances on his account for his accommodation that I was in the habit of discounting such bills remitted by him, although as a matter of fact I sometimes did not discount such bills forthwith, but retained the same until it was convenient to me to discount them. In any event it was the arrangement between us that I should debit him with interest at the rate of 5 per cent. per annum in respect of moneys paid by me for the purpose of paying my credit acceptances as aforesaid, and credit him with interest at the same rate from the due dates of any remitted bills in respect of any moneys which were the proceeds of bills remitted by him. It was my custom to render accounts to Thomsen annually, and such accounts were made up to the 31st Dec. in each year, and the balance of interest was either debited or credited, as the case might be, in the accounts so rendered.

Neck's books showed that the accounts had been kept as described by him.

The letter of the 13th July 1883 sent by Thomsen to Neck with the bill for 450*l.* on Westenholz Brothers contained this passage :

Inclosed I beg to remit 450*l.* at sight, on Westenholz Brothers, which please encash to my credit.

Neck, in a letter to Thomsen dated the 18th July 1883, said :

We are in receipt of your letter of the 13th inst., having a cheque for 450*l.* for 17th inst. on Westenholz Brothers, which is noted to the credit of your account.

In Neck's bills receivable book the bill on Westenholz Brothers was entered as received on Thomsen's account.

On the 14th Nov. 1883 Neck filed a liquidation petition, under which his creditors resolved on a liquidation by arrangement and appointed a trustee.

From the registrar's decision the trustee appealed.

*Sidney Woolf* for the appellant.—Although Thomsen sent the bill on Westenholz for the purpose of meeting his own bill, which matured on the 21st July, there was no fiduciary relation between him and Neck, and the case is therefore distinguishable from *Re Hallett*; *Knatchbull v. Hallett* (42 L. T. Rep. N. S. 421; 13 Ch. Div. 696). Thomsen, therefore, cannot follow the proceeds of the bill, although he would have been entitled to the bill if it had remained in specie. The arrangement as to interest being paid by Neck shows the intention to have been that the proceeds should be used by Neck as a banker uses such proceeds. Therefore there is no specific appropriation :

*Re Gothenburg Commercial Company*, 44 L. T. Rep. N. S. 166.

[BAGGALLAY, L.J. referred to *Johnson v. Roberts*, 32 L. T. Rep. N. S. 446; L. Rep. 10 Ch. App. 505.]

*J. E. Linklater* for Thomsen.—There was a fiduciary relation between Thomsen and Neck. The remitted bills were sent by Thomsen to meet Neck's acceptances for him, and under the distinct agreement that the proceeds of the remittances should be employed for Neck's own purposes. Interest was only allowed from the due dates of the remitted bills, not from the dates of their being discounted, and not down to the time of the payment of the bills which the remitted bills were intended to cover, but to the end of the year. Neck knew the bill on Westenholz was meant to cover his own acceptance for 450*l.* *Re Hallett* is an authority in my favour. Sending remittances generally for the purposes

of a specified account is a sufficient appropriation :

*Ex parte Gomez*; *Re Yglesias*, 32 L. T. Rep. N. S. 677; L. Rep. 10 Ch. App. 639.

Where a banker is not expressly authorised to deal with the remittances of a customer as if they were his own, the customer, on the banker becoming bankrupt, is entitled to have the remittances returned in specie :

*Ex parte Cooke*; *Re Strachan*, 35 L. T. Rep. N. S. 649; 4 Ch. Div. 123;

*Re Gothenburg Commercial Company* (*ubi sup.*).

BAGGALLAY, L.J.—The question involved in this appeal is whether a bill for 450*l.* remitted on the 13th July by Thomsen to Neck was specifically appropriated to the taking up of a bill for the same amount which had been accepted by Thomsen for Neck, and which fell due upon the 21st of the same month, the debtor having stopped payment on the previous day. The question depends, I think, partly upon the general course of dealing with Thomsen, and partly on the circumstances attending the particular remittance which was made upon the 13th July. It appears that the ordinary course of dealing was this : Neck from time to time was under liabilities upon acceptances on behalf of Thomsen, and the practice was that Thomsen should remit money or bills for the purpose of enabling Neck to meet the acceptances on their becoming due. In some cases possibly the bills remitted were retained by Neck until they became due; but, as to part, occasionally at any rate, he cashed them before they became due, and carried the amount of the cash, whether obtained by discount or otherwise, at once to the general credit of Thomsen's account. The particular remittance of the 13th July was a bill payable "at sight," and that bill was cashed by Neck on the 17th July, and the amount was carried to the general credit of the account. This appears to have been in accordance with the ordinary course of business, and if this particular transaction was not in any way taken out of the ordinary course of business, it would follow that the decision which the registrar has arrived at in this case was wrong; and that Thomsen was not entitled to have the 450*l.* paid over to him. But it is suggested that there was a specific appropriation so far as regards this particular transaction, and reliance has been placed on Thomsen's letter of the 13th July, which was sent to Neck with the bill. But the terms of the letter seem to me to be entirely in accordance with the usual practice. No doubt the general ground or reason why the remittance was made was that bills drawn by Thomsen on Neck were becoming due (there were more bills payable on the 21st July), but an authority "to cash" the remitted bill, and to carry the amount to Thomsen's credit is contained in this very letter. If this bill had not been cashed before Neck's stoppage on the 20th July, but had remained in specie, then upon the authority of *Ex parte Gomez*, and *Re Gothenburg Commercial Company*, Thomsen would have been entitled to take the proceeds. It appears to me that *Re Gothenburg Commercial Company* clearly applies to the present case when once it is ascertained that in the ordinary course of business the remitted bill has been cashed, and the proceeds have been carried to the general credit of the account, and interest has been credited on

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them. In that case it was strongly urged that there was a specific appropriation, because the letter written by the manager of the Swedish bank only three days before the stoppage referred to the remittance as being made specially as a provision for paying certain acceptances which were about to become due. In that case, however, it was held that, as regards those remittances which were cashed before the stoppage and paid to the general credit of the account, there was no right on the part of those who remitted to receive the proceeds, but that, as regards those remittances which were not cashed before the stoppage, the remitters were entitled to have them specifically appropriated. I think that, when once you ascertain the relation and the nature of the course of dealing between the parties, the decision in *Re Gothenburg Commercial Company* is applicable, and that this appeal must be allowed.

COTTON, L.J.—I also am of opinion that the appeal should be allowed. What we have to deal with is this, the proceeds of a remittance made by the customer to the debtor, which had been cashed before the debtor's stoppage, not with a bill which remained in specie at the time when the stoppage took place. If the bill had remained in specie the matter would have stood upon a very different footing, and, though it is not necessary to decide the point, probably the customer might have been entitled to say, "That is my bill; I have paid your acceptance, therefore hand the bill over to me." What really took place was this: Some few days before the stoppage the debtor cashed the bill, and now the customer says: "I am entitled to follow the proceeds as trust money specifically appropriated to a purpose which has not been performed, and therefore this money ought to be handed over to me." In my opinion he is not so entitled. We find that the course of dealing was this: Although the remittances were made by the customer for the purpose of meeting the acceptances on his account, yet the debtors cashed or discounted the remittances which were made to him, and carried the proceeds to the general account of the customer, and credited the customer with interest on the sums which he so received in respect of the remittances. Now, in *Re Gothenburg Commercial Company*, Jessel, M.R. said: "The bills were sent, I think, originally for the purpose generally of providing funds to meet acceptances, and for no other purpose, with the right of discounting and appropriating the money." If a man pays interest for money he must be entitled to the use of the money. When a man locks up money which is intrusted to him in a box, he does not pay interest on it. I think we must judge of the contract between the parties from the course of dealing and from the accounts which were rendered, and, looking at the whole course of dealing, in my opinion, although so long as the remittance remained in specie unappropriated the customer might have said, "Hand it over to me," yet, looking at the accounts rendered from time to time, the inference is that the banker was to be at liberty to put himself in funds by cashing the remittances, and when he had done so to treat himself, not as a trustee of the proceeds for the customer, but only as a debtor to the customer for the sums which he had thus received. In my opinion, interest being from time to time carried to the

credit of the customer in the account, the banker was entitled to put the proceeds into his own pocket, not keeping them separate from his general account. In my opinion, therefore, as regards the proceeds of the bills which were cashed before the stoppage, the customer must come in and prove as a creditor, and cannot say that the debtor was a trustee for himself. I cannot see any distinction at all between the previous decision in *Re Gothenburg Commercial Company* and the present case.

LINDLEY, L.J.—I am of the same opinion. If we look at the course of dealing between these parties and the terms of the letter of the 13th July, which remitted the bill for 450*l.* at sight, and also look at what was done with respect to the interest on the balance due on the account between Neck and Thomsen, I think the inference is inevitable that the position of Neck, as regards the money received by him from the bill, was the position not of a trustee, but of a debtor. I think that is the true inference, and the only inference that can be drawn. I am quite unable to distinguish this case from *Re Gothenburg Commercial Company*.

*Appeal allowed.*

Solicitor for the appellant. *H. Montagu.*

Solicitors for the respondents, *Young, Jones, Roberts, and Hale.*

Thursday, March 6.

(Before COTTON, BOWEN, and FRY, L.JJ.)

*Re MASSEY AND CAREY. (a)*

*Solicitor—Bill of costs—Taxation—Negligence—Disallowance—Jurisdiction of taxing master.*

*The taxing master, when taxing a bill of costs between a solicitor and his clients relating to the proceedings in an action, has jurisdiction to disallow the costs of proceedings which were rendered necessary only by the negligence or mistake of the solicitor.*

THIS was an appeal from the Vice-Chancellor of the County Palatine of Lancaster.

Messrs. Massey and Carey, who were solicitors at Liverpool, acted as solicitors for Mr. Wood, who was himself a solicitor, in an action in the Lancaster Court, in which he was defendant.

The plaintiff having delivered a reply to the defendant's statement of defence, Messrs. Massey and Carey sent it to Wood. He did not communicate with them, and they made no suggestion to him concerning the reply, and no rejoinder was delivered within the time limited by the Rules of Court. After that time had expired, counsel advised that it was desirable for the interests of the defendant that a rejoinder should be put in. An application was accordingly made to the court for leave to deliver a rejoinder, notwithstanding the time had expired. In support of this application, Mr. Carey made an affidavit, in which he stated that he was acting as solicitor for the defendant and had the conduct of the action for him, and that the omission to file a rejoinder had happened "by inadvertence."

Leave was granted by the court upon the terms of the defendant paying the costs of the application. These costs were paid by Messrs. Massey

and Carey, and were charged against Mr. Wood in their bill of costs.

Subsequently Wood, on a motion *ex parte* to the Palatine Court, obtained the common order for delivery and taxation as between solicitor and client of Massey and Carey's bill of costs in relation to the action. On taxation of the bill, the registrar, acting as taxing master, disallowed the costs of the application for leave to deliver the rejoinder, on the ground that they had been caused by the negligence of the solicitors.

Messrs. Massey and Carey appealed to the Vice-Chancellor, but he affirmed the decision; and they now appealed to the Court of Appeal.

*Clare* for the appellant.—The bill ought to have been taxed as between solicitor and town agent, and not as between solicitor and client. The registrar, acting as taxing master, had no jurisdiction to consider the question of negligence, and to disallow the items on that ground. The client's remedy was an action against the solicitor for negligence:

*The Papa de Rossie*, 3 P. Div. 160;

*Whiteman v. Hawkins*, 39 L. T. Rep. N. S. 629;

4 C. P. Div. 13;

*Matchett v. Parkes*, 9 M. & W. 767;

*Morgan & Wurtsburg on Costs*, p. 394.

[*Fry*, L.J. referred to *Re Bolton*, 9 Beav. 272.] But if the registrar had such jurisdiction he ought not to have exercised it here. If there was a slip in not putting in a rejoinder, Wood is responsible for it. He had taken the whole conduct of the action into his own hands. The reply was sent to Wood, and the appellants were not responsible for the delay in putting in the rejoinder.

*Rotch*, for the respondent, referred to *Dixon v. Williamson* (4 De G. & J. 508), but was stopped by the Court.

*Corrux*, L.J.—This is an appeal by Messrs. Massey and Carey from a decision of the Vice-Chancellor of the County Palatine of Lancaster, refusing to entertain an objection to the taxation of the appellants' bill of costs. The taxation must be treated as a taxation between a solicitor and his client. The taxation was claimed by Wood, who alleged that Messrs. Massey and Carey were his solicitors, and asked for taxation on that ground. It was an *ex parte* order, which did not indeed bind the solicitors; but they did not apply to discharge it, as they might have done, if the allegations made in the petition were not true. But the case does not stop there, for in the affidavit sworn by Mr. Carey in his application for further time, he stated that he was acting for Wood as his solicitor in the action. Therefore, in my opinion, it must be taken as a taxation between solicitor and client. Now, we must consider what the items are which the registrar has disallowed. It appears that a reply had been delivered by the plaintiff in the action, and Messrs. Massey and Carey sent it to Wood. He said nothing, and they did nothing; but after the time had expired for putting in a rejoinder, counsel advised that a rejoinder ought to be put in, and thereupon a summons for further time to deliver the rejoinder was taken out by the appellants, and the costs of those proceedings have been disallowed by the registrar. In my opinion he was quite right in disallowing them. The proceedings were necessary only for the purpose of extending the time

for putting in the rejoinder after the proper time had been allowed to expire. Therefore, they were not proceedings necessary for the due conduct of the action, but necessary only to remedy a slip which the appellants had themselves made. It was said that the taxing master had no jurisdiction to disallow charges on the ground of negligence, but that an action for negligence ought to be brought by the client against the solicitor. In my opinion, the question here is not the same as that which would arise in an action for negligence. The question here is, whether the client should be charged with costs which are referable only to amending a slip made by the solicitor. We have made inquiries of the taxing masters, both of the Chancery and common law divisions, as to what has been their practice in such matters. Undoubtedly the taxing masters in the Chancery Division are more liberal in entertaining objections on the ground of negligence, perhaps because the order for taxation in the Chancery Division directs payment on taxation, while the order in the Common Law Division is only a stay of proceedings on payment. Probably, at common law, if the objection was that the whole action had failed by reason of the negligence of the solicitor, that would be considered a question proper to be decided, not by the master, but in an action by the client for negligence. Whether that would be so also in the Chancery Division, I do not know; but it is not necessary to consider that point now, for both at Common law and in Chancery the taxing master will entertain the objection that a certain step in the action would not have been necessary if the solicitor had done his duty in the ordinary way, and would hold that the costs of such a step were not properly chargeable to the client. No doubt, in the case of *Matchett v. Parkes*, Parke, B. said (9 M. & W. 767, 768): "The master had certainly no authority to entertain the question of negligence; that is a matter for the consideration of a jury." But any expression of a judge must be taken with reference to the facts of the case before him, and in that case it was not a question of particular steps in the action, but the whole action had been rendered useless to the client by the negligence of his solicitor. Therefore, it was a question which ought properly to be left to a jury in an action. In the present case, I am of opinion that the registrar had power to disallow, and was right in disallowing, the items in question. Then it was contended that Wood had relieved his solicitors from the duty of advising him as to delivery of a rejoinder. But this being a taxation as between solicitor and client, and not as between solicitor and agent, the onus is on the solicitors to show that their client had undertaken the duty of advising as to the conduct of the action. No evidence has been adduced in support of this contention, except the mere fact that the appellants had undertaken to do the work on agency charges. But there is nothing to prevent solicitors, while acting as solicitors for a client in an action, agreeing that they shall only make agency charges. Beyond this there is no evidence that Wood relieved his solicitors from the duty of advising him as to the conduct of the action. That contention, therefore, fails. It was also objected that we have no proof that the rejoinder was necessary; and if so, it is urged, how can it



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be said that the appellants made a mistake in not delivering one? But that is met by Mr. Carey's own affidavit, where he says that the rejoinder was omitted to be delivered "by inadvertence." Perhaps the appellants ought not to be conclusively bound by this expression, but it shows that the onus is on them to show that the rejoinder was not reasonably necessary, and they have not attempted to do this. On the whole, I am of opinion that the decision of the Vice-Chancellor was right, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. The taxing master, when taxing a bill of costs relating to proceedings in an action, is not bound to allow the costs of proceedings which are apparently unnecessary, and which could only be held to be proper if it were shown that they were caused by the act of the client, not by the act of the solicitor. For the purpose of this taxation the order treated Massey and Carey as being Wood's solicitors. They were his solicitors, though employed on agency terms. In a free country you may make any bargain you like. Here the only bargain was as to the scale of remuneration. Therefore, treating them as solicitors, with a special undertaking as to the scale of fees, the registrar finds that certain costs were inexcusable. He seems to me to have been right in disallowing these items. It is true that at common law the taxing master has not the power to decide the question of negligence in all cases. If the negligence goes to the loss of the whole action he cannot entertain the question, but if it relates only to certain proceedings in the action he can. Otherwise the unfortunate result would be that if there was a question as to the propriety of a particular step in the action, as to which no man is better able to decide than the taxing master, you place the client in the position that he would have to pay the charge and then bring an action to get it back from the solicitor. It seems to me that the taxing master has the power to decide, and that he ought to decide, such questions without prejudice to the right of the client to bring an action. In *Cliffe v. Prosser* (2 Dowl. 21) it was decided that the master may disallow costs occasioned by the negligence of a solicitor. In that case the action had been commenced by the solicitor in *assumpsit* instead of in covenant, whereby the proceedings became useless, and the court made an order absolute to strike out the items objected to without prejudice to the solicitor's right to bring an action for them. That shows that the master had jurisdiction to allow or disallow items on the ground that the costs were unnecessary. That is the real question here, whether these costs were unnecessary, and I think the master was right in deciding that they were. I agree, also, as to the other points.

FRY, L.J.—To my mind it is very clear that the taxing master has power to decide whether any particular items charged are proper, and to disallow them if they are improper. It is equally clear that no item can be proper which is due to the negligence or ignorance of the solicitor. Therefore, the only question is, are these items proper charges, or do they arise from the negligence of the solicitor? We must, therefore, consider who was responsible for the slip

which occurred? Carey, when the matter was fresh in his memory, stated in his affidavit that he was Wood's solicitor, and that it was through his inadvertence that the rejoinder was not delivered. But afterwards the appellants say that Wood was the person who assumed the duty of seeing if the rejoinder was necessary. They have failed to show that this was the case. In my opinion we are driven to the conclusion that the appellants were responsible for the slip, and that these items were properly struck out. It appears to me that our decision is in accordance with *Re Bolton* (9 Beav. 272). In that case the word "inquiry" had been substituted by mistake for "sale" in the decree. The defendant's solicitor ought to have had the error corrected, and he requested the plaintiff's solicitor to get this done, but he failed to do so by reason of ill health. The defendant was obliged to present a petition to remedy the mistake, and the court made the defendant's solicitor bear the costs of the petition.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Norris and Norris*, agents for *Massey and Co.*, Liverpool.

Solicitors for the respondent, *Pritchard, Englefield and Co.*, agents for *A. S. Mather*, Liverpool.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Aug. 9 and 12.

(Before KAY, J.)

PORTAL TO LAMB. (a)

*Will—Construction—After-acquired property—Specific or residuary gift—1 Vict. c. 26, s. 24.*

*Testator, by his will, gave to his son G. for life "my cottage and all my land at S., on the especial condition that no fir or other trees or shrubs thereon (except when actually decayed) be at any time cut down or removed, and that the outside boundary fences he kept in good preservation, and the plantations, heathens, and furze be all preserved in their present state;" and as to all other his freehold manor, messuages, lands, and real estate whatsoever and wheresoever, he gave the same to trustees upon certain trusts.*

*At the date of his will the testator was seised of a cottage and about twenty-two acres of land at S. He subsequently contracted to buy from his son G. a mansion-house and about ten acres of land, also at S., but at the date of his death the contract had not been completed. The question arose whether the mansion-house and ten acres of land were comprised in the specific, or the residuary, gift:*

*Held, that they were comprised in the specific gift.*

### ADJOURNED SUMMONS.

This was a summons under the Vendor and Purchaser Act 1874, for the purpose of obtaining a decision as to whether certain property passed by a specific gift in the will of the testator George Lamb, or by the residuary gift in the same will.

George Lamb, by his will, dated the 5th Nov. 1872, made the following disposition:



I give and devise unto my son George Henry Lamb for his life my cottage and all my land at Stour Wood, in the parish of Christchurch, in the county of Southampton, on the especial condition that no fir or other trees, or shrubs thereon (except when actually decayed) be at any time cut down or removed, and that the outside boundary fences be kept in good preservation, and the plantations, heathers, and furze be all preserved in their present state. And after the decease of the said George Henry Lamb I give and devise the said cottage and lands at Stour Wood, with their appurtenances, unto his son Douglas George Lamb, his heirs and assigns for ever. Provided, nevertheless, that in case the said Douglas George Lamb shall die under the age of twenty-one years, or shall die after that age without leaving any issue him surviving, then I give and devise the said cottage and land at Stour Wood with their appurtenances unto my son, J. W. Lamb and his heirs and assigns for ever.

And as to all other his freehold manor, messuages, lands, and real estate whatsoever and wheresoever, and also as to all the residue of his moneys and personal estate whatsoever, he gave the same to trustees upon certain trusts.

At the date of his will, and thenceforth until his death, the testator was seised of a cottage and about twenty-two acres of land situated at Stour Wood. Heather and shrubs were growing upon the land.

In July 1875 the testator entered into a contract to purchase from his son George Henry Lamb, a mansion-house and about ten acres of land at Stour Wood. This property adjoined the cottage and twenty-two acres of land.

The testator died on the 11th Aug. 1875, at which date the contract for the purchase of the mansion-house and ten acres had not been completed.

In Dec. 1875 George Henry Lamb conveyed this property to the trustees of the testator's will, and on the 7th July 1884 the trustees entered into an agreement to sell the same property to George Henry Lamb.

The question having arisen whether this property passed under the specific, or the residuary, gift in the will, the trustees took out this summons asking that it might be declared that the hereditaments comprised in the agreement of the 7th July 1884 did not pass by the specific devise contained in the will of the testator of his cottage and all his land at Stour Wood, in the parish of Christchurch, but formed part of his residuary real estate at the time of his death.

*Hamilton Humphreys* for the summons.—The words of the specific gift here are not appropriate to the mansion-house and ten acres after acquired. I submit that the intention here was only to devise the cottage and twenty-two acres, and that there is a sufficient contrary intention shown here to take the case out of the 24th section of the Wills Act:

*Cole v. Scott*, 1 Mac. & G. 518.

*Bramley* for the purchaser.—By reason of sect. 24 of the Wills Act the will must be construed as if the testator had at the time of making it the property which he subsequently acquired. If that had been so, the words of the specific gift would have been wide enough to include such property. There is no indication of any contrary intention within the meaning of sect. 24 of the Act. Even if the testator had qualified the gift by the use of the word "now," there would not, I submit, have been any such intention shown:

*Wagstaff v. Wagstaff*, L. Rep. 8 Eq. 229;

*Re Ord*; *Dickinson v. Dickinson*, 41 L. T. Rep. N. S. 13; 12 Ch. Div. 22;

*Re Midland Railway Company*; *The Otley and Ilkley Branch*, 12 L. T. Rep. N. S. 659; 34 Beav. 525.

*Hamilton Humphreys* replied.

*Cur. adv. vult.*

Aug. 12.—KAY, J. stated the facts, and continued:—The 24th section of the Wills Act provides that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section was intended to give effect to what has been called a generic disposition, so as to make it include all property of the kind described belonging to the testator at the time of his death. Obviously it is not necessary to the application of this section that it should be shown that the testator intended that the after-acquired property should pass. If he had no intention on the subject, the after-acquired property would pass by force of this provision. The statute requires that the will should show upon the face of it a contrary intention, that is, an intention that the after-acquired property should not pass. There are two classes of cases of which the books contain examples: one where the words are not, strictly speaking, generic, but really describe a particular property which the testator had at the date of his will, among which *Cole v. Scott* may be ranked, where Lord Cottenham read the will as meaning "all the freehold and leasehold estates of which the testator at the date of his will was seised or entitled," and that, as Lord Hatherley says in *Douglas v. Douglas* (Kay, 400), being a reference to something specific, would not be enlarged by this provision of the statute." On the other hand, such an expression as "all the lands of which I am seised in A." must be read as if written just before the testator's death (*Doe v. Walker*, 12 M. & W. 591). So the word "now"—any property I now possess—read in the same manner would pass all the property possessed by the testator at the time of his death: (*Wagstaff v. Wagstaff*; *Re Ord*; *Dickinson v. Dickinson*; *Everett v. Everett*, 38 L. T. Rep. N. S. 581; 7 Ch. Div. 428; *Goodlad v. Burnett*, 1 K. & J. 341; *Re Midland Railway Company*.) Reading, therefore, this will as though it had been written immediately before the testator's death, the words "in their present state" which occur in this devise must be taken to refer to that period, and do not indicate an intention that after-acquired property should not pass with sufficient clearness to amount to that contrary intention which the statute requires. The real difficulty, to my mind, is to determine whether in fact this gift of specific property contains general words which would pass lands subsequently acquired, or whether it is, as Lord Cottenham considered to be the case in *Cole v. Scott*, merely a description of certain specific property of which the testator was possessed at the date of his will. I agree with the argument that the mode of trying this question is to suppose the testator at the date of his will to have been possessed of the property which he in fact subsequently acquired, and then to consider if the words are sufficient to pass it. They certainly are not very apt words for that purpose. The testator desiring

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to devise this mansion-house would hardly describe it by the terms used. However, the word "land" is quite large enough to include it, and, as the words are "all my land at Stour Wood," I do not see that it could be held on any true principle of construction that this property would not pass. Probably the testator had no intention in the matter. Perhaps he did intend this property to go to his son. I cannot tell. However, he has not indicated that contrary intention required by the statute with sufficient clearness to enable me to say that this property did not pass. There must be a declaration that the property in question passed by the specific devise.

Solicitors for the trustees, *Johnson and Weatherall*, agents for *Lamb, Brooks, and Sherwood*, Basingstoke.

Solicitors for G. H. Lamb, *Longbourne and Stevens*, agents for *E. and B. Locke*, Melksham.

Tuesday, May 6.

(Before PEARSON, J.)

GOW v. FORSTER. (a)

*Tenant for life and remaindermen—Share in partnership business—Loss—Apportionment.*

*A testator gave all his property, which included a share in a partnership business, upon trust as to one moiety to pay the annual proceeds thereof to his daughter for life, and after her decease for her children. He directed his trustees to carry on the business until the expiration of the existing partnership term, and authorised them to employ any of the trust premises therein, but he made no provision as to the manner in which losses should be borne between tenant for life and remaindermen.*

*The partnership deed contained no provision as to the mode in which losses were to be borne, but it had been the custom of the firm during the testator's lifetime to divide all the profits of each year, and in any year in which there was a loss to write such loss off the capital according to the proportionate shares therein of the partners.*

*Held, that the testator's daughter was entitled to receive without deduction one moiety of that share in the profits of each year which the testator, if living, would have received, and the losses of an unprofitable year must be written off capital, according to the custom of the firm, there being no liability upon the testator's daughter, as tenant for life, to recoup out of subsequent profits any losses sustained by the settled share in the capital of the partnership.*

#### SPECIAL CASE.

James Forster, who died on the 30th March 1879, made his will dated the 22nd Aug. 1878, and thereby appointed executors and trustees for the special purposes mentioned, and devised and bequeathed to them all his real and personal estates upon trusts for payment of debts and funeral and testamentary expenses and certain pecuniary legacies, and subject thereto out of the income to pay an annuity to his wife for her life; and the testator directed that subject to the trusts aforesaid the trust premises should be held upon trust for his only son Alfred James Forster, and his only daughter Emma Jane, the wife of C. F. Forster, absolutely in equal shares, but as to the

share of his daughter he directed that it should be held by his trustees upon trust to pay the annual proceeds, including the net profits of any business, to her during her life for her separate use without power of anticipation, and that after her death the same share and interest should be held upon trust for her children or remoter issue, or for her testamentary appointees or next of kin as therein mentioned. The testator further directed that his share and interest at the time of his death in the business of lead manufacturers, in which he was a partner, should be deemed to have been bequeathed to his said trustees by the general devise and bequest aforesaid, and in case the therein terms of the then existing partnership should not have expired at his death, he directed his trustees to carry on the said business until the expiration of the said partnership term, and he expressly authorised them not only to use such capital as he should have in the business at the time of his death, but also such other part of the trust premises as they should think fit, it being his intention that they should have as full control over the whole of the trust premises, for the purpose of carrying on the said business, as he would himself have had if he had been living. The testator made no special provision by his will for the event of any loss being sustained in carrying on the business.

The testator was at the time of his death in partnership with John Wilson, Alexander Gow, and C. F. Forster in a business of lead manufacturers at Newcastle-on-Tyne, the testator's share in the capital amounting to one-half.

The existing term was, according to the terms of the deed of partnership, to expire on the 1st Jan. 1883.

The deed provided that an annual account should be taken, and that immediately after the closing of every such account the interest on capital should be set apart for payment in the first place, and subject thereto the net profits should be divided between the partners in the proportions to which they should for the time being be entitled to the partnership property.

The deed further provided that each partner might bequeath his share by will, but contained no express provision as to the mode in which any loss incurred in carrying on the business was to be borne.

It appeared that it was the practice of the firm in each year in which the business resulted in a profit, to divide the profit among the partners according to the provisions of the deed of partnership, and in each year in which there was a loss, to write off the apportioned share of the loss from each partner's share in the capital.

From the testator's death to the end of 1882 the partnership business was carried on by John Wilson and the trustees of the will, the latter being also partners in their individual capacity, namely Alexander Gow and C. F. Forster. The business so carried on earned a profit up to the end of the year 1880, and one-half of the share in the profit which belonged to the testator's estate was, after providing for the annuity to Mrs. James Forster, the testator's widow, paid to his daughter, Emma Jane Forster.

During the year 1881 the business was carried on at a loss, which was, in accordance with the custom of the firm as above stated, written off

(a) Reported by J. F. WAGGERT, Esq., Barrister-at-Law.

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the capital, one-half being written off from the testator's share.

During the year 1882 the business was carried on at a profit, and the question now submitted to the court was whether, as between Mrs. Emma Jane Forster and her infant children entitled in remainder upon her decease, Mrs. Emma Jane Forster was entitled, subject to the annuity to the testator's widow being satisfied, to receive one-half of the net profits belonging to the testator's share in the business earned in the year 1882 without deduction, or whether the same moiety was liable in the first place to recoup to the corpus of her settled share of his estate one half of the loss attributable to the testator's share sustained in the year 1881.

*William Druce*, for the plaintiff, Alexander Gow, stated the case.

Sir *Arthur Watson*, for Mrs. Emma Jane Forster and her husband C. F. Forster.—Mrs. E. J. Forster is entitled to half the profits earned by the testator's shares in the business in each year, and is under no liability to make good the loss of any previous year. The testator must be taken to have known the custom of his own firm, and regard must be had to that custom, which was to write off losses from capital in any year in which they occurred. *Howe v. Earl of Dartmouth* (7 Ves. 137) is inapplicable here. *Upton v. Brown* (26 Ch. Div. 588) was not this case; there the business was being carried on by a receiver under the court. Here it has been carried on by express direction of the testator, and as if he had been alive and a partner. [PEARSON, J. referred to *Brown v. Gellatly*, 17 L. T. Rep. N. S. 131; L. Rep. 2 Ch. 751; *Green v. Britten*, 1 De G. J. & S. 649.]

*Leveson* for the infant children of Mrs. Emma Jane Forster.—The loss incurred in 1881 should be made good out of the large profits earned in 1882. The tenant for life ought not to have all the benefit of the profits, and yet bear no part of the losses. It was not the testator's intention to benefit the tenant for life at the expense of the parties entitled in remainder. The latter ought not to suffer from the special mode of book-keeping practised by the partnership firm. *Upton v. Brown* (*ubi sup.*) is applicable. He referred also to

*Ex parte Harper*, 29 L. T. Rep. 168; 1 De G. & J. 180.

Sir *Arthur Watson* in reply.—The proper method of adjusting the rights of the tenant for life and the remaindermen is to follow the course which would have been adopted if the testator had been living; according to that, all the profits of each year should be paid over intact.

PEARSON, J.—I am far from saying that the question of the relative rights of a tenant for life and remaindermen in property of this nature is not a difficult matter. It has come before me on more than one occasion, and I have always felt it a matter of considerable difficulty to decide satisfactorily to my own mind what are the rights of the parties. In the present case there was, according to my reading of the will, no limit imposed by the testator upon the sum which the trustees might place in the business, except the amount of the testator's estate itself. It appears that, in accordance with the practice of the partnership firm, the tenant for life received nothing from the unprosperous year 1881, there being no

profits to pay over to her. She went without income so far as the business was concerned. The question now is, whether, her proportion of the loss for that year having been written off against her share of the capital, the trustees ought, out of her share of the profits for 1882, to retain in their hands (for I do not understand that they could pay it into the business) a sum equal to that which was written off the capital of the settled share of which she is tenant for life in respect of the losses of the year 1881. If I am to hold that they ought to do this, I must come to this conclusion, that the business being carried on in the same way in which it was carried on during the testator's lifetime, and the trustees going to the manager of the business and inquiring what are the profits which they are to receive and pay over to this lady as her share of the annual proceeds given to her by the will of the testator, and having received those profits, they must also inquire whether any losses were written off against the capital during the preceding year, and if they find that losses were written off, they must deduct from the profits payable to the lady in respect of her share in the current year, and retain in their hands so much as is necessary to make good her proportion of the loss which was written off in the preceding year. I cannot bring myself to the conclusion that that was the intention of the testator, and of course I must be guided by the directions which I find in his will. As I understand the will, he intended that the business should be carried on in the same way in which it was carried on during his lifetime, with such modifications only as the change of circumstances would render necessary, and which, in the discretion of the trustees acting under the powers given to them by his will, they might agree to. Subject to that, I conclude from the terms of the will that the testator's intention was that the business should proceed as it had proceeded, and that the daughter should be entitled to one moiety of those profits which he himself would have received if he had lived and had continued to be a partner in the business. If that had been so, he would have received in respect of the year 1882 the whole amount of the profit which the trustees have now in their hands, and, under the circumstances, I must hold that the daughter is entitled to receive a moiety of the profits which her father himself would have drawn if he had been living.

Solicitors for all parties, *Shum, Crossman, and Co.*, for *Stanton and Atkinson*, Newcastle-on-Tyne.

## QUEEN'S BENCH DIVISION.

Monday, Nov. 19, 1883.

(Before DAY and SMITH, JJ.)

BOOTH v. SMITH. (a)

*Rentcharge on land—Assignment of portion of land charged—Rentcharge in arrear—Recovery of arrears by action against assignee—Rentcharge created by deed or will.*

*Where a portion of lands that are charged with the payment of a rentcharge is assigned to a purchaser, an action at law for the recovery of the arrears of the rentcharge is maintainable against the*

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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*assignee of such portion, whether the charge was created by deed or by will.*

THE statement of claim delivered by the plaintiff alleged :

(1.) That Frederick Griffiths, late of Epping, in the county of Essex, died on the 25th day of March 1875, having by his will, dated the 28th day of September 1874 (and proved on the 31st day of July 1875), devised and bequeathed to his son William Griffiths his house, shop, and premises in Epping aforesaid (in which the testator carried on the business of a printer and stationer), with the garden, stabling, and appurtenances thereto belonging, for his own use and benefit, but subject to and chargeable with an annuity or yearly sum of 20*l.* to his daughter, the plaintiff, for and during her life, for her sole and separate use.

(2.) That in or about the year 1876 the said William Griffiths sold part of his hereditaments so as aforesaid devised to him by the said will to the defendant, who entered into possession thereof, and has ever since remained in possession or receipt of the rents and profits thereof. The last-mentioned hereditaments were duly assured by the said William Griffiths to the defendant, and the estate of the said William Griffiths in such hereditaments thereby became vested in the defendant.

(3.) That while the estate of the said William Griffiths in the last-mentioned hereditaments was vested in the defendant, viz., on the 25th day of March 1879, the 25th day of March 1880, the 25th day of March 1881, the 25th day of March 1882, and the 25th day of March 1883, the said annuity became and was due and payable to the plaintiff; the same was not so paid, and the sum of 100*l.* remains due and owing to the plaintiff in respect of such annuity.

The plaintiff's claim is : (1) Payment of 100*l.* by the defendant; (2) Costs; (3) Further or other relief.

Demurrer.

The defendant demurs to the statement of claim herein and says that the same is bad in law on the ground that it discloses no contract or duty under or by virtue of which the defendant has become or is personally liable to pay the arrears of the alleged annuity to the plaintiff; and contains no averment that the defendant has actually received any moneys from the said hereditaments applicable to the payment of any such arrears; and on the ground that a purchaser or grantee from a devise of real estate charged with an annuity is not personally liable in an action to the legatee of the annuity for or in respect of arrears of such annuity; and that no action is maintainable against such purchaser or grantee for the recovery of the same from him personally; and on other grounds sufficient in law to sustain this demurrer.

Witt (with him Metcalfe), for the defendant, in support of the demurrer.—The question is whether, where there is a devise of land which is subject to a rentcharge, an action at law can be maintained by the person entitled to the rentcharge against the assignee of a portion of the land so charged and devised? Whether in fact there can be a personal remedy? [DAY, J.—Is there any precedent for this form of action?] As far as I am aware this is the first time such an action has been attempted. [He was here stopped.]

J. Cutler, for the plaintiff, *contra*, in support of the statement of claim, was called on and submitted that this was not the first instance of such an action being brought. The old doctrine that where part of the land charged was released the whole charge was released was altered as long ago as the 22 & 23 Vict. c. 25, by sect. 10 of that Act, and obtains no longer. The point here is covered by authority. In *Thomas v. Sylvester and others* (29 L. T. Rep. N. S. 290; 42 L. J. 237, Q. B.; L. Rep. 8 Q. B. 368) it was held that, since the 3 & 4 Will. 4, c. 27, s. 36, abolishing real actions, an action of debt will lie for the recovery of a rentcharge in fee.

No doubt, in the case of *Whittaker v. Forbes* (33 L. T. Rep. N. S. 258; L. Rep. 10 C. P. 583; affirmed on appeal, 33 L. T. Rep. N. S. 582; 1 C. P. Div. 51), the decision in such an action was against the plaintiff on the ground that the land was situate in Australia, but in both courts the judgment in the previous case of *Thomas v. Sylvester* (*ubi sup.*) was upheld. The defendant, as assignee of the land subject to a rentcharge, is liable, and it makes no difference that the charge was created by will and not by deed.

Witt in reply.—The point I rely on is that there is a difference between a grant by will and by deed. Where the grant is by deed, then by reason of the privity between the grantor and the grantee of the land there is an implied covenant or contract which attaches to the subsequent assignee of the land to pay the rentcharge. That distinction was clearly in the mind of Quain, J. in the case of *Thomas v. Sylvester* (*ubi sup.*). No such covenant can be implied in the present case. In his judgment in the case of *Whittaker v. Forbes*, on appeal (*ubi sup.*), Lord Cairns says with regard to this subject: "The liability arises by reason of what is called privity of estate," that is, in respect of the party's possession of the estate. The proposition on the other side is too wide. There is no possible privity of contract between the testator and the assignee. There is good reason for such a contract being implied in the case of a grant by deed, because the assignee of the grantee steps into the same position. In *Whittaker v. Forbes* (*ubi sup.*) it was assumed that if the land had been in England the action would have lain; the point was not argued. In two cases in the Chancery Courts, *Saltery v. Leaver* (21 L. T. Rep. N. S. 453; L. Rep. 9 Eq. 22; 39 L. J. 72, Ch.) and *Kelsey v. Kelsey* (30 L. T. Rep. N. S. 82; L. Rep. 17 Eq. 495), in which an application for a receiver was refused, neither the counsel nor the learned judge alluded for an instant to there being a remedy by an action at law.

DAY, J.—I am of opinion in this case that the defendant's demurrer must be overruled, and judgment be given for the plaintiff. The case of *Thomas v. Sylvester* (*ubi sup.*) appears to me to conclude the question raised in the present case; nor am I able to perceive any difference or distinction between a case where the rentcharge has been created by deed and one in which it has been created by will.

SMITH, J.—I am of the same opinion.

Solicitors for the plaintiffs, *Tippetts and Son*, agents for *Crompton Chambers*, Hastings.

Solicitors for the defendant, *Tamplin, Tayler*, and *Joseph*.

Monday, Nov. 26, 1883.

(Before Lord COLERIDGE, C.J., HAWKINS and MATHEW, JJ.)

FREEMAN (app.) v. NEWMAN (resp.). (a)

Parliament—Election law—Claim for a county vote—Notice of objection to—Incorrect date in notice to overseers—Publication by overseers of list of objections—Waiver of defect in notice by—Registration Act 1843 (6 Vict. c. 18), s. 7.

A notice of objection to a claim for a county vote

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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FREEMAN (app.) v. NEWMAN (resp.).

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was delivered, on the 18th Aug. 1883, to the claimant and also to the overseers, under sect. 7 of the Registration Act 1843 (6 Vict. c. 18), the notice to the claimant being correct in all particulars, but the notice to the overseers being, by oversight, dated 18th Aug. 1880. The overseers duly published the claimant's name in the list of persons objected to, and it was found as a fact by the revising barrister that he had not been inconvenienced or misled by the incorrect date.

Held, by Lord Coleridge, C.J., Hawkins and Mathew, J.J. (affirming the revising barrister's decision), that the omission of the correct date in the notice to the overseers was a defect which rendered the notice invalid, and which the overseers had no right or power to waive.

CASE:—

At the Revising Barrister's Court for the revision of the list of voters for the Southern Division of the West Riding of the county of York, the appellant objected on behalf of William Fitton to the claim of Charles James Ellis to have his name inserted in the list of voters for the township of Alverthorpe-with-Thornes in the said division.

On the 18th Aug. 1883 the said William Fitton gave notice of his objection to the overseers of the poor of the said township in the form No. 6 in the schedule to 6 Vict. c. 18, as follows:

I hereby give you notice that I object to the name of the person mentioned and described below being retained in the list of voters for the southern division of the west riding of the county of York. (The notice then set out the name and abode and qualification of Charles James Ellis in the ordinary form, and concluded as follows:)

Dated this eighteenth day of August, one thousand eight hundred and eighty .

(Signed) Wm. FITTON,  
of Charles-street, Mold Green, Huddersfield.

The above-mentioned notice was filled up on a printed form which had the date of the year 1880 printed upon it, and that date had not been altered. Another and a correctly dated notice of objection was given by the said Wm. Fitton to Ellis the claimant, and the overseers duly published a list of objections, including therein the name of the claimant.

It was objected by the claimant at the barrister's court that the notice to the overseers was insufficient and void in law, inasmuch as the year of our Lord was incorrectly stated in the date at its foot.

It was found as a fact, by the revising barrister, that the claimant had not been inconvenienced or misled by the alleged defect in the said notice of objection given to the overseers, and that he was entitled to take advantage of its insufficiency, notwithstanding the publication of the list of objections by the overseers.

The names of seventy other claimants were objected to under similar circumstances, and they appeared in a schedule to the case.

It was contended on behalf of the said W. Fitton, the objector, that the notice to the overseers was sufficient and valid in law, inasmuch as the date thereon appearing did not show that the notice was not given to the overseers before the 20th Aug. 1883; that the notice given by the objector to the claimant himself was correctly dated; and further that the defect, if it were one, in the notice to the overseers, related to and con-

cerned the overseers only, and had been waived by their publishing the list of objections, including the name of the claimant.

The revising barrister held that the notice of objection to the overseers was insufficient and defective.

If the court should be of opinion that his decision was wrong, the names of the claimant Ellis and the seventy other persons in the schedule were to be expunged from the list of voters, it being admitted that if the notices were valid their names must be expunged.

C. Stuart Wortley, for the appellant objectors, contended that the notice of objection was good, and the decision of the revising barrister was wrong. The question is, whether the imperfect statement of the date in a notice of objection to overseers—which, in all other respects, is perfectly good and valid—is a defect which renders the notice invalid. Here the day and the month are right, but the date of the year is wrong in this respect, that, a blank having been left in the printed form for the date of the year, it was, by an oversight, omitted to be filled in before the notice was served on the overseers. Here, however, as was found by the revising barrister, no one was misled. In *Jones v. Jones* (13 L. T. Rep. N. S. 633; L. Rep. 1 C. P. 140) a notice wrongly dated, though bearing a date within the period prescribed for giving notice, was held by the Court of Common Pleas to be sufficient, Byles, J. holding it to come within sect. 101 of the Registration Act 1843 (6 Vict. c. 18), which enacted "That no misnomer or inaccurate description of any person, place, or thing named or described in any . . . notice required by this Act shall in any wise prevent or abridge the operation of this Act with respect to such person, place, or thing; provided that such person, &c., shall be so denominated in such . . . notice as to be commonly understood"—thus treating the case as one of "misnomer." That case is in point here. Now, no doubt, the respondent will rely on the case of *Beenlen v. Hockin* (16 L. J. 49, C. P.; 4 C. B. 19; 1 Lutw. 526), but that case is distinguishable from the present one. In the first place, it was decided on a different section, the 17th of the Act. Here, too, the notice served on the claimant voter was valid in all respects, but in *Beenlen v. Hockin* both notices were objected to, and it is submitted that, whilst an omission of the date in the notice to the voter may well be held fatal, a like omission in the notice to the overseers need not be so; and it is competent to overseers to waive the defect, as they have done in this case, by publishing the name of the claimant voter in the list of persons objected to. That the overseers have power to waive an irregularity of this kind is shown by the cases of *Davies v. Hopkins* (30 L. T. Rep. O. S. 152; 3 C. B. N. S. 376) and *Leonard v. Alloways* (40 L. T. Rep. N. S. 197). He also referred to the case of

*Re Sale*, 43 L. T. Rep. N. S. 615; 50 L. J. 113, C. P. 1 Colt. Reg. Cas. 153.

Mattinson, for the respondents, *contra*.—The decision of the revising barrister was right. The notice of objection was invalid, and being a matter arising in a county and not in a borough, there was no power of amendment. As to *Beenlen v. Hockin*, no doubt, as has been urged for the appellant, both notices in that case were

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defective in the omission of the correct date; but the decision of the court was based on the fact that the forms prescribed by the statute had not been complied with in either notice; and the case is a direct authority in favour of the barrister's decision here. [HAWKINS, J.—Is not the sole object of the notice to the overseers to enable them to publish a list of the persons objected to?] The notices are required by sect. 7 of the Registration Act 1843 (6 Vict. c. 18), and by sect. 40, proof of both notices is made a condition precedent to the objected voter being called on to make good his right to the vote; and it seems clear, from the language of that Act, that the overseers have no power to waive any defect in the notices; and the person objected to is entitled to insist upon proof being given of a valid notice in each case. *Davies v. Hopkins* and *Leonard v. Alloways* (*ubi sup.*), cited for the appellant, do not apply. They relate to notices of claim, and not to notices of objection, and there is this distinction between the two—that with regard to notices of claim, the Legislature does not require proof of them in cases where the overseers have, by inserting the voter's name in their lists, accepted the notice; whereas, with respect to notices of objection, proof of the notice is expressly required. The overseers having placed a claimant's name upon the county list, the barrister has no power, under the statute, to insist upon proof of the notice of claim. *Beenlen v. Hockin* (*ubi sup.*) is recognised by Erle, C.J. in *Jones v. Jones* (*ubi sup.*) as an authority for holding that the date of the year is essential to the notice. In *Beenlen v. Hockin*, there being no such date, the notice was held bad; whilst in *Jones v. Jones*, there being such a date, the notice was held good.

C. Stuart Wortley in reply.

LORD COLERIDGE, C.J.—It is impossible for me to help regretting the decision which I am about to pronounce, because it is a decision on a point which is highly technical and quite beside the merits, if indeed there be any merits in this case. Nevertheless the case is one to which, as it seems to me, the Legislature has not seen fit to extend the beneficial powers of amendment. No doubt there is the high authority of Byles, J. in the case of *Jones v. Jones* (*ubi sup.*) for holding that the misdating a notice is a "misnomer, or inaccurate description," within the meaning and words of sect. 101 of the Registration Act 1843 (6 Vict. c. 18); but, with the highest respect for the opinion of that learned judge, I am bound to say that I am unable to agree with him on this point; for it seems to me that he altogether omitted to take into consideration the words of the latter part of the section, namely, "provided that such person, place, or thing shall be so denominated in such . . . notice as to be commonly understood." I have the less hesitation in thus expressing my opinion in this matter because the other three learned judges (Erle, C.J., and Willes and Keating, JJ.) who took part in the decision of that case carefully based their judgments, not on the ground of there being any "misnomer" but, on other grounds which in my opinion were perfectly correct, namely, that all the requirements of the statute had been substantially complied with in that case. But, setting authority aside for the moment, what we have to determine in the pre-

sent case is, whether a notice of objection given to overseers under sect. 7 which is on the face of it admittedly imperfect, and might possibly be misleading, is or is not a valid notice. Now, Parliament has in mandatory terms enacted that two notices of objection shall be given, one to the person objected to and the other to the overseers, and has specified with great particularity what each of these notices is to contain. The person who is objected to is therefore entitled, before his right to be on the list of voters can be questioned at the barrister's court, to see, and to have it clearly shown by competent proof, that the objector has duly complied with all the conditions imposed by the statute. In the present case the objector has in one notice complied with these conditions, but in the other, namely, the notice to the overseers, he has not complied with one of the statutory conditions, namely, the date, the notice being misdated. Now it was decided as long ago as in the case of *Beenlen v. Hockin* (*ubi sup.*) that such an omission or error is fatal to the validity of the notice; all the judges (Wilde, C.J., Colman, Maule, and Williams, JJ.) in that case agreeing in the opinion that, although the notices were proved to have been delivered in due time, the revising barristers were wrong in holding them to be valid, and proceeding to hear the case. So far as I am aware, the judgments in that case, which were pronounced by judges of the highest authority, have never been attempted to be reversed or in any way qualified, and their decision is binding upon us. I do not concur in the view which was urged upon us by the learned counsel for the respondent that overseers have power to waive the delivery to themselves of a notice valid and perfect in all respects. If the voter who is objected to appears, and fails to take the objection that he himself has not received a proper notice of objection, that no doubt is quite another matter, and one entirely for the voter's own consideration; but overseers have no right or power, as against the voter, to waive the defect or the objection to the invalidity of the notice. As I said at first, I confess that it is with regret I feel compelled to yield to such a technical objection, because the revising barrister has found as a fact that the claimant was not inconvenienced or misled. Upon the words of the statute, however, as well as upon the authority of *Beenlen v. Hockin* (*ubi sup.*), I am of opinion that the decision of the revising barrister was correct, and must be affirmed, and that this appeal must be dismissed, but without costs.

HAWKINS and MATHEW, JJ. concurred.

*Judgment for the respondent. Appeal dismissed, and barrister's decision affirmed, without costs.*

Solicitors for the appellant, *Van Sandau, Cumming, and Armitage*, agents for *Brook, Freeman, and Batley*, Huddersfield.

Solicitors for the respondent, *Singleton and Tattershall*, agents for *Newman and Sons*, Barnsley.

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LOWCOCK (app.) v. THE OVERSEERS OF BROUGHTON (resps.).

[Q.B. Div.]

Monday, Nov. 26, 1883.

(Before Lord COLERIDGE, C.J., HAWKINS and  
MATHEW, JJ.)LOWCOCK (app.) v. THE OVERSEERS OF BROUGHTON  
(resps.). (a)*Parliament—Vote for a county—Freehold rent-charge—Grant of, by A. to B., C., and D. to the use of A., B., C., and D.—Effect and operation of—"Actual possession"—Statute of Uses (27 Hen. 8, c. 10)—Reform Act 1832 (2 & 3 Will. 4, c. 45).**By deed of the 11th Jan. 1883, A., the owner in fee of rentcharges issuing out of freehold lands, granted them to his three sons, B., C., and D., their heirs and assigns, to the use of the said A., B., C., and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common. B., C., and D. claimed to be inserted in the list of voters for the county in respect of their one-fourth shares respectively, although no portion of the said rentcharges had been paid to or received by either of them before the last day of July 1883; and their claims having been disallowed by the revising barrister on the ground that, as there was no third party intervening between them and the grantor, they took their one-fourth shares by force of the common law and the Statute of Uses did not apply, it was, on appeal therefrom:**Held, by Lord Coleridge, C.J. and Hawkins and Mathew, JJ. (reversing the barrister's decision), that the grant operated under the Statute of Uses, and that as A., not being a grantee to uses, took under the statute, B., C., and D. took in the same way, and by force of the statute were in the "actual possession" of their shares from the date of the deed so as to be entitled under the authority of Heelis v. Blaine (infra) to be registered as county voters under sect. 26 of the Reform Act 1832 (2 & 3 Will. 4, c. 45).*

At the court held for the revision of the list of voters for the township of Broughton before me John Hargrave Hodgson, Esq., barrister-at-law, duly appointed to revise the lists of voters for the south-eastern division of the county of Lancaster, Jas. Hunt objected to the name of Arthur Lowcock being retained on the list of voters for the south-eastern division of the county of Lancaster, in respect of property situate within the township of Broughton.

The facts of the case were as follows:—

The above-named Arthur Lowcock claimed to be inserted in the list of voters for the said township, and in his said claim he entered the particulars of his place of abode and qualification in the usual columns; the claim being in respect of one equal fourth part of freehold rentcharges, issuing out of freehold property specified in the claim, and situate in the township of Broughton aforesaid.

The said rentcharges (three in number) were created by one John Lowcock, two for 11l. 6s. and 7l. 7s. in 1865, and one for 22l. in 1875. The conveyance of 1875 creating the rentcharges conveyed the land to the purchaser and his heirs to the use that the said John Lowcock and his heirs and assigns should for ever thereafter out of the said plot of land thereby assigned, and the buildings for the time being erected thereon, receive and take a clear yearly rent of

22l. by equal half-yearly payments on every 25th March and 29th Sept., and to further uses limiting to the said John Lowcock, his heirs and assigns, powers of distress and of entry and of perception of rents and profits for securing the yearly rents, and as to the land subject and charged as therein-before mentioned to the use of the purchaser, his heirs and assigns for ever.

By indenture duly executed by all parties upon and dated the 11th Jan. 1883, and made between the said John Lowcock of the first part, Richard Lowcock, the said Arthur Lowcock (the appellant), and Frederick William Lowcock (sons of the said John Lowcock) of the second part, and the said John Lowcock, Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock of the third part, the said John Lowcock, in consideration of the natural love and affection which he had for his said sons, &c., conveyed unto the said Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock, and their heirs, all those the said three several yearly rents of 11l. 6s., 7l. 7s., and 22l., to hold the same unto the said Richard Lowcock, Arthur Lowcock, and Frederick William Lowcock, and their heirs, to the use of the said John Lowcock, Richard Lowcock, Arthur Lowcock, and Frederick Lowcock, their heirs and assigns for ever, in equal one-fourth shares as tenants in common.

The half-year's rents which became due on the 25th March 1883, being the first which became due after the execution of the said indenture of the 11th Jan. 1883, were paid in the month of April to the said John Lowcock, but no portion of the same has been paid to either Arthur Lowcock, Frederick Lowcock, or Richard Lowcock.

It was objected that the claimant had never been in actual possession or in receipt of his share of the said rentcharges.

The claimant contended that the Statute of Uses (27 Hen. 8, c. 10) operated to give to him the actual possession of the rentcharges on the execution of the said deed on the 11th Jan. 1883.

I was of opinion that the said deed operated as a reservation by the said grantor of one-fourth of the said rentcharges for himself, and as a gift of the remaining three-fourths to his three sons in equal one-fourth shares as tenants in common, and that, as there was no third party intervening between them and the grantor, the said claimant took the said one-fourth share by force of the common law, and the Statute of Uses did not apply, and I therefore disallowed the said claim.

The claims of the two persons hereinafter mentioned to be inserted in the list of voters were also disallowed by me upon the same point of law. All the above-named claimants having appealed from my decision, I declare that the same should be consolidated, and I appoint the said Arthur Lowcock to be the appellant and the overseers of the township of Broughton to be the respondents in such consolidated appeal.

(Signed) J. H. HODGSON.

Ambrose, Q.C. for the appellant.—The decision of the revising barrister holding that the deed operated as a reservation of one-fourth of the rentcharge to the grantor, and a grant of the remaining three-fourths to his three sons, the grantees, and that, as there was no intervening third party as a releasee to uses, those three grantees



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took at common law, and not under the Statute of Uses, was wrong. The real and sole question is, was there "actual seisin and possession" of the rentcharge for the necessary statutory period of six months so as to establish the appellant's right to be registered as a voter under sect. 26 of the old Reform Act of 1832 (2 & 3 Will. 4, c. 45)? The revising barrister seems to have acted on the authority of *Webster v. The Overseers of Ashton-under-Lyne*; *Orme's case* (27 L. T. Rep. N. S. 650; L. Rep. 8 C. P. 281), in which the grant of a rentcharge to A., B., and C. and their heirs, to hold to them and their heirs to the use of the said A., B., and C. and their heirs, was held not to be a use under the Act, but that the grantees were in at common law, and that until rent had been received by them there was no "actual possession" within sect. 26 of the Act of 1832. But in that case the grantees or releasees to uses and the *cestui que use* were all one and the same persons. In the present case, on the contrary, the grant is to three persons to the use of four persons, viz., to the grantor and the three grantees, and is not therefore to the same persons. Where the persons are the same there is nothing for the statute to operate upon; but it is different where they are not the same. In *Heelis v. Blaine* (11 L. T. Rep. N. S. 480; 34 L. J. 88, C. P.) it was held that the *cestui que use* under a conveyance to uses of a rentcharge is, by force of the statute, in the "actual possession" thereof, within the meaning of the Act of 1832, immediately on the execution of the conveyance, and before any rent has been received by him. The Statute of Uses expressly says that in every case where there is a conveyance to one person to the use of another person, there the *cestui que use* shall be deemed and adjudged to be in lawful seisin, estate, and possession, and sect. 26 of the Act of 1832 (2 & 3 Will. 4, c. 45) enacts that no person shall be registered as a freeholder in any year in respect of his estate unless he shall have been in the actual possession thereof for six calendar months. Now, here the three sons are seised to the use, and are also *cestui que use* together with their father. Without question the father takes by the statute, and, inasmuch as all the four *cestui que use* must take in the same way and by the same title, the three sons must also take under the statute and not at common law. [Lord COLERIDGE, C.J.—Why, on principle, may not a conveyance operate in two ways, as to a part of the subject-matter at common law, and as to another part under the statute?] There is not, as far as I am aware, any authority for such a construction. Some of the parties to the deed cannot take by the statute, and others of them by the common law. This operation of the Statute of Uses is clearly explained and illustrated by the late Mr. Williams in his *Principles of the Law of Real Property* (at p. 198, 14th edit.); and also by Burton in his *Compendium of the Law of Real Property* (8th edit. p. 45, par. 150). *Heelis v. Blaine* (*ubi sup.*) has never been overruled; but, on the contrary, was expressly approved of by the Court of Common Pleas in the case of *Webster v. The Overseers of Ashton-under-Lyne*; *Orme's case* (*ubi sup.*), and also in that of *Webster v. The Overseers of Ashton-under-Lyne*; *Hadfield's case* (28 L. T. Rep. N. S. 901; 8 C. P. Div. 306).

But neither of these three cases, I submit, touch the precise point involved here. They settle only the doctrine of "actual possession and receipt" of the rent, &c. The holding of the revising barrister as to the operation of this deed is not tenable, and should be reversed.

No counsel appeared on the part of the respondents.

Lord COLERIDGE, C.J.—After very carefully considering the able arguments which Mr. Ambrose has addressed to us on behalf of the appellant, I have come to the conclusion that his contention is correct, and that the decision of the revising barrister in this case is wrong and must be reversed. The question arises under a deed by which the grantor, John Lowcock, granted and conveyed to his three sons, the appellants, three yearly rentcharges, to hold the same to the use of himself and his said three sons in equal one-fourth shares as tenants in common; and the question is, whether that grant operated as at common law or under the Statute of Uses. Now, there is no doubt that, had not the grantor himself been made one of the *cestui que use*, the statute would have had no operation at all here, and the grant would have operated at common law. The statute has reference to the case of a person or persons being seised to the use of any other person or persons, and it is implied that the *cestui que use* should be a different person from the grantee or releasee to uses. For this we have the high authority of Lord Bacon, who, in his tract "A Reading on the Statute of Uses," says, at p. 352: "The whole scope of the statute was to remit the common law and never to intermeddle where the common law executed an estate; therefore, the statute ought to be expounded that, where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect except by the statute." If, then, the grant in the present case had been to the three sons to the use of the three sons alone, the Statute of Uses would have had no application, and in such a case, at common law, in order to obtain the franchise, it would have been necessary that there should have been an entering into the receipt of the rents and profits, and an "actual possession" of them for the specified statutory six months. Again, the case of *Heelis v. Blaine* (*ubi sup.*) establishes the proposition that a conveyance which operates under the Statute of Uses gives at once to the *cestui que use* the necessary "actual possession" that is required by sect. 26 of the Reform Act of 1832 (2 & 3 Will. 4, c. 45). That case has never been overruled, and indeed the court in subsequent cases not only declined to reconsider it, but practically approved and followed it (*Orme's case* and *Hadfield's case, ubi sup.*), and it is binding on us. In saying that I do not mean to say that, if we had good reason to think that it had been wrongly decided, we should be unable to overrule or reverse it, or, at any rate, to so far disregard it as to decide another case in opposition to it. Here, however, there is nothing so exceptional or extraordinary as to call upon us so to do, or making it clear beyond doubt that that decision was wrong. What, then, is the true legal effect of the conveyance in the present case? I confess that during the argument it occurred to

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me as possible that the deed might be read as having two distinct operations; that is say, that, so far as regards the three sons, the grantees, it might operate as at common law, and that as regards the father, the grantor, it might be taken to operate under the Statute of Uses. It seems, however, on closer consideration of the matter, that there is, as Mr. Ambrose pointed out to us, very strong authority against the correctness of such a view of the operation of the deed. In the first place, there is the authority of the late Mr. Williams, who deals with the question in his treatise on the Principles of the Law of Real Property. He says: "A conveyance might also have been made by lease and release, as well as by a feoffment, to one person and his heirs to the use of some other person and his heirs; and in this case, as in a similar feoffment, the latter person took at once the whole fee simple, the former being made by the Statute of Uses merely a conduit-pipe for conveying the estate to him. This extraordinary result of the Statute of Uses is continually relied on in modern conveyancing; and it may now be accomplished by a deed of grant in the same manner as it might have been before effected by a lease and release. It has been found particularly advantageous as a means for avoiding a rule of law, that a man cannot make any conveyance to himself; thus, if it were wished to make a conveyance of lands from A., a person solely seised, to A. and B. jointly, this operation could not, before the Statute of Uses, have been effected by less than two conveyances; for a conveyance from A. directly to A. and B. would have passed the whole estate solely to B. It would therefore have been requisite for A. to make a conveyance to a third person, and for such person then to reconvey to A. and B. jointly. . . . If the estate were freehold previously to the 1st July 1882, A. must have conveyed to B. and his heirs to the use of A. and B. and their heirs, and a joint estate in fee simple would have immediately vested in them both." (Williams' Principles of the Law of Real Property, 13th edit. pp. 187.) In addition to that there is the still higher authority of Burton to which we were also referred by Mr. Ambrose. That learned author states the law on this point as follows: "If A. be enfeoffed to the use of himself and B., here by a literal construction of the statute B. would take his share of the estate by Act of Parliament, leaving A. to take his immediately by the feoffment; but then they would, contrary to the intention, be tenants in common instead of joint tenants, because identity of title is essential to joint tenancy; and therefore it has been decided that they are both in by the statute." (Burton's Compendium of the Law of Real Property, 8th edit. p. 45.) As, therefore, the father, the grantor in the present case, not being one of the grantees to uses, would, as one of the four *cestuis que use*, take his one-fourth share of the tenancy in common created by the deed under the Statute of Uses, it seems to be established by authority beyond the reach of doubt that, as all the four *cestuis que use* must take in the same way, therefore the three other *cestuis que use*, the three sons, take their one-fourth shares under the statute also. Taking that, therefore, to be, upon the before-mentioned authorities, the true and correct construction of the statute, the case of

*Heelis v. Blaine* (*ubi sup.*) is clearly in point, and the revising barrister was, I think, wrong in disallowing the votes, and his decision must consequently be reversed. I must say, however, that I am not at all surprised at his deciding the case as he did, and his decision will be reversed without costs.

HAWKINS, J.—I am of the same opinion.

MATHEW, J.—I also am of the same opinion. When we come to look at the conveyance here it is clear that the persons entitled, the *cestuis que use* under the deed, are "other persons" within the meaning of the words of the Statute of Uses. The statute has operated, and the appellant, as well as his two brothers, the other two *cestuis que use*, are entitled to their votes.

*Judgment for the appellant, reversing the barrister's decision, but without costs.*

Solicitors for the appellant, Johnson and Wetherall, agents for Wigglesworth and Rogerson, Manchester.

## Judicial Committee of the Privy Council.

March 7, 8, 11, 12, and April 7.

(Present: The Right Hons. Lord BLACKBURN, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE).

HETTIHEWAGE APPU AND OTHERS v. THE QUEEN'S ADVOCATE (Consolidated Appeals).

THE QUEEN'S ADVOCATE v. HETTIHEWAGE APPU AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

*Law of Ceylon—Roman-Dutch law—Right of subject to sue the Crown—Claim in reconvention—Set-off—Petition of right.*

*The petition of right does not exist in Ceylon, but by Ordinances of 1856 and 1868 an established practice of instituting suits against the Queen's Advocate in respect of claims against the Crown arising ex contractu is recognised and regulated.*

*Held (affirming the judgment of the court below), that such practice must be held to be incorporated into the law of the colony, whether the claim be made by an original action or "in reconvention" (by a counter-claim).*

*Palmer v. Hutchinson* (6 App. Cas. 619; 45 L. T. Rep. N. S. 180) distinguished.

*Held, further, that though execution cannot issue against the Crown, a claim recovered against it may be set off against a claim recovered by it, and judgment may be given for the difference only.*

*Semble, that by the Roman-Dutch law of Holland, as it existed at the date of the conquest of Ceylon, a subject could not sue the Crown.*

THESE were consolidated appeals from two decrees of the Supreme Court of Ceylon, which had varied the decree of the district judge; and also a cross-appeal by the Crown against a claim "in reconvention," i.e. a counter-claim.

The circumstances under which the actions were brought appear sufficiently from the judgments of their Lordships.

Marten, Q.C. and E. W. Stock appeared for the appellants in the consolidated appeals, and the respondents in the cross appeal.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The *Attorney-General* (Sir H. James, Q.C.), *Bomer*, Q.C., and *Jeune* appeared for the Queen's Advocate.

\*The arguments on the only points material for the purposes of this report appear from the judgment.

*April 7.*—Their LORDSHIPS gave judgment as follows:—The facts which give rise to these suits took place in the year 1878. Appu and Francisco Fernando, the two principal defendants, purchased of the Crown agents two arrack rents, each of which gave them a monopoly of selling the native liquors, arrack rum and toddy, for the year ending on the 30th June 1879, within a certain district called a rent division. The purchase money was to be paid in twelve instalments, and was secured by mortgage bonds given by the defendants to the Queen. The third defendant, Juan Fernando, is a surety for the others. In the earlier action numbered 83,316 the Queen's Advocate on behalf the Crown sued for Rs. 29,783. 34 cents, and in the later action numbered 83,320 for Rs. 30,216. 66 cents, being respectively the balances due on account of the two rents. The defendants do not deny that the balances sued for are unpaid and would be due if there were nothing to set off against them. But they allege that the Crown has broken its engagements to them in connection with the arrack rents, and that they have thereby suffered damage which they are entitled to have ascertained in these actions and to enforce against the Crown in reconvention. In action 83,316 the district judge found that the defendants had suffered damage to the extent of Rs. 4500, and therefore that the Crown could recover only the amount of rent *minus* the damage, viz. Rs. 25,283. 34 cents. In action 83,320 he found that the defendants had suffered damage to the extent of Rs. 70,000, which exceeded the claim of the Crown by Rs. 39,783. 66 cents. He then set the results of the two actions against one another, and made a single decree condemning the Crown to pay the defendants the sum of Rs. 14,500. 32 cents. The Crown appealed to the Supreme Court in both actions, and that court made separate decrees. In action 83,316 they held that the defendants had not made out any case in reconvention, and they decreed to the Crown the whole sum claimed for it. In action 83,320 they held that the defendants had proved damages to the extent of Rs. 37,031. 25 cents, which exceeded the claim of the Crown by Rs. 6814. 91 cents, and for that sum they gave the defendants a decree. The defendants have now appealed to Her Majesty in Council from both decrees of the Supreme Court, seeking in effect to restore the decision of the district judge. And the Crown has appealed in action 83,320, seeking to have the claims in reconvention entirely disallowed. [After going through the facts of the case and the evidence their Lordships continued as follows:] On these grounds their Lordships concur with both the courts below in thinking that there has been a breach of contract. It remains to consider the legal objections urged by the Crown against the defendants' right to recover damages. The argument on behalf of the Crown may be thus condensed. A claim in reconvention is in substance nothing else than a cross-action brought by the defendant against the plaintiff; to sustain such a claim the defendants must show that they can maintain a suit against the Crown;

no such right existed under the Roman-Dutch law, which is the law of Kandy; even if it did it would have been abrogated by the conquest of the country, being one of those rights which must of necessity be varied by a change of sovereign power; there has been no subsequent establishment of the right; a practice of suing the Crown has arisen, but it is irregular and cannot be upheld unless warranted by law, and no law can be found which confers the right. Even if there were the right of suit, it is argued that it would not warrant such a decree as the court has made, for though the court says that a judgment against the Crown does not carry execution with it, it has in fact given execution to the extent of the debt due to the Crown by setting off the two claims and so wiping out the debt. These arguments were enforced at the bar with great learning and ability. The maritime provinces of Ceylon were part of the dominions of the United Provinces, and were acquired by conquest by the British Government in 1799. The law in force before the time of the conquest must have been the Roman-Dutch law of Holland, probably with some modifications. On the conquest the King of England might have abrogated the old law and have introduced the English law. He did not do so, but continued the old law with modifications, reserving to the King and to the East India Company power to make other alterations. The interior of the island, then the kingdom of Kandy, was not conquered till 1818, after which the law of the maritime parts was extended to the interior. One of the laws of Ceylon, which differed from the English law, was that of reconvention, and it is not disputed that, as between subject and subject, that law of reconvention is in force. The question now is whether the same law is in force between the Queen's Advocate suing for the Crown and a subject. It may be assumed in favour of the Crown that for the purpose of trying whether the counter-claim can be made at all there is no distinction between a claim in reconvention and an original action. And if it cannot be shown that the right to bring such an action existed under the Roman-Dutch law, a legal foundation for it, if found at all, must be found in transactions subsequent to the conquest of the country. The defendants contend that there was a power given by the Roman-Dutch law to sue the officer of the Government on behalf of the Government, and that this power has been preserved, the style of the officer alone being changed into the Queen's Advocate. They do not allege that when judgment is given for the subject against the Queen's Advocate execution can be issued against his person or private property, nor even against the property or revenue of the Government; but they say that, though the judgment cannot be thus enforced, the subject has a right to have it ascertained by a court of justice that he has a debt which the Government ought to pay, and to have the benefit of the strong moral pressure that there would be on the Government to provide for payment of the debt thus ascertained. Such a suitor would thus be much in the position of a subject in England who on a petition of right has obtained a judgment in his favour, but can only obtain the fruits of his judgment by the grace of the Crown and the assistance of Parliament. In support of the plaintiff's argument, it was contended that it was not possible to suppose that

any Government, or at least any monarchical Government, would submit to the indignity of being sued even through its officers. That, however, is not an impossible supposition. In *The King's Advocate v. Lord Duncraig* (15 Court of Sess. Cas., 1st Series, 314) Lord Medwyn enters into a very learned discussion as to the early history of the mode of procedure in Scotland. He states at p. 325 that in very early times the King of Scotland sued in person in civil suits, but that afterwards he sued by his officers of state, and at p. 333, when discussing how the King was to be sued, Lord Medwyn says: "His officers are cited instead of the Sovereign, and to defend his interest, on the ground that it was thought improper to call the King personally into court. The rule, however, was not extended to the Regent. Thus the Queen Regent is defender in a reduction of a forfeiture in 1558, John Duke of Albany in 1525, and James Earl of Arran in 1543, along with the Treasurer and Advocate, or (and P) the donators, the persons having interest." There certainly seems no more antecedent reason why the Counts of Holland should be exempted from suit through their officers than existed for the exemption of the King of Scotland. And though it is very likely that whilst great potentates, like the Dukes of Burgundy and the Kings of Spain, were Counts of Holland, it would not be very safe to sue them, yet when the United Provinces became independent, suitors might find themselves more favourably placed. But whatever speculations may be made upon these points, their Lordships cannot advise Her Majesty that such was the Roman-Dutch law, unless it is shown to them that it was so. And neither the researches of counsel nor their own have enabled their Lordships to attain any certainty on the subject. That a very extensive practice of suing the Crown has sprung up is certain. In his judgment in the case of *Fernando*, which was decided immediately before the present case came under review, Cayley, C.J. says: "The practice has been recognised in many hundreds of decisions, and long acquiesced in by the Crown, and, so far as I am aware, has not till now been called in question." It was recognised by the judgment of the court in *Fraser's case*, decided in the year 1868. In Mr. Justice Thompson's Institutes of the Laws of Ceylon, after referring to the English petition of right, he says that, the Ceylon Government having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. He then points out that, except in land cases, this action gives little more than is given by the petition of right, for no execution can issue against the Crown or against the Queen's Advocate. It is true that in *Palmer v. Hutchinson* (45 L. T. Rep. N. S. 180; 6 App. Cas. 619) it is stated that no practice of the court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted. But in *Natal*, where that case arose, the jurisdiction of the court was founded on an Ordinance dated the 10th July 1857, and extended only over all Her Majesty's subjects and all other persons whomsoever residing "and being within the colony." And this case possesses a feature which is not found in *Palmer v. Hutchinson*, viz., that the practice of suing the Crown has been recognised by the Legislature.

The 117th section of Ordinance No. 11 of 1868 runs as follows: "All suits instituted in the name of the Queen's Advocate on behalf of the Crown, for the recovery of any debt, damages, or demand, or to obtain possession of any property, provided the amount or value in dispute exceeds ten pounds, may be instituted and prosecuted, at the discretion of the Queen's Advocate, in the district court held at the principal town of the province in which the defendant resides, or in which the cause of action shall have arisen wholly or as to any part, or in which such property is situated; and all suits instituted by any private party against the Queen's Advocate wherein the amount or value in dispute exceeds ten pounds shall, unless the Queen's Advocate consents to forego such right, be instituted and prosecuted in the district court held at the principal town of the province in which the act, matter, or thing in respect of which any such suit shall be brought shall have been done or performed, or in which the property in dispute is situated; and the said district court shall have cognisance of and power to hear and determine such suits as if the cause of action had arisen within the district." It appears to their Lordships that the latter part of that section would be deprived of its meaning unless it is held that, in the view of the Legislature, suits might be instituted by private persons against the Queen's Advocate for the recovery (amongst other things) of debts and damages. It is said that to give that meaning to the Ordinance would prove too much, for it would include actions for damages *ex delicto*, which, as everybody admits, cannot be brought against the Crown. But it does not follow that, because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right, or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can therefore receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed it is difficult to assign them any substantial operation at all, unless they embrace actions *ex contractu*. It is then certain that prior to 1868 there was such an established practice of suing the Crown that the Legislature took it for granted and regulated it. The same state of things must have existed prior to 1856, for the Ordinance of 1868 is only a re-enactment of an earlier Ordinance of 1856. Earlier Ordinances still have been referred to, but their Lordships do not discuss them, because, though they speak of suits in which the Crown is defendant, and though it is the opinion of the Supreme Court and is probable that they refer to claims *ex contractu*, it is not clear that they do so. It would certainly be inconvenient that there should be no means of obtaining the decision of a court of justice in Ceylon on claims made by the subject against the Crown. Yet there are none if actions of this kind do not lie, for the petition of right does not exist in the colony. In the present case the consequences would be somewhat startling. The Crown would be able to sue the subject on one portion of a contract, while itself violating with impunity another portion of the same contract; and the subject must pay for the breach which he has committed, while recovering nothing for the

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breach by which he has suffered. Whatever may be the exact origin of the practice of suing the Crown, it was doubtless established to avoid such glaring injustice as would result from the entire inability of the subject to establish his claims. And finding that the Legislature recognised and made provision for such suits at least twenty-eight years ago, their Lordships hold that they are now incorporated into the law of the land. It remains to consider whether the decree does right in setting off the defendants' claim against that of the Crown, or whether separate judgments should be given for each amount, leaving the sum awarded to the defendants to be recovered only as a matter of grace on the part of the Crown. It is true that the course taken by the courts below does practically give an effective execution against the Crown to the extent of the Crown's claim against the defendants. But though the Crown is thereby prevented from recovering its debt, it is not exposed to the indignity attendant upon process of execution. Some analogy to this question may be found in the cases which decide that a foreign Sovereign may be sued in the Court of Chancery by way of defence or cross-claim, though he cannot be sued unless he himself has first invoked the jurisdiction of the court. In the case of *The Duke of Brunswick v. The King of Hanover* (6 Bea. 1) the principle of this doctrine was very fully discussed by Lord Langdale, M.R. In the course of his judgment he says: "The liability of a foreign Sovereign to be sued in a case where he himself was suing here, was considered to be founded upon the principle that by suing here he had submitted himself to the jurisdiction of the court in which he sued. The decision is in accordance with the rules of the civil law. The *reconventio* is a species of defence, and *Quid non cogitur in aliquo loco iudicium pati, si ipse ibi agat, cogitur excipere actiones et ad eundem iudicem mitti.*" A further analogy may be found in the practice of the Court of Admiralty affecting cases of collision where both parties are to blame. There, though the damage suffered by each is ascertained by a separate process, no monition is issued except for the moiety of the balance awarded to the one who has suffered the greater damage. And that rule is followed though the amount actually payable by one of the parties is materially affected by it, as it would be when the other is insolvent. This principle is illustrated by the case of *The Stoomvaart Maatschappij Nederland v. The Peninsular and Oriental Steam Navigation Company* (7 App. Cas. 795; 47 L. T. Rep. N. S. 198). In this case the suit is brought by the Queen's Advocate on a contract made between the Crown and a subject. The parties have contracted on a footing of equality. It would lead to injustice if, when brought into court by the Crown, the subject should not be able to resist payment of anything but that which, on the balance of the debt or damage recoverable under the contract by each party, is found due to the Crown. The Crown suffers no more indignity or disadvantage by this species of defence than it would suffer by defences of a more direct kind, which yet would be clearly admissible: as for instance, if a breach of contract sued on by the Crown were excused on the ground that the wrongful action of the Crown itself had led up to that breach. For these reasons, their Lordships consider that the judgment of the Supreme Court on this point must be upheld. The result is, that

each of the three appeals ought to be dismissed with costs, and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the appellants in the consolidated appeals and the respondents in the cross-appeal, *Baker and Nairne*.

Solicitors for the respondent in the consolidated appeals and the appellant in the cross-appeal, *Sutton and Ommanney*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Friday, Aug. 8.

(Before BAGGALLAY and COTTON, L.JJ.)

Re THE NORWICH EQUITABLE FIRE ASSURANCE COMPANY. (a)

*Company — Winding-up — Official liquidator — Private examination of witness — Right of creditors to attend — Companies Act 1862 (25 & 26 Vict. c. 89), s. 115—General Order of the 11th Nov. 1862, rule 60.*

*The creditors of a company in the course of being wound-up, who have obtained an order giving them liberty to attend the proceedings in the matter at their own expense, will nevertheless not be permitted to attend a private examination of the late manager of the company upon a summons taken out by the official liquidator under the 115th section of the Companies Act 1862.*

*The decision of Bacon, V.C. affirmed.*

In this case a motion was on the 20th June 1884 made by the official liquidator of the Norwich Equitable Fire Assurance Company for a declaration that the Royal Insurance Company were not entitled to attend an examination of a witness under the 115th section of the Companies Act 1862. The Norwich Company were in the course of being wound-up, under an order of the 14th June 1883, and the Royal Insurance Company claimed to be creditors to a large amount in respect of certain agreements called "treaties," entered into by Mr. James Stark Skipper, the late manager of the Norwich Company, and themselves.

On the 17th Dec. 1883, upon the application of the Royal Insurance Company, the chief clerk gave them "liberty to attend the proceedings in this matter at their own expense."

On the 16th May 1884, the official liquidator of the Norwich Company being desirous of obtaining information as to the various "treaty" agreements between the two companies, took out a summons that James Stark Skipper should attend the judge in chambers on the 11th and 12th June 1884, to be examined for the purpose of the proceedings directed by the judge to be taken before the chief clerk.

The summons of the chief clerk for the attendance of the witness for examination was served upon all the parties who had obtained leave to attend, including the Royal Insurance Company. On the 11th June they accordingly attended, and their presence was objected to. It was arranged

(a) Reported by G. MACAN and FRANK EVANS, Esqrs., Barristers-at-Law.

that they should withdraw on the understanding that, if it should be ultimately decided that they might attend, a copy of the shorthand notes of the examination should be furnished to them.

On the 17th June 1884 the official liquidator gave notice of motion as above, before Bacon, V.C., and asked that the order of the 17th Dec. 1883 might be varied or discharged.

*Marten, Q.C. and Seward Brice* for the official liquidator.—Creditors whose debts are disputed cannot be permitted to attend an examination of a private character such as this; and rule 60 of the General Orders of November 1862 only refers to proceedings before the judge himself:

*Re Grey's Brewery Company*, 50 L. T. Rep. N. S. 14; 25 Ch. Div. 400.

*Hemhold* for the witness.

*Hemming, Q.C. and Cababé* for the Royal Insurance Company.—We are entitled to be present at the examination, as we claim to be creditors for about 14,000*l.* We had special leave to attend, by virtue of the order of the 17th Dec. 1883, and do not therefore need to have recourse to the general right of a creditor to attend, which is given by rule 60 of the General Orders of Nov. 1882. In *Re Grey's Brewery Company* (*ubi sup.*) there was no special order giving the creditors liberty to attend, and if there had been, the decision would have been different. We rely upon *Re The Empire Assurance Corporation Limited* (17 L. T. Rep. N. S. 488). As in that case, so here, we have a special order to attend. We claim, therefore, as a matter of right, and also in the exercise of the discretion of the court, to be present at this examination. No one can be damaged by our presence, and we may be prejudiced by not knowing what takes place at the examination.

Bacon, V.C.—This is purely a question of principle. The clause in the Companies Act, which has been referred to, and which gives the court power, in a winding-up, to summon persons before it for examination, is a re-enactment in almost the very same words of the old clause contained in the Bankruptcy Act of 1841, giving a similar power. And between bankruptcies and insolvent companies, in questions of this nature, the difference is such as can hardly be perceived. In the case of a bankrupt, the law enables the assignee or trustee in bankruptcy to call for evidence wherever he can find it, for proving what he requires to prove. It gives him almost inquisitorial powers of finding out anything in support of the case which he advances. How does that differ from the case which is before me? The official liquidator has to establish some claim which can only be done by means of witnesses. He knows a man who can give him the information which will enable him to discharge his duty; and he therefore summons that man under the powers conferred upon him by statute, and examines him. Who has a right to be present? What right has anybody else to be present at that examination? I might as well hold that the official liquidator's case for the opinion of counsel should be ordered to be produced for the benefit of opposing creditors. It is a mistake to suppose that the 115th section of the Companies Act 1862 gives anybody a right to be present at the examination ordered under it except the liquidator himself. Mr. Cababé is reduced to argue

that his client will be in a worse position if not allowed to be present, because he will know nothing about what has taken place at the examination, and that if the evidence adduced is unfavourable the liquidator will suppress it, and if favourable he will embody it in an affidavit, and make use of it as evidence against the Royal Insurance Company. What follows if he does? The Royal Insurance Company will have the opportunity of cross-examining upon the affidavit, if they can find the materials for so doing. But that is not the question here; it is one of principle only. The hands of the official liquidator are not to be tied. He is not to discuss on behalf of the various parties what he can prove, or what he fails to prove. The cases which have been referred to are perfectly distinct and clear. In the case before Stuart, V.C. (*Re The Empire Assurance Corporation, ubi sup.*), disputes having arisen between two assurance companies, whose affairs had become much mixed up together, and who were both being wound-up, the liquidator of the one obtained special leave to attend the proceedings in the winding-up of the other, and certain creditors and contributories also obtained special leave to attend the proceedings. The Vice-Chancellor held that the parties who had special leave had a right to be present. Chitty, J., in the case which came before him (*Re Grey's Brewery Company, ubi sup.*), put it on a somewhat different ground, but that does not affect the case before me. Upon the principle contained in the 115th section, and upon every principle upon which the law is administered, the Royal Insurance Company have no more right to be present at this examination by the official liquidator of the Norwich Company, than they have to be present at any consultation which the liquidator may hold with his counsel or solicitors, or anybody else, and which is held with the view of establishing the case which it was his duty to urge before the court. In my opinion the Royal Insurance Company have no more right to be present at that private examination than any stranger has, for not one word that has been uttered at that examination could ever be adduced as evidence against the Royal Insurance Company, nor could they be in any worse position than if the examination had never in fact taken place. The Royal Insurance Company must pay the costs of this motion, but no other costs, inasmuch as they were invited to attend the examination.

The Royal Insurance Company appealed.

*Hemming, Q.C. and Cababé*.—The former order of Bacon, V.C., giving us liberty to attend at our own expense, is in general terms and cannot be reviewed by the Vice-Chancellor. [COTTON, L.J.—The court must have power to limit your attendance.] If it has a discretion, that ought to be exercised as Stuart, V.C. exercised it, by giving us leave to attend:

*Re The Empire Assurance Corporation*, 17 L. T. Rep. N. S. 488.

[BAGGALLAY, L.J.—If what Stuart, V.C. said is to be taken as a general rule, I do not agree with it; but there were very special circumstances in that case.] Our exclusion from the examination will give the other company an unfair advantage. *Re Grey's Brewery Company* (50 L. T. Rep. N. S. 14; 25 Ch. Div. 400) is not an authority



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against us. [COTTON, L.J.—That case does not seem to help either side. The applicants there were admitted creditors, but here the point in liquidation is whether the appellants are or are not creditors.]

*Marten, Q.C. and Seward Brice*, for the liquidator of the Norwich Equitable Fire Assurance Company, were not called upon.

BAGGALLAY, L.J.—In the course of the liquidation of the Norwich Equitable Fire Assurance Company, the Royal Insurance Company claim to rank as creditors for upwards of 20,000*l.*, and on the 17th Dec. 1883 they obtained an order giving them liberty to attend the proceedings at their own expense. Afterwards, the liquidator was proceeding, under the powers of sect. 115 of the Companies Act 1862, to examine a former officer of the company. The Royal Insurance Company then contended that they had acquired a right, under their order of the 17th Dec., to attend this examination. Bacon, V.C. decided against them, and I think that he was right in so doing. I have often myself, when at the bar, had to complain of the extensive powers given by this sect. 115. Indeed the section has been very generally abused. It has been called harsh, unfair, and inquisitorial. But the Legislature thought fit to confer these powers on liquidators because the exigencies of public justice required it. The section has now been in operation for twenty-two years, and I have never heard it suggested that anyone could be present at an examination under it unless he had obtained special leave to attend. The liquidator is empowered to hold these examinations for the purpose of determining what course he will adopt. The information he obtains is not evidence; it can only be made evidence by calling the persons who have been examined in private to give their evidence in court. Such an examination is not a "proceeding" within the meaning of the order of the 17th Dec. 1883. It is rather in the nature of a preliminary investigation; and it is necessary, and always has been, to obtain a special order for leave to be present.

COTTON, L.J.—I am of the same opinion, that the Vice-Chancellor's order cannot be disturbed. I do not think it necessary to say whether this examination is a "proceeding" within the meaning of the formal order, but undoubtedly the court, when it gives a general liberty to attend, must have a discretion to suspend the working of the order. Sect. 115 gives liquidators very large means of obtaining information or discovery in a way that is not open to ordinary litigants. But a statement which the liquidator obtains from the persons examined cannot be used as evidence. Mr. Hemming says that such statements are used in evidence, but if there is any such practice it is clearly wrong. No doubt these statements are often read by consent; but they are distinctly not evidence, and counsel can always object to their being read. The Act of Parliament, by providing this power, does certainly put into the hands of a liquidator an advantage which is not open to the rest of the world, but I think the Vice-Chancellor was right in not allowing the appellants to be present.

*Appeal dismissed.*

Solicitors: *Bocall and Bocall; Ocles and Col-linson.*

Feb. 8 and 9.

(Before Lord SELBORNE, L.C., COTTON and FRY, L.J.J.)

STRICKLAND v. SYMONS. (a)

*Trustee carrying on business — Creditor — Right against trust funds.*

*By the marriage settlement of Dr. and Mrs. S. a leasehold house, used as a lunatic asylum, was assigned to trustees on trust to sell the same and the goodwill, at the request of Dr. and Mrs. S., or, if Dr. S. should fail to perform certain covenants, at the request of Mrs. S. alone. Until sale Dr. S. had power to carry on the asylum for his own benefit.*

*In July 1875 Dr. S. went into liquidation, having also failed to perform the covenants. The trustees entered, and until April 1876 carried on the asylum, when he sold the premises and business as a going concern, with the goodwill.*

*The plaintiff had supplied goods for the use of the asylum between July 1875 and April 1876, and having in an action in the Common Law Division recovered judgment against the trustee for the value of the goods, brought an action in the Chancery Division to have his judgment debt raised out of the proceeds of the sale of the premises.*

*Held, that though the trustee might have a right to indemnity out of the trust property as between himself and the cestui que trust, yet there being no power to carry on the business and no dedication of any of the trust property for that purpose, the plaintiff's claim could not be maintained.*

*Decision of Pollock, B. (48 L. T. Rep. N. S. 188; 22 Ch. Div. 666) affirmed.*

By the marriage settlement of Dr. and Mrs. Sabben, a lunatic asylum was assigned to trustees on trust at the request of Dr. and Mrs. Sabben, or in certain events at the request of Mrs. Sabben alone, to sell the same and the goodwill thereof, and to stand possessed of the proceeds for the benefit of Mrs. Sabben and the children of the marriage. It was also declared that until the trust premises should be sold it should be lawful for Dr. Sabben to continue the business of the asylum upon the premises without paying any rent other than the rent payable under the leases thereof, but paying to the trustees a sum of 10,000*l.* by certain instalments, and the premium on certain policies of insurance, which he had covenanted to do.

Dr. Sabben carried on the business of the asylum until July 1875, when he filed a liquidation petition, and a trustee was appointed.

The defendant, Dr. H. E. Symons, the surviving trustee of the settlement, entered into the management of the asylum, and continued to manage it until April 1876 when it was sold for 18,000*l.* The plaintiff alleged that Dr. Symons had so managed the asylum in order that it might be sold as a going concern under the trusts of the settlement.

The plaintiff, J. R. Strickland, was an upholsterer at Gravesend, and while the business of the asylum was being carried on by Dr. Symons had supplied the asylum with furniture and other things. A sum of 500*l.* was due to him for these, and he recovered judgment in the Common Pleas Division against Dr. Symons for

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.



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that sum, together with interest and costs. As he was not paid this sum by Dr. Symons the plaintiff commenced this action against Dr. Symons and Dr. and Mrs. Sabben and their children, claiming to be paid the amount of the judgment debt out of the trust funds.

The case was heard by Pollock, B. in Feb. 1883, and is reported in 48 L. T. Rep. N. S. 188, where the facts are fully stated.

His Lordship gave judgment for the defendants, and the plaintiff appealed from that decision.

*Higgins, Q.C.* and *Dauney* for the appellant.—The settlement having directed the asylum to be sold, together with the goodwill, it was the duty of the trustee to carry on the business in order to preserve that goodwill. He carried on the business for the benefit of the trust estate, and if he had advanced this money he would have been entitled to an indemnity out of the trust funds. Even if he had not been a trustee he would have been entitled to be recouped the money, as it is similar to a case of salvage. In either case the plaintiff is entitled to stand in his place, and to be paid out of the trust funds. They referred to:

*Attorney-General v. Corporation of Norwich*, 2 My. & Cr. 406;

*Bright v. North*, 2 Ph. 216;

*Re Leslie*, 48 L. T. Rep. N. S. 564; 23 Ch. Div. 552;

*Owen v. Delamere*, 27 L. T. Rep. N. S. 647; L. Rep. 15 Eq. 134;

*Ex parte Garland*, 10 Ves. 110;

*Ex parte Edmonds*, 4 De G. F. & J. 488;

*Re Johnson*, 43 L. T. Rep. N. S. 372; 23 Ch. Div. 548;

*Fraser v. Murdoch*, 45 L. T. Rep. N. S. 417; 6 App. Cas. 855.

[Lord SELBORNE, L.C. referred to *Labouchere v. Tupper*, 11 Moo. P. C. 198.]

*Barber, Q.C.* and *Kirby*, for Mrs. Sabben, and *S. T. Moore* for the other defendants, were not called on.

LORD SELBORNE, L.C.—This action has been rightly described in the course of the argument as an action to enforce the plaintiff's lien, but you cannot enforce a lien without showing that it exists. There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property. There is not the least authority for such an action as the present. It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no evidence of any contract for any security on any part of the estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee. The mere fact that the customer was carrying on an asylum which was subject to a trust would not give the tradesman the right to be paid out of the trust fund. The trustees of the settlement with respect to the asylum were to sell it, with certain consents, and to deal with the proceeds of the sale as therein mentioned, and there was a power that until the premises should be sold it should be lawful for Dr. Sabben to carry on the business of an asylum upon the premises for his own benefit, he making certain payments. This he did until July 1875, when he got into difficulties, and became a liquidating debtor, and then Dr. Symons continued to carry on the asylum, and

for the purposes of this business he contracted this debt. Nothing can be more plain than that on the face of the settlement there is no dedication or application of the trust property to any trade purposes, and no provision that the business was to be carried on by the trustees. It was argued that, as it was intended that the asylum should be sold and the goodwill with it, it was intended that the goodwill should be preserved, and therefore it was necessary and proper that the trustee should continue to carry on the asylum after Dr. Sabben gave it up, for the purpose of preserving the goodwill. That might have been a very sound argument if used between the trustee and *cestuis que trust* for the purpose of justifying him and showing that he was entitled to an indemnity. But that is not the question here. On this settlement it is clear that it was intended that the asylum should be carried on by Dr. Sabben and not by the trustees; and that if he did not carry it on, it should be sold with the goodwill. It is therefore impossible to compare the case with *Ex parte Garland* (10 Ves. 110) and *Re Johnson* (43 L. T. Rep. N. S. 372; 15 Ch. Div. 548), and the other cases where there has been an express direction by the testator to carry on a business, and where he specially appropriated a part of his property for that purpose. Those authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. But the authorities tend to limit that doctrine rather than to extend it. The case of *Ex parte Garland* (*ubi sup.*) shows that the creditor can only have recourse to the particular part of the property of which there has been such an express dedication; and the right cannot be extended beyond that, either in bankruptcy or administration. And that applies even to cases in which the trustee has merely done his duty in carrying on the business, and where he may be entitled to an indemnity for the expenses incurred by him. *Re German Mining Company* (4 De G. M. & G. 19) and *Labouchere v. Tupper* (11 Moo. P. C. 198) are cases in which the distinction is laid down between the rights of trustees carrying on the business to be indemnified for expenses *bonâ fide* incurred where there are no particular assets appropriated, and the rights of creditors. Under such circumstances the creditors have no rights against the trust estate. The doctrine contended for by the appellant is not only not supported by *Ex parte Garland* (*ubi sup.*), but is opposed to it. The appeal must be dismissed with costs.

COTTON, L.J.—I agree, for the reasons stated by the Lord Chancellor.

FRY, L.J.—I also agree, for the same reasons.

Solicitors for the appellant, *Harries, Wilkinson, and Raikes*, agents for *Sharland and Hutton*, Gravesend.

Solicitors for the respondents, *E. Smith and Co.*; *W. J. Smith*; *W. R. Hulme*.

[Ct. of App.]

HARVEY v. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY.

[Ct. of App.]

Feb. 26 and 28.

(Before COTTON, BOWEN and FRY, L.JJ.)

HARVEY v. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY. (a)

*Building society—Loan—Interest on premiums—Redemption—Mortgage—Statutory receipt—Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 42.**A building society, in accordance with its rules, on making an advance to a borrowing member, charged a premium on the sum advanced in proportion to the amount and the intended duration of the loan. The advance was to be paid off by monthly instalments.**Held, that the society might properly add the whole of the annual premiums to the amount actually advanced and charge interest on the total amount; and in the event of the loan being paid off before the date to which the premium was calculated, the borrower was not entitled to a rebate in respect of the premiums paid for the longer period.**Where a building society gives a statutory receipt under sect. 42 of the Building Societies Act 1874 for money due on a mortgage by a borrowing member, no claim can afterwards be maintained by the society for any further payment, even on the ground that a further sum was due on the mortgagor's shares, or that the money paid was calculated on a wrong principle.**Sparrow v. Farmer (28 L. J. 537, Ch.) distinguished.*

THE plaintiff in this action claimed to have an account taken of what was due from him to the defendant society in respect of certain mortgages, and repayment of 270*l.* already paid by the plaintiff under protest upon redeeming the mortgages.

The defendant society was a building society, registered under the Building Societies Act of 1874 (37 & 38 Vict. c. 42), and was incorporated in Nov. 1874. The prospectus contained, under the heading "To borrowing members," the following statements:

A borrower receiving an advance will be charged a fixed premium of 2*s.* per share per annum, and interest calculated at the rate of 5*l.* per cent. per annum only upon the equity of redemption at the end of each financial year.

Advances are granted for any period not exceeding twenty-five years upon freehold, leasehold, and copyhold property, and tables of repayment ranging from five to twenty-five years, showing the monthly repayments required to repay 100*l.*, including principal, interest, and premium, are annexed to this prospectus.

Borrowers can redeem at any time. Under the Act of Parliament which governs this society borrowers incur no liability beyond the performance of their special contract.

Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital with interest to the date of redemption.

In the years 1878, 1879, and 1881, the plaintiff became a borrowing member of the society, and borrowed different sums, amounting altogether to 4880*l.*, and as security for the repayment thereof he executed mortgages to the society of certain property at Milton Villas, Addiscombe, and elsewhere.

In Aug. 1881 the plaintiff desired to redeem all the mortgages, and requested the society to furnish him with an account of the money due

thereon, and on the 20th Aug. the secretary sent him a statement showing that the sum of 4443*l.* 8*s.* 4*d.* was then due.

The plaintiff alleged that he then discovered that the accounts had been made out on a wrong principle, and were inconsistent with the terms stated in the prospectus, namely, that mortgages by borrowing members might be at any time redeemed by payment of the balance of the amount of capital with interest to the date of the redemption.

Some correspondence ensued, but the society refused to alter their claim, and the plaintiff paid it under protest. The mortgage deeds were then given up to the plaintiff with the following receipt indorsed on each, which is the form provided by the Building Societies Act 1874.

The Municipal Permanent Investment Building Society hereby acknowledge to have received all moneys intended to be secured by the within written deed. In witness whereof the seal of the society is hereto affixed this 21st day of August 1881, by order of the board of directors, in the presence of W. H. Richards and Ed. Pulleyne.—GEORGE MARSHALL, Secretary. (L. S.)

The plaintiff alleged that he had paid the society the sum of 270*l.* too much, and commenced this action to recover it from the society.

The defendants put in a statement of defence, in which they stated that the conditions in the prospectus were wrongly stated by the plaintiff, and that the clause as to mortgages by borrowing members was that such mortgages might be at any time redeemed by payment of the balance of the amount of capital, "and premium," with interest only to the date of redemption.

The defendants further alleged that there was an error in the accounts rendered by them, and that a larger sum was due to them than that paid by the plaintiff, and by way of counter-claim, they claimed a further sum of 427*l.* 5*s.* 3*d.*

In his reply the plaintiff stated that the words "and premium," alleged by the defendants to have been omitted in the plaintiff's extract from the prospectus were not contained in the prospectus issued in 1878, but had been inserted in a prospectus published subsequently.

The plaintiff then set out the two rules of the society applicable to advances and the redemption of mortgages, which were as follows:

Rule 32: The directors shall make advances, as funds permit, to any amount, repayable in one sum, or by monthly contributions according to the scales and tables hereto annexed, and such additional scales and tables as they may adopt. The premiums charged on all mortgages shall be due in advance, but, if desired, may be added to the mortgage, or paid in cash.

Rule 43: Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments, as ascertained by reference to the tables.

The advances to the plaintiff were payable in fifteen years by monthly instalments, in conformity with the scale issued by the defendants, and included and were in respect of interest and premium, the interest being calculated at simple interest at 5 per cent. on the money actually advanced and for the time being remaining unpaid, and the premium being a fixed premium of 2*s.* per share per annum, and not bearing interest.

The plaintiff set out a detailed statement of accounts, made out according to his view of the

(a) Reported by W. C. BIRN, Esq., Barrister-at-Law.

principle upon which they should have been settled with reference to the first property mortgaged, namely, Nos. 1 and 2, Milton-villas. These accounts were equally applicable to all the other properties. The amount actually advanced on Milton-villas was 380*l.*, the premium amounted to 57*l.*, being 2*s.* per share on thirty-eight shares for fifteen years. The principal, with interest and premiums, was to be paid by monthly instalments of 3*l.* 10*s.* 4*d.*, which amount, according to the statement at the head of Table II., under which the advance was made, included principal, simple interest at 5 per cent., and a fixed premium of 6*s.* 4*d.* (such 6*s.* 4*d.* being the monthly contribution in respect of the premium), and by making which monthly payments of 3*l.* 10*s.* 4*d.* during and up to the end of fifteen years the 380*l.* with interest thereon at 5 per cent. and the 57*l.* premium would be fully paid.

The defendants claimed to charge the plaintiff on the following principle: The whole amount of the premium at 2*s.* per share on the thirty-eight shares for fifteen years, amounting to 57*l.*, was added to the 380*l.* advanced, and this total of 437*l.* became the principal, upon which interest at 5 per cent. was charged. The monthly instalments due at the beginning of the year were applied to the payment of the interest on the capital and the remaining instalments were applied to the reduction of the capital. In the first year the first six instalments and 15*s.* of the seventh were required to pay the interest on the 437*l.*, and the remainder of the instalments, amounting to 20*l.* 17*s.*, was applied towards the reduction of the capital. By this mode of calculation the capital at the end of the first year was reduced to 416*l.* 3*s.*, while by the plaintiff's method the capital of 380*l.* was reduced to 360*l.* 12*s.*, and the interest for the second year would be calculated on these respective sums.

The mortgage deed was dated the 16th Feb. 1878, and was made between the plaintiff of the one part and the society of the other part, and after reciting that the plaintiff was entitled to a leasehold interest in two houses known as Nos. 1 and 2, Milton-villas, Addiscombe, it recited as follows:

And whereas the mortgagor having subscribed for forty-four advance shares in the said society, numbered respectively from 16,240 to 16,283 (both inclusive), and being desirous of borrowing the sum of 380*l.* in respect of such shares, has applied to the said society to lend him such sum for the period of fifteen years, to be computed from the 16th day of February, and has also offered to pay a premium for such advance, which being calculated according to the rules and bye-laws of the said society amounts to the sum of 57*l.*, and is to be added to and treated as part of the principal sum; and to repay such principal sum by 180 advance instalments of 3*l.* 10*s.* 4*d.* each, the first of such advance instalments to become due and to be paid on the execution hereof, and the remainder of such advance instalments to become due and to be paid respectively on the first day of every month during the said period, commencing with the month of March next.

It was then witnessed that, in consideration of the sum of 380*l.* paid to the mortgagor out of the funds of the society (such sum making together with the said premium the full amount of his said forty-four advanced shares in the society), the mortgagor did thereby covenant that he would during the continuance of the security pay to the society all advance instalments, fines, and other moneys (if any) which,

according to the agreement and to the rules for the time being of the society, should from time to time become payable in respect of the said forty-four advanced shares, and would also duly observe the rules of the society. This was followed by the usual assignment of the property by way of mortgage, with a proviso that upon payment by the mortgagor to the society of all advance instalments, fines, and other moneys which, according to the recited agreement and to the rules of the society, should become payable in respect of the said forty-four advanced shares, then the said indenture should be vacated.

The plaintiff subsequently borrowed from the society the further sums of 1100*l.*, 900*l.*, 1700*l.*, and 800*l.*, and thereupon executed mortgage deeds of other property similar in all respects to the before recited mortgage of the houses Nos. 1 and 2, Milton-villas, and the plaintiff on each occasion subscribed for a proportionate number of shares according to the amount advanced to him. The whole amount advanced was 4880*l.*

At the trial a question was raised as to the jurisdiction of the court to decide a dispute between the society and its members, it having been held in the case of *Wright v. Monarch Investment Building Society* (5 Ch. Div. 726) that under the rules of the society all such questions must be decided by arbitration. Counsel on both sides, however, agreed not to raise any objection as to the jurisdiction, and the only question which was argued was the principle on which the accounts between the parties were to be taken.

The action was heard by Pollock, B. on the 13th Feb. 1883.

*Barber, Q.C. and W. W. Cooper* for the plaintiff.—The interest at 5 per cent. was chargeable only on the amount advanced, and from year to year on the reduced capital, and no interest was chargeable on the premiums which were added to the capital. By the defendants' method, instead of the capital being reduced at the end of the first year by 20*l.* 12*s.*, it was increased from 380*l.* to 416*l.* 3*s.*, and the plaintiff is obliged to pay as many premiums for a loan for three years as he would have to pay for fifteen. Neither the prospectus, rules, or mortgage deed support the defendants' claim. The rules did not include the words "and premium" at the time the plaintiff borrowed this money, and the plaintiff is only liable to pay what is due from him under those rules:

*Smith's case*, 1 Ch. Div. 481.

By this mode of calculation the plaintiff would be charged interest on the premiums falling due after the capital had been paid off, and he is not liable for that:

*Ex parte Osborne*; *Re Goldsmith*, 31 L. T. Rep. N. S. 366; L. Rep. 10 Ch. App. 41.

*T. Terrell and H. Terrell* for the defendants.—The addition of the premium to the capital is justified by the prospectus and rules, and the recital in the mortgage deed makes it clear. If the plaintiff were correct, the table in the prospectus, which is repeated in the rules, would be wrong, and the monthly payments there set out would repay the principal in less than the time fixed for the advances. It is true that the charge for a loan for a short time is as much as one for a number of years, but the object of the society is to keep the money out at interest, and the effect

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HARVEY v. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY.

[CT. OF APP.]

of the rules is to prevent speculative builders from obtaining money, and immediately afterwards repaying it. The loans granted by the society are different to ordinary mortgages, as the full value of the property is lent. It is recited in the mortgage deed that the plaintiff has subscribed for forty-four shares, which is sufficient to cover the advance and premiums, when thirty-eight shares would have been sufficient to cover the actual advance of 380*l*. They referred to

*Seagrave v. Pope*, 22 L. J. 258, Ch.;

*Mosley v. Baker*, 18 L. J. 457, Ch.;

*Matterson v. Elderfield*, 20 L. T. Rep. N. S. 503; L. Rep. 4 Ch. App. 207;

*Solvency Mutual Guarantee Company v. Freeman*, 6 L. T. Rep. N. S. 574; 31 L. J. 197, Ex.

*Barber*, Q.C. in reply.

**POLLOCK, B.**—I have heard everything that could be urged on behalf of the plaintiff in this case, and if this court were sitting with the function of requiring that all the rules and prospectuses drawn by these societies should be perfectly clear to all persons, I think a very useful office might be created for requiring some alterations in the prospectuses. But the office I have to perform now is to say what the contract is between the parties. Before doing so, no doubt the general observations made by Mr. Terrell in the beginning of his argument are useful. So far as one takes the scope and object of the society even apart from its rules, the governing principle of this society and of all building societies is to spread an amount which is paid by a borrowing member for the purchase of a house over a certain number of years. That is the intention and the object of the borrowing power, and it is not to enable people who are speculative builders or land jobbers to come into the market backed by the aid of a society of this kind. That being so, it only remains to be seen what is the real contract between these parties. Now, without any authority, I should have thought it was tolerably obvious in this case that the mortgage deed embodying these rules, so far as they are referred to by that deed, is the contract which is binding on both sides. If any authority be necessary those two cases of *Solvency Mutual Guarantee Company v. Freeman* (6 L. T. Rep. N. S. 574; 31 L. J. 197, Ex.) and *Mosley v. Baker* (18 L. J. 457, Ch.) cited by Mr. Terrell and which are binding upon me, are certainly sufficient. Now, this mortgage deed, after setting out the ordinary recitals of the premises, has this recital: "And whereas the mortgagor having subscribed for forty-four advanced shares of the society numbered respectively 16,240 to 16,283, and being desirous of borrowing a sum of 380*l*. in respect of such shares, has applied to the said society to lend him such sum for the period of fifteen years, to be computed from the 16th Feb., and has also offered to pay a premium for such advance, which, being calculated according to the rules and bye-laws of the said society, amounts to the sum of 57*l*. and is to be added to and treated as part of the principal sum," then comes the provision as to repayment. Now, not merely by letter but in spirit, what is the meaning of this? The meaning of it is, that a certain sum is to be borrowed, but that the borrower is content to pay a premium, and that premium is to be added to and treated as part of the principal sum. Then that principal sum is to be paid in

accordance with the rules of the society, which means to say that the principal sum which now *ex hypothesi* includes the premium is to be paid, not down at once, but to be distributed over a certain number of years. It would, to my mind, be a fallacy to suppose that the principal sum, including the premiums, can lose its character in any way because it is to be spread over a number of years. That is the very object of the society—to enable borrowing members to pay during a number of years what they cannot pay down at one time. Following that out, we then turn to the rules, which are very clear about this head, because the first rule having reference to the subject, which is the 32nd, says this: "The premiums charged on all mortgages shall be due in advance, but if desired may be added to the mortgage or paid in cash." That is not in conflict in any way, but is consistent with the provisions in the deed. Then the 43rd rule, which has a bearing on the subject, is this: "Any member desirous of redeeming the securities held by the society shall be at liberty to do so upon payment of all sums then due from him for subscriptions, fines, and interest, and also the present value of the future repayments as ascertained by reference to the tables." Now what does that mean? It means the future value by reference to the table, which table is the distribution over a certain period of the money lent *plus* the premium. So that it is as if they had referred to the original sum lent *plus* the premium at any time. These are the rules which seem to me not only not to conflict with the mortgage deed, but to be perfectly consistent with it. It is said that the observations, for they are little more, contained in the prospectus are in conflict with this. I confess I do not quite see that, if the prospectus is read by an intelligent person who understands the scheme of the society. Without at all saying that any complaint ought to be made against this particular society, I have often had occasion to regret that building societies should not frame their rules in a more intelligible form, because one finds (not so much in this society as in other societies, such as insurance and benefit societies) that they hold enormous sums of money which are subscribed by the poorer classes especially in the north of England; so that there should be no mistake in the mind of the most ignorant man as to what is the contract he is entering into. With regard to this case, when the prospectus is read with the contract I do not think there is any great doubt about it, because when the repayments are described it is in this way: "Tables of repayment ranging from five to twenty-five years, showing the monthly repayments required to repay 100*l*., including principal, interest, and premium, are annexed to this prospectus." That leaves open the question entirely as to what is the character of the premium. Then again: "Mortgages by borrowing members may be at any time redeemed by payment of the balance of the amount of capital and premium, with interest to the date of redemption." That also leaves it open. Interest upon what? Is that interest upon the bare principal lent, or is it interest on the principal and premium? I have already given my reasons for thinking it is interest on the principal and premium. Then again there are these words: "Borrowing members" (in addition to a fixed premium of 1 per cent.) "are

charged annually only 5 per cent. interest upon the amount remaining unpaid." That also leaves it open, and you must refer to the rules to see what is the amount remaining unpaid; and the next words are those which I have read as to payment of the "amount of capital with interest to date of redemption." What is the amount of capital? That again refers to the mortgage and the rules, and it seems to me that "capital" for this purpose includes premium, so that it is as in all these societies some arrangement whereby a larger amount of interest is obtained than actually appears under the name of interest. Whether that is done by calling it premium paid down or premium distributed over a number of years according to the option of the borrower, or whether it is done by entrance fees or occasional fees, is immaterial. But so it is, and the misfortune is that it needs somebody who has had experience of these transactions to ascertain that the borrower is really paying more than the 5 per cent. The answer, however, is this: societies of this kind are mutual societies, but in any case, whether they be or not, they can scarcely carry on their business with the risks they run except by having something to cover more than the ordinary interest which would be paid on a sum of money advanced and properly secured. These are only matters of observation, and perhaps I might refrain from making them altogether, but I use them to show that the document is one that is not unusual or reprehensible. There was one question I ought to have asked, which of these mortgages were after 1880?

*Barber, Q.C.*—Only one with the alteration in the rules. Your decision against me on the first four of the five will practically cover the fifth.

*POLLOCK, B.*—Then there will be judgment for the defendants on the claim and on the counter-claim, with costs.

The plaintiff appealed from this judgment so far as it decided in favour of the defendants on the counter-claim, on the ground that the defendants were estopped by the form of their receipt from claiming any further sum from the plaintiff.

The first time the appeal came on the respondents raised the objection that the point was not raised by the pleadings, and the hearing therefore stood over, leave being given to the plaintiff to amend his pleadings.

The appeal then came on for hearing on the 26th Feb. 1884.

*Barber, Q.C.* and *W. W. Cooper* for the appellant.—The defendants are bound by the statutory receipt indorsed on the deeds, and are estopped from saying the further sum claimed by their counter-claim is due. The 42nd section of the Building Societies Act 1874 (a) enacts that such

(a) 37 & 38 Vict. c. 42, s. 42: When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may indorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society countersigned by the secretary or manager in the form specified in the schedule to this Act; and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption without any reconveyance or resurrender whatever.

statutory receipt shall vacate the mortgage and vest the estate in the person entitled to the equity of redemption.

*A. Charles, Q.C., H. Terrell, and T. Terrell* for the defendants.—The statutory receipt only operates when the whole of the mortgage debt has been paid. Sect. 42 contains two alternative modes of revesting the property in the mortgagor. The receipt is no better than the reconveyance, and the defendants are entitled to go into the question as to how much is really due. The object of the latter part of the section is to clear the title to the property:

*Fourth City Mutual Benefit Building Society v. Williams*, 14 Ch. Div. 140;

*Pease v. Jackson*, L. Rep. 3 Ch. App. 576.

But if the mortgage is discharged by the receipt, the liability on the shares still remains, and must be determined according to the rules of the society:

*Sparrow v. Farmer*, 28 L. J. 537, Ch.

The plaintiff claims to have a part of the money returned, and thus go behind the receipt, and therefore cannot set it up as an answer to our counter-claim. In any event the defendants are entitled to the costs of the appeal, as the decision of the court below was right on the pleadings as they then stood.

*Barber, Q.C.* in reply as to the costs.

*COTTON, L. J.*—This is an appeal from a decision of Pollock B. in an action brought by a member of the society who had borrowed money from the society on mortgage. The plaintiff has paid a certain sum which has been accepted as the full amount due from him on his mortgages, but he paid part of it under protest. The society gave him a statutory receipt indorsed on his mortgage deeds. The plaintiff in the action claims repayment of part of the money paid, and the society have counter-claimed for a further sum. The learned judge in the court below decided that the defendants were right on both these points. We have not now to decide on the right of the plaintiff against the society, as that part of the judgment is not appealed against; but what is said is, that under the 42nd section of the Building Societies Act 1874 it is not possible for the society, after having given the statutory receipt, to claim anything more, and we think that contention is correct. The section relied on is as follows: [His Lordship read the section.] The society adopted the latter of the two alternative methods; that is, they gave a receipt indorsed in the statutory form. We must give effect to the words of the Act, which say that the receipt "shall vacate the mortgage or further charge or debt." It is contended that the alternative form of the clause points to a difference between a mortgage and a debt, and that the latter word only refers to a case where there is no mortgage. But even if it were so, it would come to the same thing, for if the mortgage is vacated the debt due on the covenant in the mortgage is also vacated. The society has therefore precluded itself from saying that there is any debt due, even though the receipt was given under a mistake. The counsel for the respondents raised two points: the first was, that if all the moneys were not in fact paid the statutory effect of the receipt did not arise. But that is not so; to say that after the indorsement is made the parties were left free to

reopen the question as to the amount due would be to repeal the section. The second argument was, that two alternative provisions are really only two alternative modes of revesting the property in the mortgagor; but such a contention would strike out part of the second alternative. The receipt has, under the statute, not only the effect of revesting the property, but also of vacating the mortgage; therefore, in my opinion, the receipt precludes the society from saying that anything remains due on the mortgage. Then it is said that the debt on the plaintiff's original obligation on the shares still remains, though the mortgage is gone; but, in my opinion, it is clear that the mortgage covenant is to cover not only the mortgage money and interest, but all the payments due on the shares, and, even if all such payments have not been made, the debt is gone by reason of the indorsement. The case of *Sparrow v. Farmer* (28 L. J. 537, Ch.) was referred to; but, when we look at the facts of that case, we find that all that was decided there was that, though the mortgage debt was so far gone that the shareholder was able to redeem his property, yet it still remained liable for payments in respect of shares still subsisting. But here all which was payable down to the time when the mortgage was satisfied is covered by the receipt, and there is no claim for payments accrued due since, but for sums due before the mortgage was vacated. Therefore that decision has no bearing on the present case. With respect to the costs, we think that, as the decision of the court below was right on the pleadings then before it, the order as to costs should not be disturbed, and that there should be no costs of the appeal.

BOWEN, L.J.—I am of the same opinion, and will only add one word, namely, that I am not quite so confident upon the point as the other members of the court.

FRY, L.J.—I am of the same opinion. The argument of the respondents would reduce the words of the section to no effect whatever, for a receipt indorsed is *prima facie* evidence of payment independently of the statute. It is said that before the receipt can have its statutory effect it must be proved that all moneys due have been paid; but the words "such receipt" seem to be against that construction, and it would be a very inconvenient construction, as the effect would be that proof of all money having been paid would be essential to the title of every estate which has been mortgaged to a building society. Then it was said that, though the liability on the mortgages was satisfied, the liability on the shares remained; but all liability on the shares was merged in the mortgage, and if that is vacated, the debt is gone also. I agree as to the costs.

Solicitors: J. J. and C. J. Allen; C. A. Russ.

July 14 and 31.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

HETHERINGTON v. GROOME. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of sale—Agreement to pay on demand—Power to seize and sell on default—Bills of Sale Act (1878) Amendment Act 1884 (45 & 46 Vict. c. 43), ss. 7, 9, 13, and schedule.*

*By a bill of sale the grantor agreed to pay the loan and interest upon demand made in writing, and the grantee was empowered to seize and sell the goods if the grantor made default in payment on such demand.*

*Held (reversing the judgment of Hawkins, J.), that the bill of sale was void: by Brett, M.R. and Fry, L.J., because payment on demand is not payment at the time in the bill of sale provided, which is the only payment for default of which the goods may be seized by 45 & 46 Vict. c. 43, s. 7; by the whole Court, because there was not a stipulated time of payment within the meaning of the form in the schedule to the Act, and therefore the bill of sale was avoided by sect. 9; by Brett, M.R. and Fry, L.J. (Bowen, L.J. doubting), because the power of sale appeared to arise immediately upon default, whereas by sect. 13 five clear days must elapse before it can be exercised, and therefore the bill of sale was not made in accordance with the form in the schedule.*

THIS was an interpleader issue, in which the defendant was an execution creditor of one Ramsay, and the plaintiff was the claimant under a bill of sale given to him by Ramsay, which contained the following provisions:

And the said mortgagor doth hereby agree and declare that he will, upon demand made in writing, therefor duly pay to the said mortgagee the principal sum of 74l. together with interest thereon due. And also that it shall be lawful for the said mortgagee, his executors, administrators, and assigns, to enter the premises where the said furniture, chattels, and effects may be, and to seize and take possession thereof, and to sell the same, or any part thereof, if the said mortgagor shall make default in payment of the aforesaid principal sum and interest on demand in writing made therefor as aforesaid, or if the said mortgagor shall become a bankrupt or suffer the said furniture, chattels, and effects, or any of them, to be distrained for rent, rates, or taxes, or if the said mortgagor shall fraudulently either remove from the premises where they now are, or if the said mortgagor shall not, without reasonable excuse, upon demand in writing of the said mortgagee, produce to him the last receipt for rent, rates, and taxes (due in respect of the said premises where the said furniture, chattels, and things now are); or, lastly, if execution shall have been levied against the furniture, chattels, and effects of the said mortgagor under any judgment at law. . . . Provided also that the furniture, chattels, and effects hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagee, his executors, administrators, or assigns, for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act 1882. (b)

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) 45 & 46 Vict. c. 43, by sect. 7: Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment.

Sect. 9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

Sect. 13. All personal chattels seized, or of which

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Hawkins, J. gave judgment for the plaintiff in the issue, holding the bill of sale to be valid.

The defendant appealed.

July 14.—*J. E. Palmer (D'Almeida with him)* for the defendant.—The power to seize and sell contained in this bill of sale is contrary to the provisions of sect. 7, and is not in accordance with the form in the schedule to the Act. It is also a violation of the terms of sect. 13. He referred to

*Ex parte Pearce; Re Williams*, 49 L. T. Rep. N. S. 475; 25 Ch. Div. 656.

*McCall (Kemp, Q.C. with him)*, for the plaintiff, cited

*Davis v. Burton*, 11 Q. B. Div. 537.

*Palmer* replied.

*Cur. adv. vult.*

July 31.—The following judgments were delivered:—

BRETT, M.R. and FRY, L.J. (read by FRY, L.J.)—The question in the present case turns on the validity of a bill of sale made on the 29th March 1883 by one Ramsay to Hetherington by way of security, having regard to the Bills of Sale Act of 1882. The bill of sale in question contained an agreement by the mortgagor that he would, upon demand in writing, pay to the mortgagee the principal sum of 74*l.* and interest, and further that it should be lawful for the mortgagee to enter upon the premises where the assigned effects might be, and to seize and take possession thereof, and to sell the same, if the mortgagor should make default in payment of the principal and interest on demand in writing, and in certain other contingencies. The Statute of 1882, by sect. 7, provides that the assigned chattels shall not be seized or taken possession of by the grantee for any other than certain causes, one of which is default in payment "at the time therein" (i.e. in the bill of sale) "provided for payment;" and the 9th section avoids every bill of sale given by way of security unless made in the form in the schedule to the Act; and the form thus given provides for payment by instalments on days named, adding in brackets "or whatever else may be the stipulated times or time of payment." Is a payment on demand a payment at a time in the bill of sale provided for or thereby stipulated? The words of the statute and the schedule are perhaps not clear; they may well include a time fixed by reference to any known event; they may perhaps include a time to be ascertained by the happening of some contingency; but they do not, in our opinion, include a time to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale. To leave the time of payment at his unfettered choice is not, we think, within the

possession is taken . . . . . under or by virtue of any bill of sale . . . . . shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of.

The clause as to payment in the form in the schedule to the Act is as follows:

And the said A.B. doth further agree and declare that he will duly pay to the said C.D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [or whatever else may be the stipulated times or time of payment].

meaning of the 7th section of the statute, to provide in the bill of sale a time for payment, or, within the meaning of the schedule, to ascertain the time by stipulation. It is impossible not to see that the object of the statute was greatly to fetter the freedom of contract as regards such instruments as that now in question, and we think that to hold a payment on demand to be a payment at a stipulated time would be to go counter to the object and spirit of the Legislature as expressed in the Act in question. There is, in our opinion, a further objection to this bill of sale. It gives in terms a power to enter, to seize, to take possession, and to sell, in default of payment on demand, or on the happening of certain events therein mentioned, which are the same as the events referred to in sub-sects. 2, 3, 4, and 5 of sect. 7 of the Act of 1882. From this provision a person reading the document alone would conclude that all these powers, including the power of sale, arose forthwith on the happening of any of these contingencies. But the 13th section of the Act prohibits the sale of any chattels seized until the expiration of five clear days from the day of seizure, and no lawyer can doubt but that this provision of the Act would be held to override and alter what would otherwise have been the construction of the instrument. Now the form of the bill of sale given by the Act contains no affirmative statement of the contingencies on which seizure or sale may be made, and still less any suggestion that a sale can be made immediately on seizure. The form of the bill in question which contains this false suggestion is not, in our opinion, in substantial accordance with the form in the schedule. We think that this false suggestion, though no doubt inoperative in law, is likely to mislead a man of the class by whom bills of sale are often given, and to furnish a weapon of oppression to a man of the kind by whom they are often taken. Moreover we can find no motive whatever for the insertion in this instrument of the express power of sale, except the desire to mislead the grantor. We think that for this reason also the bill of sale is void under the 9th section of the Act of 1882.

BOWEN, L.J.—If the validity or invalidity of the bill of sale in this case depended upon all the different questions which have been considered and discussed in the judgment of the other members of the court, I should have considerable difficulty in agreeing with their judgment. I am inclined to think that I should be putting too strict a construction upon this bill of sale if I were to read it as purporting to confer upon the mortgagee a right to sell the goods otherwise than in strict conformity with the provisions of the 13th section. I think that, treating this bill of sale broadly and fairly, though at the same time insisting (as we are bound to do) that the form shall not be substantially at variance with that given in the schedule to the statute, I should arrive at the conclusion that no sale of the goods was to take place until after the expiration of the period of five clear days fixed by the 13th section. But this question is not now important, for I am of opinion that the bill of sale is invalid on another ground, viz., that it gives power to seize the goods on default by the mortgagor in payment on demand in writing, which I think is not substantially in accordance with the form



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in the schedule to the Act. I have felt considerable doubt, but I am not prepared to differ from the decision of the rest of the court, in which I concur on the last ground to which I have referred.

*Judgment reversed.*

Solicitor for plaintiff, *T. R. Apps.*  
Solicitor for defendant, *Thomas Durant.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Wednesday, July 9.*

(Before BACON, V.C.)

THE OLD MILL COMPANY v. THE DUKINFIELD LOCAL BOARD. (a)

*Practice—Action which before Judicature Act could have been tried as of right without jury—Trial by jury—Change of place of trial—Delay—Costs—Rules of Court 1883, Order XXXVI., rr. 4 and 6.*

*An action to restrain the defendants from obstructing the plaintiffs' water rights was set down in the Chancery Division on the 27th May, and briefs were delivered on the 7th July. On motion by the defendants that the trial might take place at Manchester before a judge and jury:*

*Held, that the defendants had an absolute right to trial by jury; that Manchester was the proper place for the trial; the costs to be reserved on account of the defendants' delay in bringing their motion.*

This was a motion by the defendants, that the trial of the action might take place at Manchester assizes and not in London, and that the action might be tried by a judge and a jury, and for inspection of the plaintiffs' premises.

The plaintiffs brought their action in the Chancery Division for alleged obstruction of water rights.

The defendants denied the obstruction, and stated that the obstruction (if any) was a subject for compensation under the Public Health Act 1875.

On the 27th May 1884 the action was set down for trial.

On the 7th July 1884 the plaintiffs' solicitors delivered briefs, and on the same day the defendants applied for leave to serve short notice of motion.

The subject of the action was near Manchester, and the witnesses on both sides lived near Manchester.

*Millar, Q.C. and Mulligan* for the defendants.—We have an absolute right to a trial by jury under Order XXXVI., r. 6, of the Rules of Court 1883. The trial of the action should, under the circumstances, take place in Manchester; we have no objection to any extra costs that have been incurred being reserved.

*Warrington* for the plaintiffs.—The plaintiffs have prepared the action for trial in London; the defendants are too late in asking that the trial should take place at Manchester. See

*Brooke v. Wigg*, 38 L. T. Rep. N. S. 732; 8 Ch. Div. 510.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

As to trial by jury, this is an action which, before the Judicature Act, "could, without any consent of parties, have been tried without a jury," and therefore, under Order XXXVI., r. 4, it is a matter of discretion; Order XXXVI., r. 6, giving an absolute right to trial by jury, only refers to "any other cause." The court will exercise its discretion, and refuse this application; the verdict of a jury, on the question of obstruction, would not be conclusive, as there is a mixed question of fact and law under the Public Health Act.

BACON, V.C. without calling for a reply.—In my opinion the time of the court ought not to be occupied with a question like this. The right of either party to have the action tried with a jury is not to be disputed. According to the plain enactment either party is entitled to a trial with a jury. It is said that there may be some other issue between the parties. If there is, that is no reason why the question of fact should not be tried by a jury. On the other point the defendants are entitled to inspection, and the necessity for changing the venue seems to me to be plain. The witnesses reside, and the *locus in quo* is, in the North; and there is every reason why the action should be tried in the North, and not in London.

*Millar, Q.C.*—The action should be transferred to the Queen's Bench Division, as was done in

*Re Martin; Hunt v. Chambers*, 46 L. T. Rep. N. S. 399; 20 Ch. Div. 365.

BACON, V.C.—I cannot do that without consent.

*Warrington.*—I consent to the transfer.

Minutes of order:—Action transferred to the Queen's Bench Division, Trial to take place at the ensuing Manchester assizes by a judge and jury. General order for inspection. Costs to be costs in the action, with a special reservation of the costs (if any) incurred by the plaintiffs by reason of the delay of the defendants in making the application.

Solicitors for the plaintiffs, *Clarke, Woodcock, and Ryland.*

Solicitors for the defendants, *Smiles, Benyon, and Allard*, for *Garforth and Cooper*, Manchester.

July 8 and 9.

(Before BACON, V.C.)

HORNER v. THE WHITECHAPEL DISTRICT BOARD OF WORKS. (a)

*Approaches to a market—Market rights—District board of works—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), ss. 91, 108.*

*A district board of works gave notice of their intention, by virtue of the power given to them by sect. 108 of the Metropolis Local Management Act 1855, to place posts on the sides of the footways and carriage-ways leading into a market, and forming part of the market area.*

*At the trial of the action, in which the plaintiff claimed an injunction against the board, the Court held, that, the plaintiff having established market rights over the entrance streets, with which the posts would interfere, and market rights being excepted by sect. 91 from the operation of the same Act, the board had no power to put up posts in the*

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

*entrance streets, and granted an injunction with costs.*

THE plaintiff in this action, Mr. Robert Horner, is the lessee for a term of eighty-four years from the 29th Sept. 1882, of the Spitalfields Market.

The owners in fee simple, and the plaintiff, derive their title to the market and to hold the same on Thursday and Saturday in every week under a grant of letters patent, dated the 29th July in the 34th year of the reign of Charles II.; they also claim to hold a market on Monday, Tuesday, Wednesday, and Friday by prescriptive right. The plaintiff as lessee claimed to be in the possession and occupation of North, South, East, and West streets, which are used as approaches to the interior of the market.

The defendants claiming that the four streets were public streets, and vested in them free from any rights of the plaintiff, threatened to place posts of a permanent nature along portions of the footway on each side of the streets.

The plaintiff thereupon brought this action, and claimed an injunction to restrain the defendants, their officers, servants, and workmen, from placing or fixing posts or rails or other obstructions in or along the said streets, and from otherwise committing acts of trespass upon them, and interfering with, impeding, or obstructing the free enjoyment by the plaintiff of the rights of the said market.

The defendants contended that sect. 32 of 12 Geo. 3, c. 38, vested the property in pavements in the parish of Christchurch, Spitalfields, in certain commissioners.

By 28 Geo. 3, c. 60, ss. 11 and 12, additional powers were given to the commissioners for protecting the said public footways.

Sect. 58 of the statute (local and personal) 57 Geo. 3, c. 29, commonly known as Michael Angelo Taylor's Act, gave express powers to the commissioners to set up posts of wood, stone, or iron near or adjoining the foot pavement.

By the Local Management Metropolis Act 1855 (18 & 19 Vict. c. 120), ss. 90 and 96, the rights, powers, duties, and authorities of the commissioners became vested in the district board, and sect. 108 of that Act provides that,

*It shall be lawful for every district board from time to time to place any posts, fences, and rails on the sides of any footways or carriage-ways in their district for the purposes of safety, and to prevent any carriage or cattle from going on the same.*

The defendants said that the four streets were subject to their statutory rights and powers, and in particular the power of erecting posts.

The plaintiff had recently pulled down many of the houses and buildings bounding the four streets on each side thereof, except the east side of South-street and North-street, in order to provide increased accommodation, and the defendants alleged that the posts were necessary to mark out the old footways, by which the public had a right of way across the market, from east to west, and north to south, and *vice versa*, and which were in danger of being absorbed into the market estate.

The footways were paved with Yorkshire flags.

The plaintiff in his reply referred to sect. 91 of 18 & 19 Vict. c. 120, which provides that,

*Nothing in this Act shall extend to or affect any rights, privileges, powers, or authorities vested in any persons in reference to any market.*

Stephen, J., in *The Attorney-General v. Horner*, refused to grant an injunction against Mr. Horner, the present plaintiff, restraining him from using the four entrances for the purposes of the market, but declared no rights in his favour; he, as he expressed it, gave Mr. Horner the benefit of the doubt as to the four streets.

Sir *Hardinge Giffard*, Q.C., *Crossley*, Q.C., and *Vernon Smith* for the plaintiff.—It is necessary to refer to other litigation to show what has given rise to the present action. There has already been litigation between the plaintiff and the Great Eastern Railway Company with respect to the encroachment by the company on the plaintiff's market rights. One argument for the company in that action was, that all market rights had been forfeited as regards Spitalfields Market, of which the plaintiff is lessee, because of the inadequacy of room; the plaintiff therefore took down a number of houses and nineteen stalls, thereby giving increased accommodation for standing carts and waggons, but shortening North, South, East, and West streets, except the east side of North and South streets; this alteration was made at a sacrifice of rent of 1400*l.* a year. The defendants then gave notice of their intention to place posts along portions of the footway on each side of the four streets, as they alleged, for the purpose of marking the line of the old footways, where the houses had been pulled down, so as to preserve the public rights, and also to prevent waggons destroying the footway and endangering the safety of foot passengers. But market rights are expressly excepted from the Act, which confers powers over roads and footways on the board. Public streets and ways into markets are distinctly different. The powers vested in commissioners over the carriage-ways and footways in the parish of Christchurch, Spitalfields, by 12 Geo. 3, c. 38, by 28 Geo. 3, c. 60, and by Michael Angelo Taylor's Act (57 Geo. 3, c. 29), are vested by 18 & 19 Vict. c. 120, ss. 90, 96 (amended by 25 & 26 Vict. c. 102) in the district board of works. The defendants rely on sect. 108 of the 18 & 19 Vict. c. 120, which permits the district board to put up posts. The 90th section of 18 & 19 Vict. c. 120 transfers the powers of the commissioners to the board, the 91st section excepts market rights, and is conclusive that the Legislature recognises a distinction between the market area and the public street. The whole litigation must be looked at as a colourable exercise of public powers, not a *bond fide* exercise of an official trust, but an unwarrantable assault on the Spitalfields Market; the plaintiff's rights have already been established by Stephen, J. in *Attorney-General v. Horner*. One member of the board wanted a warehouse from the plaintiff, who refused to let him have it, hence the annoyance of the posts.

The plaintiff was then called, and several witnesses, to prove that the posts would impede the traffic.

*Crossley*, Q.C. summed up.—First, in point of law the defendants have no such power as they claim; secondly, on the evidence, the putting up of the posts is a gross and outrageous use of their powers, destroying the safety of the users of the market.

*Finlay*, Q.C., *Colt*, and *Gore* for the defendants.—It is necessary to put up the posts because of the

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pulling down of the houses; it is necessary first for the protection of the general passengers, as well as of the porters. The plaintiff acknowledges that it is impossible to prevent waggons going on the footways; the footways would thus be broken up; the porters who were examined did not understand the situation. The question is, whether the streets under the Acts of Geo. 3 and Victoria are public or private. In accordance with the decision in *Coverdale v. Charlton* (40 L. T. Rep. N. S. 88; 4 Q. B. Div. 104), the property in the pavements actually vested in the district board, and they had power to put up posts to protect the pavement, their own property. Under sects. 58 and 64 of Michael Angelo Taylor's Act (57 Geo. 3, c. 29), and under sect. 108 of 18 & 19 Vict. c. 120, the board had power to put up posts "on the sides of any footways or carriage-ways in their district for the purposes of safety, and to prevent any carriage or cattle going on the same, and also to put posts in any carriage-way so as to make the crossings less dangerous for foot passengers." The question at issue in the information of the Attorney-General at the relation of the Whitechapel District Board of Works against Horner was, whether Horner should be restrained from licensing the standing of carriages and waggons in the market, and taking tolls. Stephen, J. granted an injunction as to the outside streets, and as to the four internal streets, North, South, East, and West streets, he gave Horner the benefit of the doubt, but he refused to make a declaration as to the rights of Horner over the four streets. The board of works have a right to decide what will impede the traffic, and what not:

*Biddulph v. The Vestry of The Parish of St. George's, Hanover-square, 3 De G. J. & Sm. 493;*  
*The Attorney-General v. The Thames Conservators,*  
 1 H. & M. 7—35.

The 91st section of the Metropolis Local Management Act 1855 is not relative to this case. If the public are entitled to pass along the streets, the public are entitled to the protection of the board, and to have the footways preserved.

Witnesses were called to prove that the pavement was injured by the passing of waggons over it.

The defendants had made an offer to leave a passage ten feet wide for waggons across the footways between the line of posts into the interior of the market; this offer the plaintiff declined to accept.

BACON, V.C.—This case has occupied some time, and a good deal has been said which I do not think has had much to do with the question before me. The plaintiff's rights are very ancient in their nature, and are well established by repeated litigation, and after the last occasion on which the matter came before a judicial tribunal they are not to be disputed. The plaintiff is the owner of a market. He has always had and has a right to the uninterrupted access to that market. There are streets which lead to the market. Those streets are not in his way, and do not form any part of the obstruction. What he complains of now is, that the entrance to those streets it was intended by the defendants (the board) to obstruct and to prevent. But, if he has any rights as a market owner, he has a right to

prevent that obstruction. The defendants justify themselves by reference to the old pavings Acts of Parliament, and to Michael Angelo Taylor's Act, and to the last Act of the 18th & 19th of the Queen, which last Act is the only one which it is necessary for me to refer to, because nobody can doubt that the rights of commissioners of pavements under almost any local Act are to put up, among other things, posts, and to protect the public by any means that they may devise which are not in themselves unlawful. The last Act of Parliament reserves expressly all market rights, and the market rights are the things which are the subject of the litigation before me. The board have threatened to put down and have made preparations for putting down a series of posts which, if they are allowed to exist, will prevent the access of any carriages out of the side streets into that which is now vacant ground, and which has been made vacant ground by the pulling down of certain houses. It is said that, inasmuch as there is a pavement extending from the angle of the houses to the market-house as it now stands, nobody has a right to interfere with that pavement. But anything that they may have done, or that the plaintiff may have done, cannot abolish or interfere with his ancient rights of access to the whole of his market, and the defendants themselves, although they have not yet made up their minds where they will place these posts, threaten and intend to place these posts, and they have by the concessions and admissions which they have made since this suit was instituted acknowledged and submitted to the plaintiff's right, for they have proposed to pacify his complaint by leaving him an uninterrupted access of ten feet in width across the pavement which they are so very anxious to protect. If they have a right to protect the pavement, and choose to pave it with Yorkshire flags, and the rightful lawful passage by the plaintiff over those Yorkshire flags produces any injury to the flags, that is a matter which may be discussed elsewhere, but with which I have nothing to do at present. I take the law to be, that if a man damages a pavement which is not his, he is bound to make it good. If the defendants desire to protect what they call their foot pavement, which is undistinguishable from the other pavement, they have only to pave it with granite instead of Yorkshire flags, and it is effectually protected. But, as I said, the question since the suit was instituted has really been settled by the defendants themselves asserting their right to protect the public; and from the evidence of the witnesses who have been examined, the members of the board, I must suppose that they have only a perfectly rightful desire to protect the public. They say, "For ten feet in width let the public take care of themselves, and let the plaintiff drive through whenever he likes." In my opinion, the plaintiff has established his right to the protection which he asks for in this court. Cases have been referred to which have really no application, if I may be forgiven for saying so, to the case before me." The Grosvenor Palace case was not a question of property; the Floating Bridge case was not a question of property. The only decision is that, in the case of those who are entitled under an Act of Parliament or otherwise to do a certain thing, this court will not interfere with their discretion. But can any case be quoted

in which the court will not interfere with the discretion of a body, however constituted, who exercise the statutory powers given to them to the detriment of a landowner? No such case can be referred to, and no such principle can be invoked. All that the plaintiff desires is that his access to his market—at least, not his access, but the access of his customers' waggons, and so on—shall not be interrupted. If the parties will agree that he shall have an entrance measuring ten feet, well and good, and I shall be glad to see the dispute so terminated. If they do not, then I think the plaintiff is entitled to the injunction that he asks for, viz., an injunction restraining the defendants from placing or fixing posts, rails, or other obstructions in the several streets. Since the suit was instituted the board has agreed or offered to leave an entrance of ten feet in width, reserving to themselves the right of putting posts elsewhere.

The order was in the following terms: "Restrain the defendants from placing or fixing posts or rails or other obstructions in or along North, South, East, and West streets, Spitalfields, and otherwise from committing acts of trespass on the four streets, and interfering with the plaintiff's right of market."

Solicitors: *F. Betteley* and *A. Turner*.

Friday, July 25.

(Before BACON, V.C.)

Re GOOLD; GOOLD v. GOOLD. (a)

*Practice—Change of parties—Alteration in interest and liability—Ex parte application—Rules of Court 1883, Order XVII., r. 4.*

Where a testator appointed his two infant sons trustees on their attaining the age of twenty-one, and an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a plaintiff and the elder son defendant; on the younger son attaining twenty-one, and becoming a trustee, and thus changing his interest and liability, the Court, on an *ex parte* application under Order XVII., r. 4, of the Rules of Court 1883, made him a co-defendant.

A TESTATOR devised and bequeathed his real and personal estate for the benefit of his two infant sons, and appointed them trustees upon their respectively attaining the age of twenty-one years.

The elder son attained the age of twenty-one years, and thereupon became a trustee of the will.

An administration action was then commenced, in which the infant son was made a plaintiff, and the elder son, who had become a trustee, defendant. The infant son then attained the age of twenty-one years, and became a trustee of the will.

*Willis Bund* for the parties.—It is necessary, in consequence of the change or transmission of interest or liability on the part of the plaintiff, that he should be made a party in another capacity, namely, that of trustee. It is provided by Order XVII., r. 4, of Rules of Court 1883 that such an order may now be obtained *ex parte* on application to the court or a judge upon an allegation of such change, or transmission of interest or liability. I ask that the plaintiff in the action,

having become a trustee of the will, may be made a co-defendant with his brother.

BACON, V.C. made the order.

Solicitors: *Wilkins, Blyth, and Dutton*.

May 22 and 23.

(Before KAY, J.)

Re MARSDEN; BOWDEN v. LAYLAND; GIBBS v.

LAYLAND. (a)

*Executor—Devastavit—Acquiescence—Statute of Limitations—Mortgage—Covenant for payment.*

*The onus of proving acquiescence in a devastavit is, by the ordinary rule, on the person alleging it, and in order to prove acquiescence he must show a standing by with full knowledge of what was being done.*

The plaintiffs, who were mortgagees, complained that the defendant, the surviving executor of the mortgagor, had been guilty of a devastavit in having administered the testator's estate without first paying off the mortgage debts, and they claimed that he might be declared answerable for all moneys forming part of the testator's estate received by him and not applied in payment of the testator's debts, &c.

The defendant alleged that the payments constituting the devastavit, if any, or the greater part of them, were made more than six years before the commencement of the action, and he craved the benefit of the Statute of Limitations.

Held, that the claim of the plaintiffs was not barred by the Statute of Limitations.

Re Gale; Blake v. Gale (48 L. T. Rep. N. S. 101; 22 Ch. Div. 820) not followed.

By an indenture, dated the 20th Sept. 1872, Charles Marsden mortgaged certain leasehold hereditaments in the Kingsland-road, Shoreditch, to John Mordaunt, George Louis Monck Gibbs, and William Cobham Gibbs, as security for the sum of 1721l. 17s. 7d., with the usual covenant by the mortgagor for payment of the principal money and interest, as therein mentioned.

By an indenture, dated the 24th Sept. 1872, Charles Marsden mortgaged the leasehold hereditaments comprised in the before-mentioned indenture, and also certain other leasehold hereditaments in John-street, Kingsland-road, to George Henry Gibbs, as security for the sum of 528l. 2s. 5d., with the usual covenant by the mortgagor for payment of the principal money and interest as therein mentioned.

Charles Marsden made his will, dated the 31st Oct. 1871, and thereby gave the interest of all his property, real and personal, to his wife Harriet Elizabeth Marsden, as long as she remained his widow, the interest to be paid to her half yearly; At her marriage or death, he gave half of his property, real and personal, to his youngest daughter Jane Fort, the remaining half to be divided between his other children share and share alike. He appointed Thomas Layland and William Fort executors of his will.

The testator died on the 17th April 1873, and his will was, on the 22nd May 1883, duly proved by both the executors.

William Fort died intestate in Sept. 1881, in wholly insolvent circumstances.

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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The testator's property, at the time of his death, consisted of cash at his bankers, debts owing to him, stock-in-trade and fixtures in his business as a paper stainer, and the leasehold premises which he had mortgaged. Apart from the mortgaged properties, the testator's estate was only of the value of about 700*l*.

Although, under the terms of the testator's will, it was the duty of the executors to have converted his property, they did not do so; but they continued the testator's business, and managed the mortgaged properties, at the same time making his widow an allowance. They stated that they acted in the belief that they were carrying out the terms of the testator's will, and that they informed the mortgagees' solicitors of their intentions, and made them acquainted with the contents of the will.

No step was taken by the mortgagees' solicitors, beyond collecting the interest as it accrued due, until July 1882, when they were informed by Thomas Layland, the surviving executor, that he was unable to continue payment of the interest to them. The immediate result of this communication was that endeavours were made to effect a settlement upon the basis of Thomas Layland paying over to the mortgagees the balance of cash then in his hands, and purchasing in a third person's name the mortgaged properties for a sum sufficient to indemnify the mortgagees from loss. These endeavours were frustrated by the administration summons in the action of *Bowden v. Layland*, on behalf of Mrs. Bowden, claiming as a legatee, being served whilst the negotiations were pending.

The mortgagees then commenced an action against Thomas Layland, claiming by their statement of claim, delivered in Nov. 1882, administration of the testator's personal estate; that the defendant might be declared answerable for the *devastavit* which they alleged he had committed, and for all moneys forming part of the testator's estate received by him and not applied in payment of the testator's debts, &c.; and that their mortgage securities might be realised, and the proceeds applied in or towards payment of their debts.

To this claim Thomas Layland by his statement of defence, delivered in Dec. 1882, raised three defences: First, that the mortgagees had elected to rely upon their securities, and had in fact waived all claim on the testator's general assets, and tacitly at least sanctioned their distribution amongst the beneficiaries under the will, and were not therefore entitled to be considered as creditors as against those assets; secondly, that the payments constituting the alleged *devastavit* (if any), or the greater part of them, were made more than six years before the commencement of the action, and that the claim as to them was therefore barred by the Statute of Limitations; and thirdly, that the mortgagees were not entitled to call for an account of rents which they had allowed the mortgagor, or those representing the mortgagor, to receive.

The action was set down for trial, and appeared likely shortly to come on for hearing, when Mrs. Bowden having, on the 10th April 1883, at length obtained an ordinary legatee's administration order, the mortgagees, with a view, as they alleged, to saving expense of useless accounts and inquiries under that order, applied to have the two

causes consolidated and their conduct given to them, and that declarations, accounts, and inquiries, which would in effect have given them all they asked in their own action, should be added to the administration order.

By the order made upon this application, on the 20th June 1883, Kay, J. stayed all further proceedings in the mortgagees' action and gave them liberty to attend the proceedings in Mrs. Bowden's action, at their own expense, and his Lordship added to the administration order of the 10th April 1883 an inquiry whether the executors, or either of them, had committed any and what *devastavit* of any and what part of the testator's estate, and under what circumstances, and whether Thomas Layland and his late co-executor's estate were under any liability in respect thereof.

Against this order the mortgagees appealed, and the Court of Appeal, endeavouring to dispose of the matter summarily, made an order of the 6th Nov. 1883 virtually transferring Mrs. Bowden's order from a legatee's into a creditor's administration order, and preserving Thomas Layland's defences in the mortgagees' action merely by the direction that, in taking the account of the testator's personal estate, no payment made by the executors, or either of them, with the consent or acquiescence of the mortgagees, was to be disallowed as between the mortgagees and the executors.

Pending this appeal, Thomas Layland's account had been carried into chambers in Mrs. Bowden's action, and after the order of the Court of Appeal had been made the mortgagees took three objections to this account before it was vouched.

They objected to the payments to the testator's widow as tenant for life; to the payments to William Fort, Thomas Layland's late co-executor; and to the items in respect of the carrying on of the testator's business being allowed.

The chief clerk required evidence of the mortgagees' consent or acquiescence in these three classes of items to be brought in, and he decided that, on the general evidence, the mortgagees must be taken to have known of the carrying on of the testator's business and of the payments to his widow, but not that these payments were in excess of income; and further, that they were precluded from questioning any payment made more than six years before the commencement of their action.

The view taken by the chief clerk being so far adverse to the mortgagees, the matter was adjourned into court at their instance, and now came on to be heard.

W. Pearson, Q.C. and Edwin Ward, for the executor, referred to

*Thorne v. Kerr*, 24 L. T. Rep. O. S. 233; 2 K. & J. 54;

*Re Gale*; *Blake v. Gale*, 48 L. T. Rep. N. S. 101; 22 Ch. Div. 820;

*Re Baker*; *Collins v. Rhodes*, 20 Ch. Div. 230; *Williams on Executors*, 7th edit. pp. 1938, 1971, 1999, 2053;

*Charlton v. Lowe*, 3 P. Wms. 328;

*Obee v. Bishop*, 1 De G. F. & J. 137;

*Brittlebank v. Goodwin*, L. Rep. 5 Eq. 545;

*Woodhouse v. Woodhouse*, 20 L. T. Rep. N. S. 209; L. Rep. 8 Eq. 514;

*Busby v. Seymour*, 1 J. & L. 527;

*Cloverley v. Brett*, 5 T. R. 8; 2 Phill. Ev. 6th edit. p. 348;

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*Hindsley v. Russell*, 12 East, 232; 2 Phill. Ev. 6th edit. p. 348;  
29 Car. 2, c. 3.

*Graham Hastings*, Q.C. and *Hadley*, for the mortgagees, referred to

*Fordham v. Wallis*, 10 Hare, 217, 226.

[They were stopped by the Court.]

*Pearson*, in reply, referred to Selwyn's *Nisi Prius*, p. 782.

The arguments sufficiently appear from the judgment.

KAY, J.—In this case a testator mortgaged a certain part of his property, and the mortgage deed contained the usual covenant for payment of the mortgage debt. He died, and appointed executors, and the executors possessed his estate, and they paid, for a long time, the interest due upon the mortgage, clearly recognising, therefore, the debt. They paid it as executors. They had also possession of the property which was the subject of the mortgage, and which was leasehold property. A judgment has been obtained in an administration action by the mortgagees against those executors, and the accounts are brought into chambers. The executors charge themselves with the receipt of assets—and in the discharge they attempt to introduce the payments made more than six years ago, but, of course, since the death of the testator, by them to some of the legatees. The ordinary rule of course is to disallow such payments. They are not a proper discharge as between the executors and creditors. But it is said those payments were made more than six years ago, and therefore all remedies in respect of them are now barred by the lapse of time. The argument is founded on what takes place at law. It is said, at law, a creditor by covenant gets the judgment against the executors *de bonis testatoris*, and if that judgment be executed by *fi. fa.*, and the sheriff finds the executor had once assets, but has parted with them, he may return a *devastavit*. Then it is said the remedy at law would only be against the executor by a personal action for *devastavit*, which personal action would be barred by the statute after six years. All that is very familiar law, but the attempt is now to apply this in equity; and to test the argument I asked the counsel how far it would go, and I suggested this: "Can you say here, that if the executors, in circumstances like these, having recognised the mortgagee and paid him interest for many years, are bringing their accounts into chambers, that they can claim a discharge of money which they had put in their own pockets more than six years ago?" Counsel very frankly answered that his argument must go as far as that. That is rather startling, certainly. I never yet heard that executors, by way of discharge in equity, as against a creditor whose debt they have acknowledged, as they have been paying interest upon it for many years, could set up their own wrong by way of *devastavit*, and say, "We admit a *devastavit*, knowing of your debt, because we have been paying interest all the while, but seeing that we did it more than six years ago we can set up a defence by way of *devastavit*." It is a novel doctrine to me, but I have listened attentively to it, as I was told there were cases which laid that down, namely, *Thorne v. Kerr* (2 K. & J. 54), and a recent case of *Re Gale*; *Blake v. Gale* (48 L. T. Rep. N. S.

101; 22 Ch. Div. 820), which were supposed to support that doctrine. I entirely dissent from any doctrine of the kind. It seems to me as plain as can be that, where an administrator or executor accepts that office, he accepts the duties of the office, and he becomes, in the language of Williams on Executors (8th edit. p. 1803), a trustee in this sense: "An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office." Now, what is the ordinary trust when an executor acknowledges a debt and pays interest upon it? Is it not to preserve the assets for payment of that creditor so far as there are assets, and to take care not to dispose of the assets, either by putting them into his own pocket, or by paying them away to the legatees, or by otherwise committing a *devastavit*? Most certainly it is; and in equity the executor is bound, by a most direct trust, to apply them in the due course of the administration of the estate for the creditor he has acknowledged. That is exactly the language used by Turner, L.J., when Vice-Chancellor, in the case of *Fordham v. Wallis* (10 Hare 217). He says (at p. 226): "We come then to the case of the residuary legatees; and as to these parties also I am of opinion that, so far as their interests in the residue are concerned, the statute furnishes no bar." That is, the Statute of Limitations furnishes no bar: "The payment over to them by the executors, whilst the debts were unpaid, was an absolute and unqualified breach of trust." Breach of trust as regards whom? Of course, a breach of trust as regards the creditors for whom they were trustees. Having accepted their office, and the creditors being *bond fide* creditors, the trustees were bound to apply the assets to the payment of their debts before they handed over anything to the residuary legatees. The breach of trust was the breach of the trust which they accepted for these creditors, and that language shows that the residuary legatees cannot set up the statute, because, having received assets from the executors while the debts were unpaid, they of course had concurred in the breach of trust by which those assets were handed over. Therefore I must hold that there should have been a disallowance in this case of those items of discharge, while the debt was unpaid, and there will be a direction to the chief clerk to disallow such items. All payments in respect of the business must be disallowed, but the executors should be credited with all receipts. The receipts might not all go out of the accounts, because whatever was correct would come in. I will deal with the thing before me. I do not make any general directions. These payments must be disallowed. With regard to the question of acquiescence, in my opinion the onus of proving acquiescence is, by the ordinary rule, on the person alleging it, and in order to prove acquiescence he must show a standing by with full knowledge of what was being done, and an acquiescence in the *devastavit*. Nothing at all of that kind has been proved, and the only evidence given of that sort has been an attempt to make out, not knowledge, but constructive notice. Because the solicitor to the mortgagees was in communication with the executors it is said he had such notice. But, on the other hand, the solicitor absolutely denies it. Even if it were true that the mortgagees' solicitor happened to be dealing with the executors, and had

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a notice of that kind, I could not treat that as constructive notice for the purpose of fixing the mortgagees, in a case like this, with acquiescence in the *devastavit*. I think the case is utterly void of proof, and therefore there can be no discharge in respect of those payments on that ground. The costs will be costs in the action.

Solicitor for the executor, J. W. T. Miles.

Solicitor for the mortgagees, E. Brodribb Randall.

Thursday, June 26.

(Before KAY, J.)

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*Power of appointment—Exercise of, by will—Death of appointee before testatrix—Lapse—Settlement—Recital—Estoppel—Covenant for further assurance.*

By a marriage settlement, dated in 1863, after reciting that B. (the wife) was "seised of or otherwise well entitled to" the freeholds therein described (subject to the life estate of J. C. P.), and that she was entitled to leasehold premises and certain personal estate, the freeholds were conveyed to trustees (subject to the life estate of J. C. P.), and the leaseholds and the personal estate were assigned to them, upon trust as to 10,000*l.* for B. for life, and afterwards for A. (the husband) for life, and subject thereto, as to all the realty and personalty, as B. should appoint, and in default in trust for B. for life, and, if she should predecease her husband, in trust as to the realty for her heirs, and as to the personalty for her next of kin, as if she had died unmarried.

The settlement contained the usual covenant for further assurance.

At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds and leaseholds, subject to the life estate of J. C. P., whereas she was entitled to only thirteen-sixteenths thereof, and J. C. P. was then, and to the time of his death, entitled to three-sixteenths.

J. C. P. died in 1866, having by his will given his property to B.

B. made her will in 1880, and, in exercise of the powers in the settlement, and of every other power, gave all the freeholds and leaseholds comprised in the settlement to W. W. P. and T. H. P. equally; and she gave all the rest of her personal estate to trustees to pay the income to her husband for life, and afterwards to divide such estate equally between J. B. P., W. W. P., and T. H. P. She declared that her executors should have power to sell her real and personal estate.

B. made a codicil in 1880, revoking the gift of any moneys or other properties which she should have accumulated from or purchased with the income of the property comprised in the settlement, or the corpus of any property not included in the settlement and otherwise acquired, and giving the same to her husband.

T. H. P. died in B.'s lifetime, without issue.

The questions were, who was entitled to the share of the residuary personal estate, the gift of which lapsed by the death of T. H. P.; who was entitled to the three-sixteenths of the freeholds; and

who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of T. H. P.

Held, that B. had made the personal estate which was included in the residuary gift part of her own assets, and that, so far as it lapsed, it passed to her next of kin, as though at her death it had belonged to her absolutely.

Held, also, that the person claiming under the appointment had, as regards the three-sixteenths of the freeholds, the right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or that he had an equity to enforce the covenant for further assurance; that B. had made the property part of her own estate, and that, so far as it lapsed, it devolved upon her heir-at-law.

By an indenture, dated the 5th Oct. 1863, and made between Elizabeth Betsey Perks (afterwards Elizabeth Betsey Horton) of the first part, John Horton of the second part, and John Bayfield Clark, John Brownjohn Perks, and William Perks. of the third part, being the settlement made upon the marriage between John Horton and Elizabeth Horton, after reciting that Elizabeth Horton was "seised of or otherwise well entitled to" the messuages, tenements, or dwelling-houses, closes, pieces or parcels of land and hereditaments, thereafter firstly, secondly, and thirdly described, and thereby granted and assured or expressed so to be for an estate of inheritance in fee simple (subject nevertheless, as to the hereditaments secondly described, to the estate for life of her father James Carpenter Perks in three undivided fourth-parts thereof, and subject, as to the hereditaments thirdly described, to the estate for life of James C. Perks in the entirety thereof), and that Elizabeth B. Horton was entitled to the messuage or tenement, closes, pieces, or parcels of land thereafter assigned, or expressed or intended so to be, for the residue and remainder of a certain term of ninety-nine years created by a certain indenture of lease, bearing date the 27th April 1832; and reciting that Elizabeth B. Horton was possessed of household furniture, and of a sum of New Three per Cent. stock, and certain other stocks and securities therein mentioned, and was entitled to certain funds in the hands of the trustees of the wills of her then late aunts, Martha Brownjohn, Mary Brownjohn, and Catherine Hayes Brownjohn, respectively deceased, and the settlement made on the marriage of James C. Perks and Jane Perks, her father and mother, subject to the life interest of James C. Perks therein; and reciting that upon the treaty for the marriage it was proposed and agreed between John Horton and Elizabeth B. Horton that the freehold and leasehold hereditaments and premises, sums of stock, and other property of Elizabeth B. Horton should be respectively conveyed and assigned unto John B. Clark, John B. Perks, and William Perks, and to be settled and assured upon the trusts and in manner thereafter mentioned; it was witnessed that, in pursuance of such agreement and in consideration of the marriage, Elizabeth B. Horton, with the privy and approbation of John Horton, granted and conveyed unto the trustees the properties therein firstly, secondly, and thirdly mentioned, and therein particularly described (subject, nevertheless, as to the here-



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ditaments secondly described, to the estate for life of James C. Perks in three undivided fourths thereof, and subject, as to the hereditaments thirdly described, to the estate for life of James C. Perks in the entirety thereof, upon the trusts thereafter mentioned; and it was further witnessed that, in pursuance of such agreement, and with the privity and approbation of John Horton, Elizabeth B. Horton assigned unto the trustees the leasehold tenement and premises therein particularly described, for the residue of the term created by the lease; and by the settlement the other securities referred to in the recitals, and all other personal property (if any) of Elizabeth B. Horton were vested in the trustees; and it was thereby agreed that the trustees should hold the freehold and leasehold messuages, lands, and hereditaments, and moneys, upon trust, as to a sum of 10,000*l.*, part of the sum of New Three per Cent. stock, for Elizabeth B. Horton for life, for her separate use, and after her decease for John Horton for life, and subject to such life estates, as to all the real and personal estate comprised in the settlement, for such persons and upon such trusts as Elizabeth B. Horton should by deed or will appoint; and, in default of any such appointment, in trust for Elizabeth B. Horton for life, for her separate use, and after her decease, if she should predecease her intended husband, in trust, as to so much as should be real estate, for her heirs for ever, and, as to such as should be personalty, for such person or persons as, under the statutes for the distribution of the estates of intestates, would be entitled thereto in case she had died intestate and without leaving a husband, to take as directed by such statutes, and, if more than one, equally between them as tenants in common.

The settlement contained a covenant by John Horton and Elizabeth B. Horton, for themselves, their, his, and her heirs, executors, and administrators, jointly and severally, with the trustees, that they, and every person claiming through them or either of them, should and would, from time to time and at all times thereafter, at the request of the trustees, make, do, execute, and perfect all and every such acts, deeds, matters, and things whatsoever, as might be necessary or thought desirable for more fully or satisfactorily granting and assigning, or otherwise assuring the hereditaments, furniture, funds, moneys, and premises thereinbefore expressed to be granted and assigned, respectively, and every or any part thereof, unto and to the use of the trustees for the time being, or other the person or persons entitled under the trusts of the settlement.

At the date of the settlement it was believed by all parties thereto that Elizabeth B. Horton was seised, for an estate in fee simple, free from incumbrances, of the entirety of the freehold hereditaments therein secondly described, and that she was entitled absolutely to the premises comprised in the lease for the residue of the term thereby granted, subject, however, to the estate for life of James C. Perks in such premises respectively; whereas, as a matter of fact, she was seised in fee simple, and entitled absolutely, to only thirteen-sixteenths of the freehold and leasehold hereditaments, and James C. Perks was then, and to the time of his death, seised in fee simple of three-sixteenths of such freehold hereditaments, and

was entitled absolutely to three-sixteenths of such leasehold hereditaments.

James C. Perks died on the 27th Jan. 1866, having by his will, dated the 7th Dec. 1864 (after certain pecuniary bequests), devised and bequeathed all the rest and residue of his money, estate, and effects whatsoever, after payment of his debts, funeral and testamentary expenses, to Elizabeth B. Horton for her sole and separate use.

Elizabeth B. Horton made her will, dated the 6th July 1880, and thereby, after reciting partly the settlement, in exercise of the powers given to her thereby, and of every other power in anywise enabling her, appointed, devised, and bequeathed all and singular the freehold and leasehold hereditaments and premises, sums of stock, and other property particularly mentioned and described in, and granted and assigned by, the settlement in manner following (she then made certain specific bequests and devises of certain properties described in the settlement, and after doing so she proceeded as follows):

I give, devise, and bequeath all the freehold and leasehold messuages, tenements, or dwelling-houses, closes, pieces or parcels of land, and hereditaments comprised in the said settlement and not hereinbefore by me devised and bequeathed, or such part of such said hereditaments and premises as shall remain unsold at my death, unto my cousins William Wereat Perks and Thomas Holway Perks, and their respective heirs, executors, administrators, and assigns, in equal shares as tenants in common.

After certain further specific bequests, the will continued as follows:

I give and bequeath all the rest, residue, and remainder of the personal estate over which I now have or at the time of my decease shall have power of disposition by will unto John Bayfield Clark, John Brownjohn Perks, and William Perks, their executors, administrators, and assigns, upon trust that they . . . shall pay the interest, dividends, and annual produce thereof unto my said husband during his life, and after his decease upon trust to divide the said residuary personal estate equally between my cousins John Brownjohn Perks, William Wereat Perks, and Thomas Holway Perks, their executors, administrators, and assigns, absolutely.

She declared that, if either of her cousins should die before her leaving a child or children surviving him, such child or children should take the share to which such deceased cousin would have been entitled, and the will ended thus:

I declare that for any purpose whatever my acting executors or executor shall have power to sell my real and personal estate or any part thereof. And lastly, I nominate and appoint my said husband and the said John Bayfield Clark and William Perks joint executors of this my will.

Elizabeth B. Horton made a codicil, dated the 9th July 1880, to her will, as follows:

Whereas I have by my said will, after making various specific and pecuniary devises and bequests to certain parties therein particularly mentioned, given, devised, and bequeathed the rest, residue, and remainder of my personal estate unto John Bayfield Clark, John Brownjohn Perks, and William Perks . . . upon trust for my said husband for his life, with remainder as in my said will is mentioned; now I do hereby declare that, notwithstanding anything appearing in my said will to the contrary, and notwithstanding any legal construction which may be put upon my said will, or any devise or bequest therein contained, it is my will and intention that any moneys or other properties which I shall have accumulated from, or purchased with, the income of the property comprised in the settlement made on my marriage with my said husband, and which settlement is recited in my said will, whether invested or not, and whether lying at my bankers in my name on deposit or otherwise, or the corpus of any property not included in

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the settlement, acquired by me from any other source than through the said settlement, shall not pass by, or be included in, the property devised and bequeathed by my said will, but shall be excluded therefrom, and be treated as not having been disposed of thereby; and I give, devise, and bequeath all such accumulations of property arising from, or acquired by me from, or purchased with, the income of any property comprised in, or settled by, the said recited settlement, and the corpus or income of any property acquired by me from any other source than through the said settlement, whether invested or uninvested, and whether standing in my own name as that of my bankers or otherwise, unto my said husband, the said John Horton, his heirs, executors, administrators, and assigns, for his own absolute use and benefit, it being my desire that my said will shall be treated as only devising and bequeathing the corpus of the real and personal property comprised in the said recited settlement, and not the income thereof, or the corpus or income of any other property otherwise acquired, and that my said husband shall have and be entitled absolutely, and for his own use, to the whole of my property, except the corpus of my said settled property, in addition to such portion of such settled property as I have devised and bequeathed to, or in trust for, him by my said recited will. In all other respects I confirm my said will.

Elizabeth B. Horton died on the 18th Sept. 1882.

Thomas H. Perks died in the lifetime of Elizabeth B. Horton, without leaving any issue.

The questions were, who was entitled to the share of the residuary personal estate, the gift of which lapsed by the death of Thomas H. Perks; who was entitled to the three-sixteenths of the freehold hereditaments; and who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of Thomas H. Perks.

On the 8th May 1884 two originating summonses were taken out by John Horton for the determination of these questions.

The summonses were adjourned into court, and now came on to be heard.

*Northmore Lawrence*, for the plaintiff, referred to

*Re Davies' Trusts*, 25 L. T. Rep. N. S. 785; L. Rep. 13 Eq. 163;  
*Re Pinder's Settlement*, 41 L. T. Rep. N. S. 579; 12 Ch. Div. 667;  
*Re De Lusi's Trusts*, 3 Ir. L. Rep. 232;  
*Re Van Hagan; Sperling v. Rochfort*, 44 L. T. Rep. N. S. 161; 16 Ch. Div. 18;  
*Heath v. Creaklock*, 31 L. T. Rep. N. S. 650; L. Rep. 10 Ch. App. 22;  
 2 Smith's L. Cas. 7th edit. 848.

*Maidlow*, for the trustees of the marriage settlement, referred to

*Brickenden v. Williams*, L. Rep. 7 Eq. 310;  
*Willoughby Osborne v. Holyoake*, 48 L. T. Rep. N. S. 152; 22 Ch. Div. 238.

*Vernon R. Smith*, for the heir-at-law, was not called upon.

The arguments sufficiently appear from the judgment.

KAY, J.—Some very curious and difficult questions arise in this case. One arises as to certain personal property which, beyond all doubt, was referred to in the marriage settlement of Mrs. Horton. By that settlement there was a power of appointment by deed or will of the lady, and in the event of there being no issue of the marriage, and in default of appointment, the personal property was to be given to her statutory next of kin. She made her will, and after referring to the settlement, and expressing her intention of exercising her power of appointment she proceeds in these words: "Now, I, the said

Elizabeth Betsy Horton, in exercise and execution of the said recited power given or reserved to me by the hereinbefore in part recited indenture of settlement, and of all other powers and authorities whatsoever in any wise enabling me in this behalf, do hereby direct and appoint, give, devise, and bequeath," and so on, and she ends her will by this disposition of her residuary estate: [His Lordship read the clause and continued:] Stopping there, I should say what happened was this: One of the ultimate residuary legatees, Thomas Holway Perks, had also in the former part of the will a portion of the settled property appointed to him. He died in the testatrix's lifetime, and so far as that was personal estate, of course that fell into this residuary bequest of personal estate. But he also was one of the three residuary legatees, and therefore the residue having been thus increased, one-third of it lapsed completely. It fell out of the will and would pass to the persons who are entitled to the lapsed interests. There are two sets of claimants only, one being the statutory next of kin of the testatrix, who are entitled in default of appointment under the settlement, and the others are her own next of kin who are entitled as if she had been unmarried, excluding her husband. The question depends upon whether or not, by this will, to the rest of which I am going to refer, she had in fact made this personal estate part of her own assets. If it stood by the will alone I take it that, by this residuary gift, she has blended the property into one fund of personalty and given it in this way. I have read that her executors may sell any part of her real and personal estate when they think proper. Therefore, it seems to me, the will is quite clear that she had made this personal estate, which was included in the residuary gift, part of her own assets, and that, so far as it lapsed, it would pass to her next of kin, as though, at the moment of her death, it had belonged to her absolutely. But then it is said the codicil makes a difference, for by the codicil, after referring to the will, she declares that "notwithstanding anything appearing in my said will to the contrary, and notwithstanding any legal construction which may be put upon my said will, or any devise or bequest therein contained, it is my will and intention that any moneys or other properties which I shall have accumulated from, or purchased with, the income of the property comprised in the settlement made on my marriage with my said husband, and which settlement is recited in my said will, whether invested or not, and whether lying at my bankers in my name on deposit or otherwise, or the corpus of any property not included in the settlement, acquired by me from any other source than through the said settlement, shall not pass by, or be included in, the property devised and bequeathed by my said will, but shall be excluded therefrom and be treated as not having been disposed of thereby, and I give, devise, and bequeath all such accumulations of property . . . to my said husband." The very ingenious argument put forward is, that placing the will and the codicil together the case is analogous to those cases in which by will a testator has kept separate the property over which he has a power of appointment from that which is his own, and that though here the testatrix has disposed of both she has disposed of them separately, and therefore that there can be no

intention in this will and codicil taken together of making one of it. That is an argument worthy of attention, but, giving the utmost weight to it, I am not convinced by it, for this reason, that the will of itself having made these assets of the testatrix, the codicil only alters the will by taking out of the mixed fund such part of it as belonged to her otherwise than under the power of appointment, and disposing of that in a different way. It does not prevent the effect of the whole instrument being that which I gather alone from the will, namely, that she does by the whole instrument show such an intention to treat the funds over which she has a power of appointment as her own property, so as to make them assets of her own. For instance, suppose they are left to be operated upon by the will. The will, as it stood, would have blended with them all the property which belonged to her in a different right, or over which she had other powers of appointment, or which had been her property for her separate use, or anything of that kind. Although in the codicil she said that she made a different disposition of those other properties, and so took them for the purpose of that different disposition out of the residuary gift in her will, still she shows she meant to treat those properties as her own. She has blended with this property belonging to herself originally the property over which she had the power of appointment. She leaves that subject to the same residuary bequest which blended it to the other; and to that property, over which she merely had this power of appointment, apply those words of the will: "I declare that for any purpose whatever my acting executors or executor shall have power to sell my real and personal estate." It seems to me that I cannot doubt that she meant, for the purpose of her whole testamentary disposition, to treat it as being her own property. This is the only question on this part of the case. I think the property which lapsed by the death of Thomas Holway Perks will go to her next of kin as her own property at the moment of her death. Then there remains this question. Before she made this will she had made the settlement which is mentioned therein, and in that settlement it is recited that she is absolutely entitled to certain property which is referred to in this way: "And whereas Elizabeth Betsey Perks,"—which was then her name, it being a settlement made in contemplation of her marriage—"is seised of or otherwise well entitled to the messuages, tenements, or dwelling-houses, closes, pieces, or parcels of land and hereditaments hereinafter firstly, secondly, and thirdly described and hereby granted and assured, or expressed so to be, for an estate of inheritance in fee simple, subject nevertheless, as to the said hereditaments secondly described, to the estate for life of her father James Carpenter Perks, in three undivided fourth parts or shares thereof," and so on. Then it is recited that, on the treaty for the marriage, it was proposed and agreed between the intended husband and herself that the freehold and leasehold hereditaments, and so on, should be respectively conveyed and assigned to trustees upon the trusts thereafter mentioned. Then comes a conveyance of the property, clearly showing an intention to pass the whole interest in that property. Then the settlement contains a covenant by the husband and wife to make any further

assurance in aid of that settlement. It seems that, at the date of the settlement, she was not entitled to the whole, but she had some thirteen undivided sixteenth shares; but during the coverture there accrued to her the remaining three-sixteenths shares, and therefore she had the power during the coverture of making that settlement good according to the true intent and meaning of it. As to the true intent and meaning there can be no question. It is quite plain that anybody within the marriage consideration could have compelled her to do so. For example: supposing there had been children of this marriage, which there were not, and supposing those children had instituted proceedings to have the three-sixteenths shares, the title to which afterwards accrued to her, conveyed to the trustees in trust of the marriage settlement, it seems to me there could have been no possible defence to that action. There was a covenant for further assurance, and I am strongly inclined to think there was complete estoppel under this recital. Reference has been made to the well-known case of *Heath v. Crealock* (31 L. T. Rep. N. S. 650; L. Rep. 10 Ch. App. 22), in which Lord Cairns criticises a recital which was, that Thomas King Stephens was "seised or otherwise well and sufficiently entitled" to certain property, in which his interest was really a very different thing, and it was a question whether that amounted to estoppel. Lord Cairns thought words like those did not amount to estoppel; but certainly he would not have held that, in a case like this (the recital being in these words, "Whereas the said Elizabeth Betsey Perks is seised of, or otherwise well entitled to the messuages," &c., thereafter described, and the whole deed showing her meaning to be that, in one shape or other, she had the fee simple in all), there would not be a sufficient estoppel as to a part of that property in which at the date of the settlement she had no interest whatever, but the interest therein accrued to her afterwards. However, I do not think it at all necessary to consider it further, because it seems to me that, under the covenant for further assurance, most undoubtedly this might have been brought within the settlement, and that the trustees now will have power to enforce against anybody claiming under her—and especially anybody claiming as a volunteer under her—that covenant for the benefit of anybody who claims under the settlement, and who was within the marriage consideration. What have I to do? She affects to exercise this power of appointment; she did exercise it, and appointed this estate, and the appointee now claims the estate. The person who claims against him is the husband who says: "No, this property did not pass by the settlement, and was not bound by it, and therefore it comes to me under the codicil." That codicil gives all the property which was not bound by the settlement to him. Now which has the better equity? The person who claims under the appointment of the wife claims under a person who was within the marriage consideration, and it seems to me that the person who claims under the appointment of the wife has the better equity, and is a person in whose favour the trustees can and ought to insist upon the enforcement of that covenant for further assurance. I think—though I confess the question is a very curious one, and it is very arguable—that I must say the claim

under the appointment is a good one, and so far as those three-sixteenth shares are concerned the appointee has a right to insist upon that claim, either on the ground that the recital in the settlement amounted to an estoppel, or (which I think is the better ground), on the ground that he has an equity to enforce the covenant for further assurance against the person who claims as a volunteer under her. Accordingly it seems to me that I must treat the property as having passed according to her settlement, and as being bound by it, and as having been operated upon by the will under which she professed to exercise her power of appointment. Then comes the same question as has been argued respecting the other point, viz., whether or not this property was by that will made part of her own assets, because, if so, there would be a lapse. It was not included in the residuary gift upon which I have been commenting, but it was appointed by these words in an earlier part of the will. She says: "I give, devise, and bequeath all the freehold and leasehold messuages and tenements, or dwelling-houses, closes, pieces, or parcels of land, and hereditaments comprised in the said settlement, and not hereinbefore by me devised and bequeathed, or such part of such said hereditaments and premises as shall remain unsold at my death, unto my cousins William Werat Perks and Thomas Holway Perks, and their respective heirs, executors, administrators, and assigns, in equal shares as tenants in common." The ultimate residuary gift did not apply to that property, because it was only a gift of personal estate. The question, as I have said, is whether or not this property was by that appointment made part of her own estate. Though it is a question of some doubt, I must say that, looking at the whole of this will (which ends with a declaration that the executors shall have power to sell her real and personal estate or any part thereof), I think it is a case in which she has so exercised the power as to make the property part of her own estate, and it accordingly devolves upon her heir-at-law.

Solicitors: *Whitakers and Woolbert*, agents for *Clark and Collins*, Trowbridge; *William Perks*.

June 21, July 7 and 9.

(Before CHITTY, J.)

PLATT v. MENDEL AND OTHERS. (a)

*Practice—Mortgage—Foreclosure action—Subsequent incumbrancers—Time for redemption—Successive periods—Further time.*

*In a foreclosure action the question came before the court whether a judgment for foreclosure nisi should, in the event of there being a second mortgagee entitled to redeem, give successive periods of redemption to such second mortgagee and the mortgagor.*

*Held, that the ordinary right of the mortgagor was that he should have six months wherein he could redeem; that it was an anomaly that a mortgagor by dealing with the equity of redemption should, by further mortgages, gain further time; that, though there was no settled rule, the practice of the courts had been to give one time only, and the court would adopt that practice in this case; that the court would give successive periods of*

*redemption on the request of the puisne mortgagees, but not on the request of the mortgagor, and that, if the puisne mortgagees made such a request, their mortgages must either be proved by them or admitted by the mortgagor.*

THIS was an ordinary foreclosure action brought by the plaintiff John Harold Platt, who was the first mortgagee and who claimed to have an account taken of what was due from the defendant Samuel Mendel to him for principal, interest, and costs on a mortgage dated the 28th Nov. 1876, and made between the defendant Mendel of the one part and Henry Platt and others of the other part, of certain premises in the city of Manchester; and on a transfer of the said mortgage indorsed thereon, dated the 14th July 1879, and made between the said Henry Platt and others of the one part and the plaintiff of the other part, and that the mortgage might be enforced was by the foreclosure. The defendant Samuel Mendel mortgagor, and the other defendants (whose names were Agnew) were second mortgagees.

The statement of claim was delivered on the 26th April 1884, but the defendant had delivered no defence, and motion for judgment in default of defence was now moved for.

The plaintiff had been in receipt of rents since the 2nd April last, and was ready to account as mortgagee in possession.

The mortgaged property was held on long leasehold tenure, and consisted of large warehouses, &c., at Manchester, and the leases of the present tenants would expire in Sept. 1885.

The plaintiff gave notice to pay off the mortgage on the 9th March 1881, but the mortgagor had taken no steps to do so. The second mortgagees never thought it worth while to give notice of their charge, and had stated through their solicitors that they did not think it worth while to pay off the plaintiff, who had good reason to believe that the property was not a sufficient security for the 50,000*l.*, for which sum it had been mortgaged.

*Leonard Field and Lees Knowles* for the plaintiff.—The question in this case to be decided is merely what form of judgment the court will adopt with regard to the times for redemption; whether it will allow one time only or successive periods. The defendants do not appear, and under the Rules of the Supreme Court 1883, Order XXVII., r. 11, in an action like the present one, if the defendant makes default in delivering a defence the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the court or judge shall consider the plaintiff to be entitled to. This is a case simply between mortgagor and mortgagee, and whether the mortgagor is to have six months only to redeem. [CHITTY, J.—The question is, whether it is the business of the second mortgagor to ask for foreclosure only.] Under the circumstances in this case it is desirable that the court should grant one time only to all the defendants for redemption. The point is not clearly settled by authority, but the practice has hitherto been as follows: If there is a question as to priority (or in other words a dispute) between the defendants, the court will fix a certain day for all to redeem or to be foreclosed:

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at Law.

CHAN. DIV.]

PLATT v. MENDEL AND OTHERS.

[CHAN. DIV.]

*Bartlett v. Rees*, 25 L. T. Rep. N. S. 373; L. Rep. 12 Eq. 395;  
*General Credit and Discount Company v. Glegg*, 48 L. T. Rep. N. S. 182; 22 Ch. Div. 249.

In the latter case Bacon, V.C. decreed foreclosure with one term of redemption for all the puisne mortgagees, without prejudice to their rights *inter se*. Liberty also was given to apply, and further time was given after the final order. The cases against me are *Titley v. Davies* (2 Y. & C. 399), but there the question was chiefly one of consolidation; and a case where Wood, V.C. refused to follow *Edwards v. Martin*:

*Bevor v. Luck*, L. Rep. 4 Eq. 537.

[CHITTY, J.—There the claim was under one instrument. I do not see why they should have had successive periods to redeem. In *Bartlett v. Rees* there were questions as to subsequent incumbrancers, and Romilly, M.R. thought that there ought to be only one time to redeem.] A form of decree was then settled, and has been found a convenient one to follow in many similar cases. The cases go to this: Where there are disputes amongst mortgagees, then there must be immediate foreclosure and only one time; but where there are no disputes successive periods are ordered. In this case there are no disputes between the co-defendants, and we submit it would be a great hardship on the plaintiff if he cannot obtain the most advantageous form of order. As it is, he may be compelled to bring in accounts when the value of the property is much less than the amount due to him under the mortgage. [*Phipson Beale (amicus curiae)* stated that in numerous cases before Pearson, J. recently one period only was allowed; but then there was no opposition.]

*Smith v. Olding*, 50 L. T. Rep. N. S. 357; 25 Ch. Div. 462;

*Cripps v. Wood*, 51 L. J. 584, Ch.

[CHITTY, J.—The judge there seems to have given consideration to the small margin of the property.] A case before Kay, J. is somewhat analogous to the present one. There one period of redemption was given to incumbrancers. In giving judgment Kay, J. said, "it would be a hardship on the prior mortgagees if they were to be delayed and embarrassed by an inquiry to ascertain the priorities of the subsequent incumbrancers. Therefore that seems to me a very sufficient reason for giving only one period for redemption, and letting the defendants then contest their rights amongst themselves." The property there consisted of mines, the rent and interest were in arrear, and the lease of the property had not a long time to run; but we submit it would be a still greater hardship that the first mortgagee should be delayed and embarrassed because the mortgagor has subsequently and independently raised a further sum of money upon the property comprised in his mortgage:

*Lewis v. Aberdare and Plymouth Company*, 50 L. T. Rep. N. S. 451; W. N. 1884, p. 116.

[CHITTY, J.—The judge there seems to have decided upon the special reasons existing in that particular case. His Lordship referred to *Sweet v. Combley*, 25 Ch. Div. 463.] It is true that there Fry, J. declined to depart from the practice of allowing successive periods for redemption to the defendants, but that was in the absence of the mortgagor, and it was thought better by counsel

in that case not to take an order on a doubtful title, and when that case was decided there were not, as there now are, a series of decisions in favour of one period.

CHITTY, J.—The question in this case is as to the form of the judgment, whether there should be only one period or two periods allowed for redemption. The defendants have not put in any defence, and they do not appear at the bar. The plaintiff, under the 11th rule of Order XXVII., is therefore entitled to such judgment as, upon the terms of the statement of claim, the court considers him entitled to. I refer to the statement of claim, and from that it appears that the plaintiff is mortgagee; that one of the defendants is the mortgagor, and then there is a statement that the other defendants (the Agnews) claim to have some charge upon the mortgaged premises, which charge is subsequent to the plaintiff's mortgage, and that is all that appears in this case. There is no admission by the plaintiff that the Agnews have a charge, merely a statement that they claim to have a charge, and the plaintiff says he is entitled therefore to have a decree against them whether they have a good charge or not. Now, it is undoubted that in a simple case between mortgagor and mortgagee, and when there is no other incumbrance, the mortgagor has, whether he be defendant in a foreclosure action, or plaintiff in a redemption action, six months, and six months only, to redeem. I put aside, of course, the case in which, by indulgence, he is allowed to come in after default made, and even those peculiar cases which sometimes occur, where, after order absolute, he is allowed to come in, but the established rule is that a mortgagor has six months, and six months only, to redeem. It is to my mind undoubtedly an anomaly to say that a mortgagor, by any dealings with the equity of redemption subsequent to the first mortgage, should be able to gain for himself a further time to redeem. In complicated cases, where the mortgagor has so incumbered the equity of redemption as to give rise to questions of priority, it is clear, and I take it to be settled after the decision in *Bartlett v. Rees* (*ubi sup.*) by Romilly, M.R., which has often been followed, that only one time is allowed for redemption. That is not merely as regards all the persons claiming to be incumbrancers, or shown to be incumbrancers on the equity of redemption (incumbrancers therefore of the mortgagor), but the mortgagor himself has no further time allowed him to redeem, and there is only one time allowed as against all the defendants. The mortgagor has no right in himself to more than one period of six months to redeem. If, however, the defendants in a foreclosure action have put in a defence, or appeared at the bar, and have proved their incumbrances, and there is no question of priority between them, it does appear that the course of the court has been to make a judgment which, when examined, in principle will be found to be a judgment not only in favour of the plaintiff, but a judgment as between the co-defendants. In order for the court properly to make such a judgment as that, the defendants must appear, and either prove or have sufficient admission of their interests in order to entitle the defendants who ask for it to such a judgment as between their co-defendants. In my opinion the mortgagor is not entitled to ask of right, or at all, for

such a judgment. It is the right of the puisne mortgagees. Take the case of first mortgagee plaintiff, second mortgagee defendant, and the mortgagor also defendant; it appears to me that, if it is desired that there should be a decree or judgment as between the co-defendants, that judgment can only be obtained on the request of the puisne mortgagee, and they can make that request either when they put in a defence or upon appearing at the bar, and proving the deed or offering to prove. In that event he would have, according to the course of the court, a right to such a judgment. Such a judgment, after all, is an anomaly, because it is not the judgment which the plaintiff asks for; but it has arisen upon the desire of courts of equity to do complete justice and to allow the defendants to take the benefits of the action. Under the old practice it was not uncommon for the second mortgagee to institute a cross-action asking to be allowed to redeem the first mortgagee, who was plaintiff, and asking for a proper foreclosure and redemption decree over against the mortgagor or the puisne incumbrancers, if any there were. But I am satisfied that, though it was sometimes done, the course of the court has been to hold that it is not necessary there should be a cross-bill (in former times), a cross-action (in the present time), but if, on the proofs before the court or on proper admissions made, the second mortgagee's case is established, then he is entitled to avail himself of the benefit of the action in the manner I have mentioned. Now, applying this principle to the case before me, I have no proof that the defendants (the Agnews) have, in fact, any charge upon the property. They do not choose to come at the bar and ask me to make a judgment as between the co-defendants, and under the rule I have already referred to all that I am entitled to do is to make such judgment as the plaintiff is entitled to. I have said, and I repeat, that the mortgagor, to my mind, has no right whatever in the matter. It would be an absurdity that he should gain a greater right by creating subsequent incumbrances. The result therefore is, that one time, and one time only, should be allowed to redeem. I have looked at all the authorities that have been cited, but I do not propose to go through them, they are not altogether reconcilable. I have consulted many of the registrars on the subject; they are nearly agreed, and I think they are all agreed to the extent I have given my judgment in this case. There has undoubtedly of late been almost a practice, not thoroughly established but a tendency, to give but one time to redeem. I know the late Master of the Rolls did it in several cases, but those cases are not reported, and it would be too dangerous for me to trust to my own recollection of the cases in which he did so. The reason for giving one time only is plain. If I could make an absolute rule upon the matter I think that one time in the present day would be sufficient, because in nearly every modern mortgage there is power of sale; and besides that, the court has extensive power now under the Conveyancing Act of ordering a sale, and in nearly every case in which the mortgagee comes and asks for foreclosure the case is one in which the security is insufficient, and he desires to make the best he can of it by converting it to other purposes out of which he hopes to be able to

make a profit, but is unable to do so so long as there is an equity of redemption which stands in the way and puts him in the difficult position of a mortgagee in possession, or a mortgagee dealing with the property in a manner which renders him liable to some serious responsibility as mortgagee in possession. That is the judgment I give, therefore, in this case; there will be one time and one time only, for redeeming. It is unnecessary for me to go on to say in this case whether or not this law would apply if the mortgagor were to redeem, or if the second mortgagee could come in and get some further judgment. I leave that question open, with this single observation, that there may be some difficulty in the second mortgagee (supposing he should turn out to be second mortgagee) carrying on this action because the judgment seems to be a final one. If the mortgagor were to redeem in such a case as the present there being (I will assume on the facts, although they are not proved) a second mortgagee, such a course would operate for the benefit of the second mortgagee, because he would then become, as between himself and mortgagor, first mortgagee. for a mortgagor redeeming cannot set up his incumbrance. If he has paid it off, he can never set it up against his own mortgagee. (a)

Solicitors for the plaintiff, *Field, Roscor. Field, and Co.*, agents for *Wrigley and Morecroft*. Oldham.

Solicitors for the defendants, *Blake and Heseltine*, for *Keith, Blake, and Co.*, Norwich, and *Bircham and Co.*

(a) The minutes as prepared, after providing for the accounts usual in a foreclosure action when a mortgagee is in possession, ran as follows: "And let, upon the defendants or any of them paying to the plaintiff what shall be certified to be due to him under or by virtue of his said securities and for costs, within six months after the date of the chief clerk's certificate, at such time and place as shall be thereby appointed, the plaintiff recover the hereditaments and premises comprised in the said mortgage securities free and clear of and from all incumbrances done by the plaintiff or any person or persons claiming by, from, or under him, or by those under whom he claims, and deliver up upon oath all the title deeds and writings in his custody or power relating to the said premises to the defendants, or to such one or more of them as shall so redeem the plaintiff, or as he or they shall direct; such conveyance to be settled by the judge in case the parties differ about the same. And in case the defendants, or any or either of them, shall so redeem the plaintiff, the defendants or defendant so redeeming the plaintiff are or is to be at liberty to apply to this court as he, she, or they may be advised, and on such application it is not to be incumbent on the defendant or defendants so applying to give the plaintiff notice thereof. But this order is to be without prejudice to any question which may arise as to the rights or interests of the defendants as between themselves or in the said hereditaments and premises. But in default of the defendants, or any or either of them, so redeeming the plaintiff by the time aforesaid, they are to stand absolutely barred and foreclosed of and from all right, title, interest, and equity of redemption in and to the hereditaments and premises comprised in the said mortgage securities and every part thereof."



CHAN. DIV.]

BLACKETT v. BLACKETT.

[CHAN. DIV.]

Monday, June 16.

(Before NORTH, J.)

BLACKETT v. BLACKETT. (a)

*Practice—Courts—Concurrent jurisdiction—Costs.*

*The Probate Division having made a decree absolute for the dissolution of a marriage on the husband's petition, made also an order that the trustees of the marriage settlement should pay an annual sum out of settled real property of the wife to the husband for the maintenance of the infant child of the marriage. The husband having died, whereupon the widow became absolutely entitled to the settled property, a further order directed that the settlement trustees should pay the annuity to the guardians of the infant, and that the settled property should stand charged with the annuity. There were, in fact, at that time no trustees of the settlement. The annuity was subsequently declared to be perpetual. The guardian brought an action in the Chancery Division against the widow, whose whereabouts was then unknown, claiming an account of the annuity; a declaration that the same was a charge on the settled property, and that it might be raised by sale or mortgage; appointment of new trustees of the settlement; an order that the defendant might execute all necessary instruments for giving effect to the charge; and a receiver.*

*At the trial it appeared that the parties had agreed that the defendant should execute a deed securing the annuity on the settled property, and the plaintiffs did not press for further relief.*

*The Court ordered execution of the deed, but under the circumstances allowed no costs on either side, as the order now made might have been obtained by summary process in the Probate Division.*

On the 20th Nov. 1877 a decree absolute was made for the dissolution of the marriage of Frederick Blackett and his wife on the petition of the husband. At this time, by the marriage settlement of the parties, certain real estate stood limited in trust for Mrs. Blackett for life, with remainder to herself absolutely in case (which happened) she should survive her husband.

By an order made in the Probate Division on the petition of Frederick Blackett, dated the 23rd July 1878, it was ordered that the trustees of the marriage settlement should pay to the petitioner Frederick Blackett the sum of 100*l.* per annum for the "maintenance and education of Mary A. E. W. Blackett, the only child issue of the said marriage."

Frederick Blackett died in June 1880, having appointed the plaintiffs Blackett and others guardians of his daughter, then an infant, but who subsequently, having attained twenty-one, was added as a plaintiff.

The plaintiffs brought this action against Mrs. Blackett in May 1881, claiming an account in respect of the 100*l.* per annum, and that such sum might be declared a charge on the settled property, and raised by sale or mortgage, and a declaration that the interest of the defendant in the settled property was charged with all sums to become due on the said 100*l.* per annum, and that the defendant might be ordered to execute all instruments necessary for giving effect to the charge, and for a receiver.

A further order of the Probate Division directed

(a) Reported by F. GOULD, Esq., Barrister-at-Law.

that the order of the 23rd July 1878 should be amended by adding after the word "marriage" the words "as if the said respondent were deceased and had died in the lifetime of the petitioner and before the 23rd July 1878, and that the property which is the subject of the said settlement shall stand charged with the payments of the said sum of 100*l.* per annum," and that the settlement trustees should pay the same to the guardians of the plaintiff, Mary A. E. W. Blackett.

There being at the date of the last-mentioned order no settlement trustees, the plaintiffs amended their claim, and claimed that new trustees of the settlement might be appointed, and execution of the trusts of the settlement directed.

On the 4th March 1884 a further order in the Probate Division declared that the annuity for the benefit of the plaintiff Mary A. E. W. Blackett was perpetual. The defendant by her statement of defence submitted that, the trusts of the settlement being at an end, there was no foundation for any relief in this respect; and that, as to the relief sought in respect of the orders made in the Probate Division, the said Probate Division had full seisin thereof, and that the plaintiffs could have recourse thereto by summary and inexpensive process, and that there was no necessity for an action in the Chancery Division.

The action now came on for trial, during which it appeared that a deed had been agreed upon between the counsel on both sides by which the annuity was to be secured by a rentcharge on the settled property; the main question, therefore, was as to the costs of the action.

*Sturges for the plaintiffs.*—The plaintiffs were right in bringing the action in the Chancery Division. The claim asks for administration of the trusts of a settlement of which there are no trustees, and the plaintiffs seek to enforce a charge obtained from the Probate Division. The plaintiffs here were no parties to the divorce proceedings. It is not denied that the Probate Division has the power to order the execution of the deed by the defendant, but it is not usual for that division to make such orders:

*Bradley v. Bradley*, 47 L. T. Rep. N. S. 355; 7 P. Div. 237.

The order of the Probate Division creating the charge is in the same position as a contract to grant a charge which would properly be enforced in the Chancery Division. The plaintiffs, by accepting the proposed deed now agreed upon as sufficient relief, are making a concession to the defendant, and are entitled to the costs of the action. He cited also

*Holloway v. York*, 2 Ex. Div. 333;

*Hart v. Hart*, 45 L. T. Rep. N. S. 13; 18 Ch. Div. 670;

*Crispin v. Cumans*, 20 L. T. Rep. N. S. 150; L. Rep. 1 P. & M. 622;

*Clarke v. Clarke*, 28 L. T. Rep. N. S. 911; L. Rep. 3 P. & M. 57;

*Anglo-Italian Bank v. Davies*, 39 L. T. Rep. N. S. 244; 9 Ch. Div. 275;

*Bryant v. Bull*, 39 L. T. Rep. N. S. 470; 10 Ch. Div. 153;

*Re Peace and Waller*, 49 L. T. Rep. N. S. 687; 24 Ch. Div. 405;

*Wenthead v. Riley*, 25 Ch. Div. 413.

*Edmund S. Ford* for the defendant.—The action is founded on orders made in the Probate Division,



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and there was no need to bring it in this division at all. The order for payment of the annuity was being complied with, and it was competent to the Probate Division to appoint a receiver if necessary. He cited

*Thomas v. Walker*, 18 Beav. 521;  
*Storey v. Waddle*, 4 Q. B. Div. 289;  
*Whittaker v. Whittaker*, 7 P. Div. 15;  
*Smith v. Cowell*, 43 L. T. Rep. N. S. 529; 6 Q. B. Div. 75.

*Sturges* in reply.

NORTH, J., after referring to the proceedings in the Probate Division which led to the order creating the annuity of 100*l.* per annum, proceeded:—That was decided in the Probate Division in making the order of the 4th March last to be a perpetual annuity. The plaintiffs have commenced this action asking that that 100*l.* per annum may be secured, and asking for a receiver. It is already secured by the order of the court, which had power to modify the settlement, and has made such order as it, under the circumstances, thought right; and although no doubt an application might be made to this court, and I should have the same jurisdiction as the judge in the Probate Division has to modify the settlement, yet I certainly should not interfere with the settlement, but leave it to the Probate Division to deal with the matter, not for want of jurisdiction in this court, but because the matter having already gone there that is the place for dealing with it. When the statement of claim was amended it asked for the execution of the trusts of the settlement and the appointment of new trustees, the order made in the Probate Division being defective in directing persons, namely trustees, to pay when there were in fact no persons who could make that payment. Moreover, it appears that at the time when the action was commenced Mrs. Blackett was out of the way; it was not known where she was, and the persons who acted as her solicitors in the Divorce Court, and who act as her solicitors now, had no authority to enter an appearance for her. The plaintiffs, therefore, were entitled to say they wanted some security of one sort or another, and there may have been a right to have the trusts executed and consequential directions given for securing the charge. But it appears that a deed was prepared in consequence of certain suggestions as to a deed creating a charge being all really that was necessary. Certain negotiations took place on that, but it was not until this order was made last March that the question which was raised by the parties was settled by the Probate Division, namely, that the annuity was a perpetual annuity. Whether the court in the Probate Division, in the last order it made, was putting its own construction on its previous order, or was exercising the power under the statute which was not exhausted by any previous order, I do not know; but at any rate in March 1884 for the first time it was decided that the annuity was perpetual. It seems to me that the plaintiffs in working that out might have been entitled to the order I mentioned, and that they are making a concession in taking less than that by assenting to the terms of the deed which has been proposed and now agreed upon by counsel on both sides as being satisfactory, subject to slight alterations in

the draft which have been referred to by them. But, on the other hand, I come to the conclusion that the Probate Division had ample and complete jurisdiction to make the order which I make now. It had made already three orders in this matter, and on a summary application which would cost less than the institution and prosecution of this action, that court might have done precisely what I have done, and inasmuch as the plaintiffs have chosen to take a course which was not indeed outside my jurisdiction, but did involve much larger expenses both to themselves and the defendants than a summary application to the Probate Division which was perfectly competent to do everything, and no doubt would have done everything I could do now, I must say that those costs are costs which ought to be borne in some way or other by the plaintiffs, and not by the defendant. I do not think it is necessary to say that the plaintiffs shall have part of the costs of the action and pay the other part; it is sufficient for the purpose of justice to say that, although I give the plaintiffs the relief mentioned, there will be no costs on either side. In a case of *Norman v. Johnson* (29 Beav. 77), before Sir John Romilly, M.R., a somewhat similar case, although the plaintiff's right to an annuity was recognised, and a charge was declared, yet giving the plaintiff such a charge was looked upon as a luxury, and the plaintiff had to pay all the costs of obtaining the charge. I have not thought it right to go as far as that here, and in making the order I give the plaintiffs no costs, and I do not make them pay any costs to the defendant.

*Order that the defendant do execute the grant of rentcharge, the draft of which has been approved by counsel for the plaintiffs and defendant. No order as to costs.*

Solicitors for plaintiffs, *Hamlin, Grammer, and Hamlin*, for B. C. Pullan, Leeds.

Solicitors for defendant, *Rowley, Page, and Rowley*.

Friday, July 25.

(Before PEARSON, J.)

CRICK v. HEWLETT. (a)

*Practice—Notice of trial—Entry of trial—Dismissal of action for want of prosecution—R. S. C. 1883, Order XXXVI., rr. 12, 16.*

*An action may be dismissed under Order XXXVI., r. 13, for want of prosecution, although notice of trial has been given within proper time, if by reason of non-entry such notice has under rule 16 ceased to be in force.*

THIS was a motion on the part of a defendant asking that the action might be dismissed under Order XXXVI., r. 12, for want of prosecution.

The pleadings had been closed on the 20th March 1884.

Notice of trial in Middlesex had been given on the 1st May, but the trial was never entered.

On the 12th July the defendant gave notice of motion as above, but the plaintiff did not appear.

*E. Ford* for the application.—The court will dismiss the action under Order XXXVI., r. 12, as if notice of trial had not been given; for under rule 16, by non-entry of trial within six days of

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

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notice, the notice ceased to be in force; i.e., the position is now the same as if there had never been any notice (a) of trial at all.

PEARSON, J. made the order, saying that the plaintiff would be able if he chose to move to discharge it.

Solicitor for defendant, *W. Foster*.

### QUEEN'S BENCH DIVISION.

Thursday, July 17.

(Before HUDDLESTON, B. and HAWKINS, J.)

MULKERN AND ANOTHER v. DOERKS. (b)

*Practice—Ejectment—Joinder of causes of action without leave—Waiver of irregularity by appearance—Rules of Supreme Court 1883, Order XVIII., r. 2; Order LXX., r. 2.*

Where a writ of summons was indorsed with a claim for the recovery of land, and also for a debt, without any leave having been obtained to join them, and the defendant entered an appearance thereto, and applied to strike out one or other of these claims:

Held, that the application was too late, as the defendant, by entering an appearance, had "taken a fresh step after knowledge of the irregularity" within the meaning of Order LXX., r. 2.

THE writ in this action was issued on the 6th June 1884, and, as amended, the indorsement was as follows:

The plaintiffs are entitled to possession of two houses formerly known as Nos. 56 and 57, New King's-road, but now being Nos. 24 and 26, Lamont-road, Chelsea, in the county of Middlesex, the defendant having, by deed dated the 13th April 1863, attorned tenant thereof to the plaintiffs, and the plaintiffs having determined such tenancy, and for arrears of subscription, and meane profits, and for a receiver. The following are the particulars of arrears of subscription:

	£	s.	d.
April 1, 1879, to June 1, 1884, sixty-three months at 5 <i>l.</i> 6 <i>s.</i> 4 <i>d.</i> per month .....	341	5	0
Received on account .....	61	10	0
	£279	15	0

This writ was issued and served without the plaintiffs having obtained the leave of the court or a judge under Order XVIII., r. 2, to join the causes of action.

The defendant appeared to the writ, and took out a summons to strike out the claim for possession of the two houses, or in the alternative the claim for arrears of subscription, on the ground that no leave had been obtained to join them. The master refused the application, and gave the plaintiffs leave to join them, and on appeal to Denman, J., in chambers, the decision was affirmed. The defendant appealed.

*A. Yates* for the defendant.—The provisions of (Order XVIII., r. 2, have not been complied with

(a) Order XXXVI., r. 12: If the plaintiff does not within six weeks after the close of the pleadings . . . give notice of trial, the defendant may . . . apply to the court or a judge to dismiss the action for want of prosecution, and on the hearing of such application, the court or a judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the court or judge may seem just.

Rule 16: In London and Middlesex, unless within six days after notice of trial is given the trial shall be entered by one party or the other, the notice of trial shall be no longer in force.

(b) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

in this case, because the leave that the master gave is of no use:

*Pilcher v. Hinds*, 40 L. T. Rep. N. S. 832; 11 Ch. Div. 905:

*Musgrave v. Stevens* (W. N. 1881, p. 168) is not like the present case, because there the writ was properly issued, and the plaintiff applied to add a claim to recover possession of a farm, which, however, the court in its discretion refused. [HAWKINS, J.—Order LXX., r. 2, says that "no application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity." This rule, though not in the Rules of 1875, is the same as rule 135 of H. T. 1853, and in Archbold's Practice, 13th ed., 1194, it is stated that a defendant takes a fresh step within the meaning of that rule by entering an appearance. How can the defendant make this application now?] The defendant was obliged to enter an appearance before he could take out the summons; for if he did not appear he would not be heard. [HUDDLESTON B., referred to Order XII., r. 30.]

*Ashton Cross*, for the plaintiffs, was not called upon.

THE COURT (Huddleston, B., and Hawkins, J.)—The defendant has taken a fresh step after knowledge of the irregularity within the meaning of Order LXX., r. 2, by entering an appearance to the writ, and therefore cannot now successfully make this application.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Poncione and Leggett*.

Solicitor for the defendant, *A. E. Griffiths*.

Saturday, Oct. 25.

(Before GROVE and SMITH, J.J.)

REG. v. BIRON AND OTHERS. (a)

*Practice—Rule under Jervis's Act—Rule for mandamus—Concurrent remedies—Applicant in person—11 & 12 Vict. c. 44, s. 5.*

A rule under sect. 5 of Jervis's Act, and a rule for a mandamus, calling upon justices to show cause why they should not proceed to hear and determine the matter of an application for a summons are concurrent remedies.

A rule under the 5th section of Jervis's Act is not confined to cases where the justices need protection in doing any act relating to their duties.

A rule under this section may be moved for by an applicant in person.

*Reg. v. Phillimore* (51 L. T. Rep. N. S. 205) followed. *Reg. v. Percy* (L. Rep. 9 Q. B. 64) not followed.

IN this case a rule had been obtained under 11 & 12 Vict. c. 44, s. 5, by one Walter Hasker, in person, calling upon R. J. Biron, Esq., Q.C., one of the metropolitan magistrates, and G. F. Goldsborough and William Morrish, to show cause why the said magistrate should not proceed to hear and determine the matter of an application for summonses against the said Goldsborough and Morrish for libel.

Hasker appeared to support the rule in person.

By 11 & 12 Vict. c. 44, s. 5, it is enacted:

And whereas it would conduce to the advancement of

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

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justice, and render more effective and certain the performance of the duties of justices, and give them protection in the performance of the same, if some simple means, not attended with much expense, were devised by which the legality of any act to be done by such justices might be considered and adjudged by a court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him; be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet, and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid.

*G. L. Denman* for the magistrate showed cause.—This is a rule which has been obtained under 11 & 12 Vict. c. 44, s. 5. The proper course, where it is sought to compel a magistrate to do such an act as is here required, would have been by way of *mandamus*, and not by rule under *Jervis's Act*, which only applies where the magistrate needs protection in the performance of his duties:

*Reg. v. Percy*, L. Rep. 9 Q. B. 64.

No doubt this court could exercise its discretion and grant a rule for a *mandamus*, if it seemed just. But if so, it is not the practice of this court to allow an application for a *mandamus* to be made in person:

*Ex parte Wason*, 10 B. & S. 580.

GROVE, J.—The master has drawn our attention to the note of a case, *Reg. v. Phillimore*, decided on the 2nd April of this year by the Lord Chief Justice, Watkin Williams and (ave, J.J., (a) in which *Reg. v. Percy* was not followed. The master's note of that case is as follows: "*Reg. v. Phillimore and others*, Justices, &c. Absolute under *Jervis's Act* with costs against Pilling. The court, on consideration of *Reg. v. Percy*, now hold that the construction placed on 11 & 12 Vict. c. 44, s. 5, is too narrow, and that the order under that section and *mandamus* are concurrent remedies, and may be granted either one or the other at the discretion of the court." We think, having regard to the fact that *Reg. v. Percy* was considered in that case by a court of three judges, that we are bound by the more recent recent decision, and the applicant should be heard in person in support of his rule. Applicant in person heard. (b)

Solicitors for the magistrate, *Hicklin* and *Washington*.

(a) This court was so constituted, it was stated, for the purpose of reconsidering the decision in *Reg. v. Percy*.

(b) The rule was subsequently discharged on the merits with costs against the applicants.

Oct. 31 and Nov. 1.

(Before DENMAN, J.)

BLAKE v. HUMMELL. (a)

*Solicitor*—Bill of costs—Substantial part improperly described—6 & 7 Vict. c. 73, s. 37.

Where a substantial part of a bill of costs is improperly set out and described, and a substantial part is properly set out and described, the whole bill is not bad, but the solicitor can recover upon those items that are properly described.

Where, therefore, in a bill of costs for 51l. 16s. 6d.. a lump charge of 38l. 10s. was made for a number of items lumped together, and the remaining items, amounting to 13l. 6s. 6d., were properly described, it was held that the solicitor could recover upon those items that were properly described.

The dicta in *Haigh v. Ousey* (29 L. T. Rep. O. S. 89; 7 E. & B. 578) followed.

THIS was an action by a solicitor to recover the sum of 51l. 16s. 6d. for work done and money expended by him as solicitor on behalf of the defendant. The defence was, that a signed bill of costs was not delivered a month before action brought.

The case was tried before Denman, J. without a jury on the 31st Oct. when the following facts were proved:—

The defendant employed the plaintiff as his solicitor, and the plaintiff more than a month before the commencement of this action sent in his bill of costs, the bill itself not being signed, but accompanied by a letter signed by him.

The bill of costs, so far as material, was as follows:

The Revd. F. H. Hummel to Edwd. F. Blake.

1881.—Oct. and Nov.—Perusing abstract of the title to Wiloot Lodge, Shanklin. Instructions for requisitions on the title and drawing same, and fair copy. Perusing Mr. Harper's replies thereto. Instructions for assignment. Drawing same, and fair copy for perusal. Engrossing same, and journey to London to examine the abstract, and compelling purchase, including attendances, and correspondence with you and Mr. Harper and Messrs. Dean and Taylor, including travelling and hotel expenses ... 38l. 10s.

1882.—April 1.—Yourself ats. Urry. Attendances on you in reference to this case on which you were summoned for an assault, and conferring thereon and receiving your instructions to attend the petty sessions on the hearing of the case, and attending accordingly on your behalf, when the magistrates considered an assault had been committed, and fined you in the penalty of 2s. 6d. and costs ... 2l. 2s.

The remaining items of the bill were properly described, and a distinct charge placed against each item, and as to them no objection was raised.

By 6 & 7 Vict. c. 73, s. 37, enacts:

From and after the passing of this Act, no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or in the case of a

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill.

C. Dodd for the plaintiff.

T. Terrell for the defendant.

The arguments sufficiently appear from the judgment.

Nov. 1.—DENMAN, J.—This is an action upon a solicitor's bill of costs, and the defence is that no signed bill has been delivered. The defendants relied on the case of *Wilkinson v. Smart* (33 L. T. Rep. N. S. 573), where there was a solicitor's bill containing a number of items with no fixed charges opposite them, but at the end there was put down a lump sum as the agreed amount of costs for all those items; and it was held that that was not a sufficient bill of "fees, charges, and disbursements" within the meaning of sect. 37 of 6 & 7 Vict. c. 73, and that in an action on a bill of costs the party is entitled to demand a full bill of costs, even though an agreed sum is charged. Here the bill was accompanied by a letter properly signed, and so the only question is, Is this a proper bill of fees, charges, and disbursements? All the items are given, except two of 38l. 10s. and 2l. 2s. With the exception of these two items, the bill appears to me to be a proper bill of fees, charges, and disbursements within the meaning of sect. 37 of 6 & 7 Vict. c. 73. Objection is first taken to the item of two guineas as being in reality a lump sum for a number of services rendered. But it appears to me to be sufficiently specific, and it is a charge that can be fairly taxed by the taxing master. Then I come to the objection to that long series of items against which 38l. 10s. is charged as a lump sum without giving the component parts of this lump charge. The items in respect of which this lump charge is made are numerous, and it is impossible to see from the bill what particular sum ought to be charged against each particular item. So far as regards this charge of 38l. 10s. the case is directly within the authority of *Wilkinson v. Smart* (33 L. T. Rep. N. S. 573); and I should have no hesitation in holding that as regards this charge this bill is not a signed bill of fees, charges, and disbursements within the meaning of sect. 37 of 6 & 7 Vict. c. 73. But then there are other items and charges which are properly described in the bill. The question, therefore, that arises is, what is the effect upon a bill of costs of one lumped item that is insufficient, there being several other items that are sufficient? But for one case, which I shall advert to presently, I should have thought that the true way of looking at it would be this: Is this substantially a signed bill of fees, charges, and disbursements? This would be a question of fact to be decided according to the circumstances of each case. Suppose, for instance, in a bill of costs there were two charges made, one a lump sum of 50l. for certain work done, and the other 5s. for writing a letter, no jury would hold that to be a good bill. On the other hand, one can suppose an extreme case in the opposite direction in which a jury would hold that substantially it was a good bill. I have searched, but have not been able to find any case that decides that this is the proper way of looking at the question. The question, therefore, that arises here is, supposing

a substantial part of the bill is properly set out and described, but another substantial part is improperly set out and described, can the solicitor recover upon that which is properly set out and described, or is the whole bill bad because a substantial part is bad? There is a case of *Haigh v. Ousey* (29 L. T. Rep. O. S. 89; 7 E. & B. 578), in which there are strong dicta that the former is the proper way of dealing with a bill of costs. The judges there decided that the items objected to were properly described; but they went on to say that, even if some of the items had been improperly described, the solicitor might, notwithstanding, recover for the items in his bill sufficiently described. This, though not actually necessary for the decision, is so strong that I feel bound to follow it. Here, then, there being an item improperly described, and a lump sum charged for it, which the master cannot possibly tax, I order that this sum (38l. 10s.) be struck out of the bill, and that the plaintiff have judgment for the balance, namely, 13l. 6s. 6d.

Judgment accordingly.

Solicitor for the plaintiff, T. Durant, for E. F. Blake, Newport, I. W.

Solicitor for the defendant, A. F. Church.

#### QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

May 29 and June 10.

(Before CAVE, J.)

Re LOWENTHAL; *Ex parte* BEESTY. (a)

Bankruptcy Act 1883, s. 102 — Jurisdiction — Questions between third parties.

A bankrupt having purchased certain sheepskins for B., who had paid to him a part of the price, deposited the delivery warrants for the said goods at his bankers by way of pledge to secure advances. On an application on the part of B. that the warrants might be delivered to him:

Held, that the question was not such a one as is referred to in sect. 102 of the Bankruptcy Act 1883, and was not a question arising in the bankruptcy within the meaning of sect. 102, and that its decision was not necessary for the purpose of doing complete justice or making a complete distribution of the property; but where the trustee has a higher and better title than any one else, there the court has and ought to exercise a jurisdiction.

LOWENTHAL, the bankrupt, had been instructed by Mr. Beesty, the person on whose behalf the present application was made, to purchase for him certain sheepskins to the value of 1750l. He purchased the said skins, and received of Mr. Beesty a part of the purchase money. Having purchased the skins Lowenthal warehoused them in his own name, and deposited the delivery warrants with Messrs. Glyn, Mills, and Co. by way of security for an advance. Lowenthal subsequently became bankrupt, and this was an application under sect. 102 of the Bankruptcy Act 1883 for an order that the delivery warrants should be handed over to Beesty by the equitable mortgagees.

Beddall in support of the application.

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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*Linklater* for Glyn, Mills, and Co.—I have a preliminary objection, which is, that your Lordship has no jurisdiction to make the order which is asked for. Sect. 102 of the Bankruptcy Act 1883 does not extend, but rather limits, the ancient jurisdiction of the Bankruptcy Court as to the decision of questions between third parties. The only part of the section which is new is that which limits the powers of County Courts. There is a noticeable tendency in the decisions under the old Act, of which there is a long series, to limit the jurisdiction of the court to cases in which the trustee claims by a higher and better title than anyone else. If it were necessary to argue the case upon the merits I should have a defence under the Factories Acts, but for the present I confine myself to the question of jurisdiction. It must be remembered here that the trustee does not put in any claim at all; but the jurisdiction of the Bankruptcy Court only extends to cases in which the trustee claims by a higher and better title than anyone else. I have a right to demand to be heard before a jury:

*Ellis v. Silber*, 28 L. T. Rep. N. S. 150; L. Rep. 8 Ch. App. 33;  
*Ex parte Dickinson*; *Re Pollard*, 38 L. T. Rep. N. S. 860; 8 Ch. Div. 377;  
*Ex parte Brown*; *Re Yates*, 40 L. T. Rep. N. S. 402; 11 Ch. Div. 148.

*Beddall, contra.*—The old cases are now of no authority, for the constitution of the Bankruptcy Court and its jurisdiction are now entirely different from what they used to be. The old Court of Bankruptcy had a separate jurisdiction, but the bankruptcy judge is now a judge of the Queen's Bench Division, and sits as such. I read sect. 102 of the Bankruptcy Act 1883 differently, and contend that the special limitation of the authority of the County Courts implies an intention of extending that of the High Court:

*Halliday v. Harris*, L. Rep. 9 C. P. 668.

*Linklater* in reply.

*Curr. adv. vult.*

June 10.—CAVE, J.—In this case Mr. Beddall moved on the part of Mr. Beesty for an order on Messrs. Glyn and Co. to deliver up to him the warrants of some sheepskins which had been deposited with them by the bankrupt by way of pledge to secure advances. The bankrupt purchased certain skins, including those in question, for Mr. Beesty for the sum of about 1750*l.*, of which Mr. Beesty has paid 1500*l.* The bankrupt has warehoused some of the skins in his own name, and subsequently pledged the warrant with Messrs. Glyn and Co., who claim to be entitled to hold them under the Factors Acts until their advances have been repaid. Mr. Linklater, who appeared for them, took a preliminary objection that this court had no jurisdiction to make the order, and as the case is one of general importance I took time to consider my judgment. The Court of Bankruptcy has exclusive jurisdiction over personal claims against the bankrupt, which are provable in bankruptcy, and also over the assets of the bankrupt which come into the hand of the trustee to be administered, and the debtors and the creditors as the parties to the administration in bankruptcy, and the trustee as the person interested in that administration, are subject to that jurisdiction. The Court of Bankruptcy, by sect. 72 of the Act of 1869, was invested with

jurisdiction over third parties for the purpose of deciding all questions of priorities and all other questions whatsoever which might arise in any case of bankruptcy coming within the cognisance of the court, or which the court might deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. The jurisdiction so given was, it should be noticed, concurrent and not exclusive, and moreover was discretionary and not to be invoked as of right. The cases which were decided upon this section established, first, that where by the operation of the law of bankruptcy the Court of Bankruptcy had jurisdiction under this section it ought to exercise that jurisdiction (*Ex parte Brown, ubi sup.*), unless (in the case of a County Court) a large amount was at stake (*Ex parte Armitage*, 17 Ch. Div. 13; *Ex parte Price*, 21 Ch. Div. 553; 47 L. T. Rep. N. S. 409); secondly, that where the trustee claimed only the same right as the bankrupt himself would have had, the Court of Bankruptcy, if it had jurisdiction under sect. 72, ought not to exercise it (*Ex parte Dickinson, ubi sup.*; *Ex parte Brown, ubi sup.*); and, thirdly, that the Court of Bankruptcy had no jurisdiction to entertain personal claims between third parties, or claims of priority as between third parties, although the decision of such question might also decide which of such third parties should prove against the bankrupt's estate. It is with the third proposition alone that I am now concerned, and I will shortly refer to the authorities by which it is supported. In *Ex parte Lyons* (L. Rep. 7 Ch. App. 494) the Court of Appeal held that the Court of Bankruptcy had no jurisdiction to set aside, on the ground that it had been obtained by pressure, a bill of sale given by a debtor who had effected a composition to secure a bill of costs of a receiver appointed under the petition for liquidation. In that case James L.J. observed: "The world has already been startled at the extent of the jurisdiction assumed by the Court of Bankruptcy under sect. 72, and it behoves us to be careful before we enlarge it, and before we allow any branch of the Court of Bankruptcy to set aside solemn deeds on equitable grounds, merely because they had their inception in or were somehow connected with bankruptcy proceedings. The case does not come within sect. 72, the object of which is to provide a summary remedy in matters relating to the distribution of the estate, or otherwise arising from or really connected with bankruptcy proceedings. I should be sorry to limit the jurisdiction of the court as to anything which can be said to be a matter incidental to the bankruptcy proceedings. But it does not follow, because there has been a relation between two parties founded on bankruptcy proceedings, that every dealing between them having any connection with that relation is drawn within the jurisdiction of the Court of Bankruptcy." In *Re Motion* (29 L. T. Rep. N. S. 757; L. Rep. 9 Ch. 192) Selborne L.C. says: "Sect. 72 gives the court a very large authority to decide such questions as it may be found necessary or convenient to determine for the proper purposes of the administration in bankruptcy, but it does not, as we understand it, at all enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property or the owners of property not vested in

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the assignee and not originally subject to the administration in bankruptcy." The same language is used by James, L.J. in *Ex parte Pannell* (37 L. T. Rep. N. S. 450; 6 Ch. Div. 335). In *Ex parte Smith* (2 Ch. Div. 51) Hopwood and Co. alleged that Collie, who subsequently became bankrupt, had bought goods of them by the authority of Smith, Wood, and Co., and sued Smith, Wood, and Co. for the price. They brought in the then trustee of Collie as a third party, and James and Mellish, L.J.J. held that the Court of Bankruptcy had no jurisdiction to try the question between Hopwood and Son and Smith, Wood, and Co. *Halliday v. Harris* (L. Rep. 9 C. P. 668) was cited by Mr. Beddall, but that case only establishes, what cannot I think be denied, that sect. 72 gave to the Court of Bankruptcy jurisdiction to determine as matter of fact the expediency or necessity for entertaining and deciding any question which affects the realisation and distribution of the property of the bankrupt, and that an erroneous determination as to the existence of such expediency or necessity is matter of appeal and not of prohibition. Since these cases were decided the Act of 1869 has been repealed, and the Act of 1883 substituted for it, and sect. 102 of the later Act contains the same provisions as that in sect. 72 of the Act of 1869, with the following addition: "Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceedings consent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds." In my judgment this provision cannot add anything to the jurisdiction given by the preceding words, but can at most only regulate the exercise of the jurisdiction where it exists, and the cases which I have cited, as establishing the third proposition, are therefore unaffected by it. The question in this case does not, in my judgment, arise in the bankruptcy within the meaning of sect. 102, nor is it necessary to decide it for the purpose of doing complete justice, or making a complete distribution of the property. The trustee does not claim any interest in the property in dispute, and although the decision of this question between Mr. Beesty and Messrs. Glyn and Co. will determine which of them is to prove in the bankruptcy in respect of the value of these skins, just as the decision of the question in *Ex parte Smith* (*ubi sup.*) determined which party was to prove in the bankruptcy for the value of the goods sold by Hopwood and Son, yet, in my judgment, that is not such a question as is referred to in sect. 102. It might with as much reason be said that if a creditor made a claim upon a surety for the bankrupt, and the surety alleged that he had been discharged by, for instance, time having been given to the bankrupt, the Court of Bankruptcy had authority to decide that question, because the result would be to determine whether the creditor or the surety should be the person to prove against the estate of the bankrupt. The motion must be refused, but without prejudice to any action that Mr. Beesty may be advised to bring against Messrs. Glyn and Co., and under the circumstances I think there should be no

order as to costs. The official receiver will take his costs out of the estate.

*Motion refused without costs.*

Solicitors for Mr. Beesty, *Stevens, Bawtree, and Stevens.*

Solicitors for the bank, *Murray, Hutchins, and Sterling.*

Solicitor for the official receiver, *W. W. Aldridge, the Official Solicitor.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, June 18.

(Before BAGGALLAY, COTTON, and LINDLEY, L.J.J.)

HOLGATE v. SHUTT. (a)

*Practice—Account—Order silent as to settled account—Audited accounts of building society—Impeaching for fraud.*

In an action brought by three members of a building society, on behalf of all the members except the defendant, against the secretary, for an account of all moneys and property of the society come to his hands as such secretary, an order was made by consent for an account. The order was in general terms, nothing being said as to settled accounts being taken as conclusive. By one of the rules (rule 7) of the society "the books of the society . . . shall be audited every twelve calendar months by auditors appointed by the society, and signed by such auditors to denote the accuracy in the secretary's book . . . After each auditing and signing, the secretary . . . shall not be answerable for any mistakes, omissions, or errors that may be proved in such accounts hereafter."

Held, that the ordinary rule, that settled accounts are not conclusive unless the judgment so directed, did not apply, inasmuch as the parties had agreed by the rules that audited and signed accounts should be conclusive; but that the rule of the society was no protection to the secretary in case of fraudulent statements in, or omissions from the account being proved.

This action was commenced on the 23rd Nov. 1883, the plaintiffs, James Holgate, Edmund Barlow, and Parkinson Heys, suing on behalf of themselves and all other the members of the No. 2 King's Arms Hotel Benefit Building Society, other than the defendant, who was Thomas Shutt, the secretary, and also a member of the society.

By their writ of summons the plaintiffs claimed to have an account taken of all moneys of the society come to the hands of the defendant; payment of the amount of such moneys; and the appointment of a receiver.

On the 14th Dec., before any pleadings had been delivered, the plaintiffs moved before Bacon, V.C. for the appointment of a receiver, and his Lordship ordered the defendant to pay into court 358l. 1s. 6d., money in his hands as trustee for the society, and appointed a receiver, and, the

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defendant consenting (though his consent was not mentioned in the order), ordered to be taken "an account of all moneys and property of the said society come to the hands of the defendant, or to the hands of any other person or persons by his order or for his use."

The order contained no direction that settled accounts should not be disturbed, or that they ought to be opened.

The defendant paid the 35*l.* 1*s.* 6*d.* into court, and carried his account into chambers.

The plaintiffs objected to certain items in the account brought in, but the defendant contended that, as the items were contained in certain accounts which had been audited, those items could not be inquired into; but the chief clerk decided that these accounts might be opened, and that, as there was no special direction in the order, the plaintiffs were entitled to have a general account taken.

Bacon, V.C., to whom the matter was referred, decided in chambers that, notwithstanding the omission from the order of a special direction, the audited accounts must stand on the same footing as settled accounts, and that the plaintiffs were bound by them.

Rule 7 of the society's rules was as follows:

That the secretary and vice-president shall keep separate accounts of all money paid by the members at each monthly meeting, and that the president shall receive the same from each member, and if the secretary's and vice-president's books agree with the cash received, the president shall sign his name in the vice-president's book, to denote the accuracy thereof. The secretary shall report upon the state of the accounts to the society at all times when required; on default thereof, he shall pay a fine of five shillings. The books of the secretary, vice-president, and treasurer shall be audited every twelve calendar months by auditors appointed by the society, and signed by such auditors to denote the accuracy in the secretary's book. That each auditor shall be remunerated for his trouble, the amount to be determined by the committee for the time being. After such auditing and signing, the secretary and treasurer shall not be answerable for any mistakes, omissions, or errors that may be proved in such accounts hereafter.

Bacon, V.C. not requiring the matter to be re-argued in court, the plaintiffs appealed to the Court of Appeal, asking that in taking the account the audited accounts of the society referred to in rule 7 might be disregarded.

*F. C. J. Millar, Q.C.* and *Farwell* for the appellants.—These accounts are not settled accounts, and if they were the defendant could not rely on them in the absence of a special direction in the order that they were not to be disturbed. Such a direction is only inserted where a settled account has been insisted on and proved at the hearing:

*Buckeridge v. Whalley*, 10 L. T. Rep. N. S. 222;  
*Daniell's Chancery Practice*, 5th edit. p. 1136;  
*Fitzpatrick v. Mahony*, 1 J. & L. 84.

There was enough evidence below to make a case for opening any settled account; one item appeared to be fraudulent. [COTTON, L.J.—To open a settled account you must show fraud in, or a material omission from, that account.] It is sufficient to show fraud in any one entry in the accounts. The defendant never set this account up as a settled or audited account before it was impeached in chambers. The onus of showing the account to be correct lies on the accounting party. They also cited

*Seton on Decrees*, 4th edit. p. 796.

*Marten, Q.C.* and *Hamilton Humphreys* for the

defendant.—The defendant is protected by rule 7 of the society's rules. We do not go so far as to say that he would be protected in case a fraud had been committed, but the account is binding on the plaintiffs until they make out a special case of fraud. If that is done they can surcharge and falsify under the order as it stands at present, and therefore there was no necessity to bring this appeal.

BAGGALLAY, L.J.—In form this is an appeal from the decision of Bacon, V.C. refusing the application of the plaintiffs. That application was that, in taking the accounts against the defendant, the audited accounts referred to in rule 7 of the society's rules might be disregarded. My opinion is that, having regard to the order made, the appeal must fail. But the question which has really been argued lies behind the precise form of the application. The defendant against whom the account was directed was the secretary of the society, and he is in a position of a trustee against whom an order for accounts has been made by consent. He now seeks to rely upon rule 7, which provides that after the auditing and signing of the accounts the secretary and treasurer shall not be answerable for mistakes or omissions which may afterwards be discovered. But it appears to me that rule could afford no protection if the audit had been obtained by fraud, or if the account contained representations of a fraudulent character. Neither the secretary nor the members can be presumed to have been unaware of this rule, and *prima facie*, in the absence of anything specifically impugning them, the accounts, which have been properly audited under the rules, ought to be accepted in chambers in taking the account which has been ordered against the defendant. Any attempt to go behind the account on the ground of fraud would scarcely be disturbing settled accounts, but would be acting in contravention of the rule as to audited accounts. But the defendant cannot avail himself of the rule if a proper case of fraud is made out. Any of the accounts may be impeached by the plaintiffs surcharging and falsifying, if a proper case of fraud is made out. If that is the true view of the case, an investigation might be made under the order of the Vice-Chancellor as it stands. But it seems that in chambers a view was intimated that the audited accounts were absolute, and could not be opened even on the ground of fraud, and there appears to have been a general impression that the account would be taken upon that footing. That must be guarded against, and therefore, although we dismiss the appeal, we will preface the order by a recital to the effect that on taking the account it will be competent to the plaintiffs to raise sufficient grounds why the audited accounts should not be taken as binding.

COTTON, L.J.—I agree that this will be the proper course. The appeal comes before us in an improper way, for it does not raise the question which has been argued. It is said that the accounts were not duly audited under rule 7; but we cannot enter into the question whether the accounts relied upon by the defendant are such as are required by the rules of the society, and to which protection is given by rule 7. The summons asks that the accounts may be disregarded, even assuming they were duly audited.



We must assume that any accounts relied upon will be properly audited ones. It is not a question of settled accounts, but of what effect is to be given to rule 7. The summons is therefore wrong in form. The defendant is, *prima facie*, on bringing in accounts properly audited, entitled to the protection of this rule. But the rule can be no protection against fraud, and if it is shown that any item has been entered fraudulently, or any omission or error has been fraudulently made, the rule will not be a protection; it will only protect an honest error. The order will be: This court being of opinion that, though the accounts, if properly audited and signed, are *prima facie* evidence, it is competent to the plaintiffs to impeach such accounts upon the ground of fraud, if proved. Dismiss the appeal.

LINDLEY, L.J.—That will make the order right. We must be careful, considering the changes in the rules as to pleading, not to lay down an improper rule. When there are no pleadings we must take care not to allow accounts like these to be treated as waste paper. The plaintiff's case has been put too high. If, however, a case of fraud can be made out, an opportunity must be given for impeaching the accounts.

*Appeal dismissed with costs.*

Solicitors: Pritchard, Englefield, and Co.; Johnson and Weatheralls.

Wednesday, July 30.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re CARTHEW.

Re PAULL. (a)

*Solicitor—Taxation of costs—Costs of taxation—Solicitors Act 1843 (6 & 7 Vict. c. 73), ss. 37, 38, 41—Judicature Act 1873, s. 17—R. S. C. 1883, Order LXV.*

*A solicitor who has delivered to his client a bill of costs, offering at the same time to take less than the full amount, cannot, when on taxation such full amount is reduced by more than one-sixth, claim that the amount so taxed off shall be deemed to be diminished by the amount which he has himself offered to remit, and that the taxation has therefore reduced his bill by less than one-sixth, so as to entitle him under sect. 37 of the Solicitors Act 1843 to escape the costs of taxation.*

*A bill of costs was delivered for "83l. 3s. 4d.—say 78l.," and signed by the solicitor. It was afterwards referred for taxation, and taxed and settled at 66l. 3s. 4d.*

*Held (reversing the decision of Chitty, J.), that the "bill delivered," within the meaning of the Solicitors Act 1843, was for 83l. 3s. 4d., and that, as more than one-sixth of that amount had been disallowed, the solicitor must pay the costs of taxation.*

*A solicitor delivered to his client a bill of costs for 360l., offering to take 320l. The client having insisted on taxation, the 360l. bill, with the offer, was carried in, and reduced by the taxing master to 280l. The taxing master made a special certificate.*

*Held, that, as there were special circumstances, the court had a discretion as to the costs of the taxation under the proviso in sect. 37 of the Solicitors*

*Act 1843, and that as 40l. had been taxed off over the sum claimed, the solicitor must pay the costs of the reference.*

*The decision of Pearson, J. (50 L. T. Rep. N. S. 585) affirmed.*

*Semble, that the one-sixth rule in sect. 37 of the Solicitors Act 1843 is not abrogated by sect. 17 of the Judicature Act 1873 and R. S. C. 1883, Order LXV.*

THE cases of *Re Carthew* and *Re Paull* were heard on the same day in the Court of Appeal. At the conclusion of the argument in the former case, their Lordships decided that before delivering judgment they would hear the argument in *Re Paull*. The judgments in the two cases were afterwards delivered at the same time.

In *Re Carthew* a summons was taken out by the residuary legatee under the will of Mr. J. B. Ogilvie to review the taxation of a bill of costs delivered by Mr. G. H. Carthew. The executors of Mr. Ogilvie had instructed Mr. Carthew to take the necessary steps to wind-up the estate.

Mr. Carthew's bill of costs, which consisted of many items, as delivered to the executors, amounted to 83l. 3s. 4d., but underneath these figures was written "say 78l." No letter accompanied the bill, but in a cash account delivered by Mr. Carthew to the executors, he credited himself with the sum of 78l. for costs "as to executorship," &c. The 78l. was paid by the executors.

On the taxation the taxing master certified that the bill of fees "amounting to 78l., I have taxed and settled the same at the sum of 66l. 13s. 4d., and the said bill as taxed not being less by a sixth part than the said bill as delivered, I have taxed the said G. H. Carthew his costs of this reference at," &c.

The summons to review the taxation was adjourned into court, and heard before Chitty, J. on the 28th May.

*Badcock* in support of the summons.—The bill as delivered was for 83l. 3s. 4d. The sum taxed off, 16l. 10s., was more than one-sixth of that amount, and therefore by sect. 37 of the Solicitors Act 1843 the costs of taxation must be borne by the solicitor who delivered the bill.

*Romer, Q.C. and V. R. Smith* for Mr. Carthew.

CHITTY, J.—I think the taxing master is right. Suppose the case of a bill of costs delivered by a solicitor for 100l., showing the items in detail, and that in the cash account which accompanies the bill, and at the foot of the bill, the solicitor says that instead of 100l. he will take 80l. If the parties go to taxation and the taxing master takes 20l. off the 100l., the result is that, as the client has still to pay 80l., he gets no benefit at all from the taxation; and although 20l. is more than one-sixth of 100l. it appears to me that the costs in such a case fall upon the party who obtains the taxation. I see no difference between that case and this. In this case the taxing master says that the bill delivered amounts to 78l., that he has taxed it at 66l. 13s. 4d., and that the bill as taxed not being less by a sixth part than the bill as delivered he has taxed the solicitor's costs of the reference. I think what he has done is quite right, and therefore I dismiss the summons with costs.

In *Re Paull*, H. Paull, a solicitor, delivered

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

to a certain client a bill of costs in respect of fees and disbursements amounting to 361*l.* 19*s.* 2*d.*, stating at the foot that he claimed only 320*l.* 16*s.* 6*d.*

The client, however, at first refused to pay the amount claimed, but subsequently paid the amount. Afterwards, on the 1st June 1883, he applied for and obtained an order for taxation.

The same bills were sent in for taxation, with the same offer repeated to accept 41*l.* 2*s.* 8*d.* less than the full amount.

On the 13th March 1884 the taxing master made his certificate, whereby he taxed the bill at 280*l.* 15*s.* 6*d.*, and gave the solicitor his costs of taxation (27*l.* 6*s.* 8*d.*), on the ground that the bills as taxed were not less by one-sixth than the amount claimed; and he disallowed objections to this decision, his reason for so doing being specially stated in the certificate as follows:

The solicitor stated an account with his clients, and in it gave credit for a sum of 320*l.* 16*s.* 6*d.*, his costs for work done for them, but he delivered no detailed bill of costs with the account. In pursuance of the order the solicitor delivered bills of costs amounting to 361*l.* 19*s.* 2*d.*, but he claimed as before 320*l.* 16*s.* 6*d.* only. I am of opinion that I ought not to disregard the fact that the solicitor's claim has never been 361*l.* 19*s.* 2*d.*, the amount of the bill delivered, but 320*l.* 16*s.* 6*d.* only, and that, in considering the disallowances, he was entitled to have it considered that 41*l.* 2*s.* 8*d.* had been voluntarily abandoned, and should be deducted from the disallowances, so reducing them to 40*l.* 1*s.*, which is not one-sixth of the amount claimed by him, and I decided that, on that footing, the solicitor is entitled to the costs of the taxation, not including, however, any costs relating to the order for delivery of the bill.

The client took out a summons to vary the certificate as regards the costs of taxation, and the summons having been adjourned into court before Pearson, J., his Lordship, on the 23rd May, held that, as the 280*l.* 15*s.* 6*d.* must be deducted from 361*l.* 19*s.* 2*d.*, the difference (81*l.* 3*s.* 8*d.*) was more than one-sixth of 361*l.* 19*s.* 2*d.*, and that the costs of the reference must therefore be paid by the solicitor: (50 L. T. Rep. N. S. 585.)

The residuary legatee in *Re Carthew* and the solicitor in *Re Paull* respectively appealed.

*Kekewich*, Q.C. and *Badcock* for the appellant in *Re Carthew*.—By sect. 37 of the Solicitors Act 1843 the solicitor is to deliver a "bill of fees, charges, and disbursements," which is to be "subscribed," and if the bill when taxed is less by a sixth part than "the bill delivered," the solicitor shall pay the costs of the reference. If such bill when taxed is not less by a sixth part than "the bill delivered," the party chargeable with such bill shall pay such costs. The whole bill, which gives the items and amounts to 83*l.* 3*s.* 4*d.*, is the bill which was delivered and taxed, and 16*l.* 10*s.*, the amount taxed off, is more than one-sixth of this amount; therefore the solicitor must pay the costs of the reference. The taxing master could not tax the 78*l.*, for it contains no items, and therefore is not a bill of costs at all:

*Wilkinson v. Smart*, 33 L. T. Rep. N. S. 573.

In the similar case of *Re Paull* (50 L. T. Rep. N. S. 585) Pearson, J. directed that the solicitor must bear the costs of the reference.

*Romer*, Q.C. and *V. R. Smith* for Mr. Carthew.—The signature of the solicitor was subscribed to the 78*l.* All he claimed was that sum. [*BAGGALLAY*, L.J.—Suppose the bill had been taxed at 80*l.*, could the solicitor have been compelled to

take 78*l.*?] Yes. [*COTTON*, L.J.—Does it not mean that 78*l.* will be taken if paid at once?] No; all that was ever claimed was 78*l.*, and that sum was actually paid before the order for taxation was obtained.

*Kekewich* replied.

*E. W. Byrne* for the appellant in *Re Paull*.—The meaning of the statute is, that on taxation what is to be dealt with is the charge actually made, and Mr. Paull has clearly only charged 320*l.* 16*s.* 6*d.*, the smaller sum. The principle is, that if he has made an overcharge to the extent of one-sixth of the total amount claimed, he is to pay the costs of the reference. The amount taxed off the 320*l.* 16*s.* 6*d.* is only 40*l.* 1*s.*, which is not one-sixth, and therefore the solicitor is not liable to the costs of the reference even under the statute. But that rule is now abolished. The combined effect of sect. 17 of the Judicature Act 1873 and the order under it (R. S. C. 1875, Order LV.; R. S. C. 1883, Order LXV.) is, with certain exceptions—of which this is not one—to repeal all previous enactments directing costs to follow certain rules, and to place costs in the discretion of the courts:

*Re Mercers' Company*, 10 Ch. Div. 481.

[*COTTON*, L.J.—That decision is not binding on this court, and I must not be taken as assenting to it.] It is founded on the decision of the House of Lords in *Garnet v. Bradley* (39 L. T. Rep. N. S. 261; 3 App. Cas. 944). [*COTTON*, L.J. referred to *Re Knight's Trusts*, 50 L. T. Rep. N. S. 550; 26 Ch. Div. 82.] The taxing master having made a special certificate the costs are within the discretion of the court under sect. 37 of the Solicitors Act. He also cited

*Dicks v. Yates*, 44 L. T. Rep. N. S. 660; 18 Ch. Div. 76.

*V. R. Smith*, for the respondents, was not called upon.

*BAGGALLAY*, L.J.—These appeals both have reference to the taxation of costs. In *Re Carthew* the order for taxation was obtained at the instance of a third party, and therefore is under sect. 38 of the Solicitors Act 1843. We are driven back, however, to sect. 37 to ascertain what rules apply. [His Lordship read the material portion of the section, and continued:] In this case the amount of the bill delivered was 83*l.* 3*s.* 4*d.* Under that was written, "say 78*l.*" Following that was the signature of the solicitor. There was no letter accompanying the bill, and we can only infer what the intention of the solicitor was from the bill itself. It is not necessary that we should have a very decided opinion as to what it was, but it appears to me that what was meant was this, "The amount of the bill is 83*l.* 3*s.* 4*d.*, but I am willing to take 78*l.* If you do not accept this offer I am at liberty to claim the larger amount." But the actually delivered bill is for 83*l.* 3*s.* 4*d.* This bill was taxed at 66*l.* 13*s.* 4*d.*, there being a deduction therefore of 16*l.* 10*s.* If the amount of the bill delivered is to be taken as 78*l.*, there is only a deduction of 11*l.* 10*s.* The amount deducted is therefore more than one-sixth if the larger sum is the amount of the bill, but less than one-sixth if the bill only amounted to 78*l.* Therefore whether one-sixth has been taxed off depends on whether the amount of the bill was 83*l.* 3*s.* 4*d.* or 78*l.* The words of the statute are imperative,

and the statute says that if the bill when taxed be less by a sixth part than the "bill delivered," the solicitor shall pay the costs. The statute certainly provides that the officer shall in all cases "be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon any such order as such court or judge may think right respecting the payment of the costs of such taxation." But except where there is a special certificate, the one-sixth rule is imperative. Chitty, J. has held that the amount of the bill was the smaller sum. I am of opinion that 83*l.* 3*s.* 4*d.* is the amount of the bill delivered, and that as more than one-sixth of that sum is to be deducted, the appeal must be allowed. In *Re Paull* the circumstances are rather different. The order for taxation in this case was not made under sect. 38, but, the bill having been paid, under sect. 41. The total of the bill delivered was 361*l.* 19*s.* 2*d.*, but the solicitor stated at the foot that he only claimed 320*l.* 16*s.* 2*d.* If the bill is taken as for the larger amount, the amount taxed off, 81*l.* 3*s.* 8*d.*, is more than one-sixth; and even if the case stood there, I should hold, as in *Re Carthew*, that the taxation was of a bill delivered as for the larger amount. But in this case the proviso in sect. 37 is to be considered, and I agree with Mr. Byrne that the special circumstances stated in the certificate of the taxing master bring the case within the proviso, and give the court power to exercise a discretion as to the costs. But, in my opinion, there is nothing in the circumstances to induce the court to depart from the ordinary rule in these cases. It would be a very serious thing if a solicitor could deliver a bill amounting to a certain sum, but offering to take a less amount which would be more than the amount allowed on taxation. The effect would be that, when the larger amount was more than one-sixth too much if he fixed the amount that he would take at such a figure as would not make that sum too much by one-sixth, the client would have to pay the costs of the reference. I see no reason to differ from Pearson, J.

COTTON, L.J.—I will not repeat the facts in *Re Carthew*. What is the meaning of the Act of Parliament when it speaks of a "bill delivered?" The bill delivered stated certain items, and was for 83*l.* 3*s.* 4*d.* Although the solicitor wrote at the foot of it, "say 78*l.*" no bill was delivered for that sum, and I quite agree with what Baggallay, L.J. has said as to that. The amount taken off on taxation was more than one-sixth of the 83*l.* 3*s.* 4*d.*, and as no special circumstances are stated in the certificate, it follows, from the words of the statute, that the solicitor must pay the costs of the reference. In *Re Paull* I think Pearson, J. was right in ordering the solicitor to pay the costs. Assuming that special circumstances are certified in this case, the order for taxation imposed no terms. The sum of 40*l.* has been deducted even from the lower amount, and although it is not one-sixth of that amount, it is such a large sum that I think it would be wrong to throw the costs of taxation on the successful client. So that, even if we have a discretion, we ought to exercise it in the ordinary way. This makes it unnecessary to consider whether, under the general discretion as to costs given under the Judicature Act, we can disregard the provisions of the Solicitors Act.

LINDLEY, L.J.—I agree in both cases. In *Re Carthew* it is clear on the Act of Parliament that the bill delivered was for 83*l.* 3*s.* 4*d.*, and that the solicitor meant by the foot-note that he would take 78*l.* to save trouble. *Re Paull* stands on a somewhat different footing. The taxing master treated the bill as being for the larger sum, but stated in his certificate special reasons, in his opinion, why the solicitor ought not to pay the costs of the reference. The case can therefore be considered as one of special circumstances, giving a discretion as to costs. Pearson, J. has exercised that discretion, and I see no reason why we should differ from him. The amount taken off, if only 40*l.*, is still a considerable sum.

*Appeal in Re Carthew allowed; appeal in Re Paull dismissed.*

Solicitors for the appellant in *Re Carthew*, Gregory, Rowcliffes, and Co.

Solicitor for the respondent in *Re Carthew*, G. H. Carthew.

Solicitors for the appellant in *Re Paull*, Whitakers and Woolbert.

Solicitors for the respondents in *Re Paull*, Peacock and Goddard.

Aug. 4, 5, and 8.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Ex parte DEVERS; Re SUSE. (a)

Bankruptcy—Bill of exchange—Consignments—Specific appropriation.

On the 16th March 1883 S. and S., who were merchants and bankers in London, granted to Q., a merchant at Shanghai (at the request of M., a London merchant acting as his agent), a letter of credit authorising Q. "to draw on us, at four months' sight, for any sums not exceeding 20,000*l.* such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased according to order of M., and shipped by steamers to London, and marine policies relating thereto, and those documents to be surrendered to us against our acceptances." The document continued: "And we hereby agree with you, and also as a separate engagement with the bona fide holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn and negotiated on or before the 31st Dec. 1883." It was also agreed that S. and S. should receive commission at 1 per cent. on all drafts drawn under this credit, and that M. should meet all their acceptances before their due dates, "the usual rate of 2½ per cent. being allowed on all prepayments."

Q., in May and June 1883, drew, under the letter of credit, bills on S. and S. for 18,000*l.* against tea consigned by him to M., each bill mentioning the date of the letter of credit, and purporting to be drawn under it against a particular consignment of tea, "as per shipping documents herewith." The shipping documents were attached to the bills, and Q. advised S. and S. by post of the drawing of each bill, mentioning the tea against which it was drawn, and the name of the ship by which it was sent. The bills all matured between the 28th Oct. and the 24th Nov. Q. discounted each bill with a bank in China, and the

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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bank forwarded the bill and shipping documents to their London agents, who obtained the acceptances of S. and S., the shipping documents being then delivered to S. and S. As the tea arrived in London it was warehoused in the name of S. and S., who from time to time gave warrant or delivery orders for parcels to M., who gave them cheques for the value of the parcels. The amount of the cheques was carried to the credit of M. in a special account in the books of S. and S., and M. was also credited with 2½ per cent. for prepayment, and was debited with the amounts of the bills and with freight and other charges. The cheques were paid into the current banking account of S. and S., and the proceeds were applied in the ordinary course of their business. In October, before the bills had matured, S. and S. stopped payment, and on the 9th Oct. filed a petition for liquidation. Some consignments of tea remained in specie at the time of the stoppage.

*Held*, that Q. was entitled to have the tea in specie applied in payment of the bills on the ground that it had been specifically appropriated to meet them, but that the bank which had discounted the bills was not entitled to have the proceeds of sale of the teas previously sold so applied.

Frith v. Forbes (7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409) distinguished.

W. V. SENTANCE was a merchant carrying on business at Shanghai, in China; J. S. Mussett was a merchant carrying on business in London; Messrs. W. E. Sibeth, C. J. Sibeth, Albert Sibeth, and C. F. T. Sibeth were merchants and bankers carrying on business in London under the firm of Suse and Sibeth.

In and prior to 1883 Sentance was in the habit of making consignments of tea to Mussett.

On the 16th March 1883 Mussett applied to Suse and Sibeth to grant a credit of 20,000l. to Sentance, which they agreed to do on the terms embodied in a letter which was written subsequently the same day by Mussett to them. The material part of the letter was as follows:

In accordance with my verbal arrangement of this morning I will thank you to send your confirmed credit to Mr. W. V. Sentance of Shanghai for the 20,000l., to be used by him against shipments of tea to this port. Marine insurance to be effected in China, and, in addition to the usual documents accompanying the drafts, there will be the marine policies of first-rate China companies settling claims in London. Mr. W. V. Sentance takes one-half share in this insurance. With regard to the other half share it is understood you are to have the option till end of this month of deciding whether you will participate in the venture, and to what extent. Should you not participate, then the customary banking commission of 1 per cent. is to be paid you on all drafts drawn under this credit. It is further arranged that I meet all your acceptances on or before their due dates, the usual rate of 2½ per cent. being allowed on all prepayments.

On the same day Suse and Sibeth addressed the following letter of credit to Sentance:

At the request of Mr. J. S. Mussett, of this city, we hereby authorise you to draw on us at four months' sight for any sums not exceeding 20,000l., such draft or drafts to be accompanied by bills of lading and invoices of tea, purchased, according to order, of Mr. Mussett, and shipped by steamers to London, and marine insurance policies relating thereto of first-rate China companies settling claims in London, and these documents to be surrendered to us against our acceptances. And we hereby agree with you, and also as a separate engagement with the *bonâ fide* holders respectively of the bills

drawn in compliance with the term of this credit, that the same shall be duly accepted on presentation and paid at maturity if drawn and negotiated on or before the 31st Dec. 1883.

On the 17th March 1883 Suse and Sibeth wrote to Mussett as follows:

In reply to your favour of the 16th inst. we beg to say that we have confirmed for your account of Mr. W. V. Sentance, of Shanghai, the credit of 20,000l., together with the conditions attaching thereto. To further contents of your letter we shall recur between this and the end of the month.

On the 31st March 1883 Suse and Sibeth again wrote to Mussett telling him that after mature consideration they had "decided upon adhering to our intention explained to you verbally some time ago, of financing your tea imports without participation in the venture, but simply as bankers, for the customary banking commission mentioned by you and subject to the usual conditions."

Under the letter of credit of the 16th March, Sentance, during the year 1883, made various consignments of tea from China to Mussett, in London, and in respect of each particular consignment he drew a bill of exchange on Suse and Sibeth. One of the bills so drawn was as follows:

No. 113. Exchange for 1197l. 6s. 1d.—Hankow, 21st May 1883.—Four months after sight of this second of exchange (first of the same tenour and date unpaid) pay to the order of myself the sum of 1197l. 6s. 1d., drawn under your documentary letter of credit No. 1014, dated 16/3, 1883, value received, which place to account of £ 354 ½ chests tea per *Stirling Castle*, as per shipping documents herewith. To Messrs. Suse and Sibeth (Signed) W. V. SENTANCE.

The other bills were in the same form, *mutatis mutandis*. The bills drawn under the credit amounted in the whole to the sum of 18,670l. 14s. They were drawn between the 17th May and the 6th June 1883, and they matured between the 28th Oct. and the 24th Nov. 1883. Sentance advised Suse and Sibeth by letter of the drawing of each bill. One of the letters of advice was as follows:

I beg to advise having valued upon your good selves under your letter of credit No. 1014, dated the 16th March, 1883, by my draft at four months' sight, favour myself, which I have negotiated as undernoted blank, indorsed to the Hong Kong and Shanghai Bank, who hold all shipping documents, being for cost of the following shipment tea one chop of tea per *Laertes*.—Yours faithfully (Signed) W. V. SENTANCE.

Particulars of drafts: 190. 273l. 11s. 3d. ex. 5/14 against T.S.I. 16½ (⊕) tea.

The other letters were in the same form, *mutatis mutandis*. Sentance discounted all the bills with the Hong Kong and Shanghai Bank, to whom the bills of lading and shipping documents were handed attached to the draft. The letter of credit was shown to the bank. The invoices of the tea were sent by Sentance direct to Mussett. The bills of exchange, with the bills of lading and shipping document attached, were on their arrival presented by the London agency of the bank to Suse and Sibeth for acceptance, and were (with one exception) duly accepted by them, and, in each case, on the acceptance of the bill, the attached documents were surrendered to Suse and Sibeth in accordance with the terms of the letter of credit. On the presentation of the bills for acceptance Suse and Sibeth in each case wrote

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to Mussett informing him thereof, and that they had noted the bills to his debit. They did not send any such notification to Sentance. On the arrival and discharge of the tea in London it was warehoused with the London and St. Katherine's Dock Company in the name of Suse and Sibeth, who paid the freight, and they debited Mussett, in an account which they kept against him in their books, with the amount of the freight, and of any other disbursements in respect of the teas. Suse and Sibeth, on receiving the bills of lading lodged them with the dock company, and Mussett from time to time instructed the dock company to issue weight notes and warrants in the names of brokers nominated by him and to deliver the notes to the brokers, and the warrants to Suse and Sibeth. As sales of the tea were from time to time effected by Mussett, and delivery was required by the purchasers, Mussett sent a written request to Suse and Sibeth to deliver to him the warrants for the tea thus sold, and of which delivery was required, and at the same time Mussett paid to Suse and Sibeth a cheque for the value of the tea stated in the requests, and that amount was thereupon credited to Mussett in the above-mentioned account. If the tea was required before the corresponding warrant had been made out, Mussett sent to Suse and Sibeth a written request for a delivery order instead of a warrant. If more than one request was lodged during the same day Mussett inclosed in one cheque the values mentioned in the different requests. In no case did he, in making the request or payment, specify the particular acceptance against which he made the payment, nor did any one payment, or the aggregate of payments made in any one day, correspond to any particular acceptance. The mode of keeping the account with Mussett in the books of Suse and Sibeth was as follows: As the bills were presented by the holders for acceptance, the amounts thereof were debited to the accounts as of the dates of the acceptances, but no entry was made in the account to show the special parcel of tea against which the drafts had been drawn.

On the 4th Oct. 1883 Suse and Sibeth suspended payment, and on the 9th Oct. 1883 they filed a liquidation petition under which a trustee was afterwards appointed. Prior to the 4th Oct. Suse and Sibeth had received from Mussett, in respect of tea delivered, sums amounting in the whole to 8361*l.*, out of which they had paid freight and other charges. The whole of the 8361*l.* received by them was paid to the general credit of the firm with their bankers, and applied with other moneys of the firm in the ordinary course of business. At the date of the stoppage Suse and Sibeth had also in their possession delivery orders or warrants for other parcels of tea which had been consigned by Sentance under the letter of credit, and which had not been sold. The tea thus remaining in specie was afterwards sold, and the proceeds of sale were carried to a special account. At the date of the stoppage there was a balance in favour of Mussett on this particular account with Suse and Sibeth, but he was indebted to them on other accounts.

On the application of Sentance and the Hong Kong Bank, Mr. Registrar Pepps, on the 29th May 1884, made an order declaring that the applicants, or one of them, "are or is entitled to have the respective bills of lading and the parcels of tea, the subject of such bills of lading, respectively referred to in certain acceptances set forth in the

schedule to this order, and all such moneys as on inquiry may be found to have been received by the above-named debtors before the liquidation, remaining in their hands or to their credit with the debtors' bankers at the date of the liquidation, or by the receiver or trustee since the liquidation, after payment of freight and other charges, by means of the realisation of such parcels of tea or any of them, applied for the purpose of paying the said acceptances." The schedule contained a list of all the acceptances under the letter of credit.

From the order of the registrar the trustee appealed.

*Cohen, Q.C. and Sidney Woolf* for the appellant.—It cannot be said that Mussett held the proceeds of the sale of the tea in trust for the persons interested in the bills of exchange. The bills of lading were to be handed to Suse and Sibeth, not on payment of the bills of exchange, but on acceptance. Their acceptance was all the security which the consignor bargained for. But for their acceptance the Hong Kong Bank would not have discounted the bills. The bank knew from the terms of the letter of credit that the bills of lading were to be surrendered to Suse and Sibeth on their accepting the bills of exchange. The bills of lading were attached for the protection of the acceptors. Mussett is not a party to this application, but the fact of his having been allowed 2½ per cent. interest on all prepayments shows that Suse and Sibeth were at liberty to use the money, when they received it, as they pleased, and that there was no specific appropriation to meet the acceptances:

*Ex parte Broad; Re Neck*, 51 L. T. Rep. N. S. 388.

The bill-holders have no lien on the proceeds of sale of the tea:

*Banner v. Johnston*, L. Rep. 5 E. & I. App. 157.

*R. Vaughan Williams* for Sentance.—*Banner v. Johnston* has no application to this case. The effect of the arrangement was to appropriate the teas to meet the acceptances. Payment of interest is not conclusive evidence of the right of Suse and Sibeth to use the money in any way they pleased. Mussett was only Sentance's agent. Suse and Sibeth knew that the venture was that of Sentance. The bills of lading were attached to the drafts, each of which referred to a specific parcel of tea. The intention of Sentance, and the bargain with him, was that the proceeds of sale of the teas should be used to meet the acceptances. Sentance is also entitled to the proceeds of tea sold before the stoppage. Mussett was only the agent of Sentance. The statement in the letter of credit that the tea was to be purchased according to the order of Mussett only means that the agent in London will inform the principal in China. The allowance of 2½ per cent. was not really interest. If Suse and Sibeth had done as they ought to have done, they would have paid the proceeds of sale to a separate account with their bankers, who would have allowed them interest for which Suse and Sibeth would have been liable to account to Sentance.

*Pollard* for the Hong Kong Bank.—The mere form of the bills of exchange gives the bank a lien or charge on the teas and the proceeds of sale:

*Frith v. Forbes*, 7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409;

*Roby and Co. v. Ollier*, 27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695.

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In the cases decided the other way the relation of vendor and purchaser, not of consignor and consignee, had existed between the parties. The letter of credit also shows the appropriation was intended, and entitles us to have the proceeds of sale applied in payment of the bills:

*Re Agra and Masterman's Bank*, 16 L. T. Rep. N. S. 162; L. Rep. 2 Ch. App. 391.

No arrangement between Mussett and Sentence can affect the rights of persons acting on the letter of credit. The bills of exchange refer to the letter of credit, and prove that it was shown to us, and that the security of the letter of credit has been transferred to us. The bill-holders are entitled to have the teas, which were in specie at the time of the suspension, and also the proceeds of those which were previously sold, applied in payment of the acceptances. The bills of exchange gave the bill-holders an equitable lien on the goods, and the teas and the proceeds of sale were in the hands of Suse and Sibeth, subject to a trust in their favour. It will therefore be assumed that when Suse and Sibeth drew money from the bank for their own purposes they drew out their own money:

*Re Hallett; Knatchbull v. Hallett*, 42 L. T. Rep. N. S. 421; 13 Ch. Div. 696.

Woolf in reply.—The Hong Kong Bank could not prevent Sentence and Suse and Sibeth from dealing with the teas as they liked. Besides the bills of exchange the only document they could have seen was the letter of credit of the 16th March, and on that their rights must depend. That letter provides that the teas are to be purchased according to the order of Mussett, and that the bills of lading are to be surrendered to Suse and Sibeth against their acceptances of the bills of exchange. After the bank have surrendered the bills of lading they cannot claim an equitable charge on the goods, or any right to interfere. *Firth v. Forbes* was decided on its particular facts:

*Ex parte Arbuthnot; Re Entwistle*, 3 Ch. Div. 477.

It is also inconsistent with *Banner v. Johnstone*. [He was stopped on this point] Sentence's claim cannot be sustained. Mussett was the owner of the teas and the principal, and Sentence was only his agent.

BAGGALLAY, L.J.—This case is somewhat singular in its circumstances. [His Lordship stated the facts and continued:] It is suggested on behalf of the appellant (I do not purpose to deal with this question now) that Mussett was the real adventurer, and that Sentence is put forward to make this claim because, if it was made by Mussett, some questions of set-off would arise which do not arise as against Sentence. There are two questions for our decision: one as to the rights of Sentence, the other as to the rights of the Hong Kong Bank. With regard to the position of the bank, I am of opinion that they are not entitled to the direction which the registrar has made in their favour. The bills of exchange were drawn expressly with reference to the letter of credit, and that letter contains a distinct statement that the bills of lading were to be surrendered to the acceptors on their accepting the bills of exchange. The acceptors acquired under the letter of credit a right to the bills of lading, and the holders of the bills of exchange cannot be heard to assert any right to the bills

of lading as against the acceptors. The particular form of the letter of credit, the express statement in the bills that they were drawn under it, and the communication by the drawer to the acceptors that they had been so drawn, make it clear that the bill-holders have no such right as that which they claim. The other question is one of greater difficulty, and we must take time to examine the evidence more closely on the question whether Mussett or Sentence was the real adventurer.

CORROX, L.J.—I will say nothing about the claim of Sentence. With regard to the claim of the bill-holders, Mr. Pollard contended that, having regard to the terms of the letter of credit, and to the fact that the bills were drawn with reference to the letter of credit, each particular bill being drawn to the credit of a particular shipment of tea, a lien or charge on the tea was given to the holder of the bill. I am unable to arrive at that conclusion. Mr. Pollard relies on the decision in *Firth v. Forbes*. That case, however, was decided on its own very special circumstances, and in my opinion it is no authority in the present case. *Banner v. Johnstone* and the cases in the Court of Appeal which have been referred to are much more like the present case. The form of the bill of exchange and of the letter of advice written at the time by the drawer to the acceptors did not give the bill-holders any lien on the goods. We must have regard to the terms of the letter of credit, and they are conclusive on the point. The bills of exchange were to be accompanied by the bills of lading, but the bills of lading were to be "surrendered" to the acceptors of the bill of exchange against their acceptances. What is the meaning of that? So long as the bill of lading is annexed to the bill of exchange the bill-holder has a lien on the goods. But the bill of lading is to be surrendered to the acceptor on his acceptance of the bill of exchange. That must mean that it is to be delivered up free from the lien of the bill-holder. If the bill of exchange and the letter of advice are ambiguous they must be taken subject to the terms of the letter of credit, which was shown to the person who discounted the bill. In my opinion the terms of the letter of credit are conclusive against the claim of the bill-holders.

LINDLEY, L.J.—I am of the same opinion. It appears to me that there is much more difficulty with regard to the claim of Sentence, and I will say nothing about it until I have had an opportunity of studying the affidavits more carefully. But the case of the bill-holders is clear. They say that they have a lien on the goods, and it is for them to make out that they have. They do not require a lien simply because the bills are drawn against the goods. They must show that the lien has been in some way transferred to them by the drawer. That this is so is shown by *Inman v. Clars* (Joh. 769, 776). But in the present case, when the documents are looked at, it is plain that no such right has been transferred to the bill-holders. There is nothing in the bills of exchange themselves, or in the letters of advice, which can operate to transfer any right of lien to the bill-holders. It is true that the bills of lading were attached to the bills of exchange, and that is no doubt a very important circumstance; but the bargain was that the bills of lading should be

given up to the acceptors of the bills of exchange on their acceptance. As regards the authorities, I think that *Roby and Co. v. Ollier* is the nearest to the present case. In that case *Frith v. Forbes* was explained, and it is clear that it was a very peculiar case. I think that the present case is undistinguishable in principle from *Roby and Co. v. Ollier*.

Aug. 8.—LINDLEY, L.J.—We have already decided as to the rights of the bill-holders, but we took time to look more closely into the affidavits and documents before deciding as to the rights of Sentence, who was the drawer of the bills and the actual remitter of the goods. His claim was to have those teas which remained unsold at the date of the suspension of payment of Suse and Sibeth applied in taking up the bills, and also to have the proceeds of those teas which had been sold before the suspension similarly applied. As to the teas which remained unsold at the date of the suspension, having regard to the documents and the facts which have been laid before us, it appears to us that Sentence, as the drawer of the bills and the remitter of the goods, is entitled to have the proceeds of those teas applied in taking up the bills so far as those teas will go. But as regards the proceeds of the teas which were sold before the suspension, the case is different. We do not see our way to holding that Sentence has any equitable right or lien as regards these moneys, or to treat them as subject to any trust, or that he can insist upon having them applied as the unsold teas are applicable; in other words, as regards the proceeds of the teas which were sold before the suspension, the case is governed by the authorities to which Mr. Cohen referred us, and which are undistinguishable. This being so, we must discharge the order appealed from, and instead of it we must substitute a declaration that Sentence is entitled to have the respective parcels of tea which remained unsold at the date of the suspension, after payment of the freight and other charges by reason of the realisation by sale of such parcels, applied to the payment of these acceptances. Then, as regards the costs, it appears to us that the trustee has not substantially been put to any extra costs by the course which has been taken by the bank; and, as regards Sentence, he is partly right and partly wrong, and therefore the only order we propose to make is that the trustee shall have his costs out of the estate.

Solicitors for the trustee, *Roberts and Barlow*.

Solicitors for Sentence, *Reyroux, Phillips, and Golding*.

Solicitor for the Hong Kong Bank, *Ambrose Parsons*.

Wednesday, Feb. 13.

(Before Lord SELBORNE, L.C., Lord COLERIDGE, C.J., and COTTON, L.J.)

Re HARRALD; WILDE v. WALFORD. (a)

Set-off—Trust estate—Costs—Debt—Solicitor's lien.

*The trustees of a will were ordered to raise and pay W. his costs as respondent to a petition on which they were appointed.*

*The trustees afterwards obtained judgment against*

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

*W. for a certain sum as mesne profits of a part of the trust property of which he had wrongfully been in possession, with costs.*

*Held (reversing the decision of Fry, J., 48 L. T. Rep. N. S. 352), that the trustees had a right to set off the costs due to W. from the trust estate against the amount due from him for mesne profits, notwithstanding the lien of W.'s solicitor on the costs recovered by him.*

On the 5th March 1881 an order was made upon a petition appointing E. T. R. Wilde and J. M. Duncan new trustees of the will of Thomas Harrald, and they were ordered to raise and pay the taxed costs of all parties of the application.

The taxed costs of F. J. Walford, who was a beneficiary under the will, and had opposed the petition, amounted to 40l. 3s. 2d.

The new trustees having found that Walford was wrongfully in possession of certain houses forming part of the trust estate, commenced the action of *Wilde v. Walford* against him, which was tried on the 7th April 1881, when they recovered possession of the property, and judgment for 52l. 10s. as mesne profits and costs, which when taxed amounted to 54l. 15s. 2d., making in all 107l. 5s. 2d.

The trustees then applied by summons for liberty to set off the sum of 40l. 3s. 2d., the costs of the petition, against the sum of 107l. 5s. 2d., the amount of the mesne profits and costs for which they had recovered judgment.

Fry, J. refused the application (reported 48 L. T. Rep. N. S. 352), and the plaintiffs appealed.

*Oswald* for the appellants.—The trustees have a right to set off the costs payable by them to the respondent against the amount ordered to be paid by him to them as mesne profits and their costs:

*Lees v. Pain*, 4 Hare, 201;

*Roberts v. Bude*, 8 Ch. Div. 198;

*Cattell v. Simons*, 6 Beav. 304.

But if they have no right to set off the costs payable by them against those payable by the respondent, they have a right to set them off against the amount ordered to be paid by him as mesne profits:

*Pringle v. Gloag*, 40 L. T. Rep. N. S. 512; 10 Ch. Div. 676;

*Re Knapman*, 43 L. T. Rep. N. S. 25; 45 L. T. Rep. N. S. 102; 18 Ch. Div. 300.

*Swinfen Eady*, for the respondent, was called upon only as to the right to set off the costs against the sum payable in respect of mesne profits.—The order for the payment of the costs to the respondent was made before the trustees commenced any proceedings against him. Besides, his solicitor has a lien on those costs, and that will be defeated if this set-off is allowed. The solicitor has a higher right to the costs than the respondents:

*Throckmorton v. Crowley*, L. Rep. 3 Eq. 196;

*Ex parte Cleland*, 16 L. T. Rep. N. L. 403; L. Rep. 2 Ch. App. 808.

Lord SELBORNE, L.C.—In this case the respondent, upon a petition for the appointment of new trustees, obtained an order for the payment of his costs out of a trust fund. I agree that his solicitor is entitled to stand in his place and to have whatever he could get. But, at the time when the order was made for the payment of these costs to the respondent, he was indebted to the trust estate. The amount had not at that time been



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ascertained, but it was subsequently ascertained in an action against him for the recovery of part of the trust estate and for mesne profits. Now, according to well-settled principles, where a person is indebted to a trust estate, he is not entitled to any costs or anything else out of such estate until he has paid the debt due from him to it; and his solicitor cannot be in any better position than he is himself. The trustees must therefore be allowed to set off the costs payable by them to the respondent in respect of the petition against the amount due from him to the trust estate for mesne profits.

Lord COLERIDGE, C.J. and COTTON, L.J. concurred.

*Appeal allowed with costs.*

Solicitor for the appellants, Kimber.

Solicitor for the respondent, Abbott, Jenkins, and Co., agents for Woolnough Cross, Bury St. Edmunds.

Wednesday, March 12.

(Before COTTON, BOWEN, and FRY, L.JJ.)

HERMANN LOOG v. BEAN. (a)

*Injunction—Slander—Mandatory injunction—Dismissed servant—Letters addressed to employers' office.*

Where a defendant, who had been in the employ of the plaintiffs, had been making statements to the plaintiffs' customers injurious to their business, and trying to interfere with their customers making payments to them, an interlocutory injunction was granted restraining him from doing so.

An injunction was also granted, ordering the defendant, who had resided at the plaintiffs' place of business, to withdraw a notice given by him to the post-office, to send any letters addressed to him there to another address, the plaintiffs undertaking not to open any letter addressed to the defendant except at certain fixed times, with liberty to the defendant to be present.

The plaintiffs were a limited company, carrying on the business of selling and letting sewing machines under the name of Hermann Loog, Limited.

In 1882 the defendant, E. C. Bean, was engaged by them as manager of a branch establishment at Portsea, at a salary of 2l. per week, the engagement being determinable by a week's notice. An agreement was entered into between the plaintiffs and the defendant, dated the 13th Oct. 1882, which (*inter alia*) provided that "all letters and correspondence, though addressed to the said E. C. Bean, unless referring to private affairs, shall be deemed to be the property of the company, and may be opened by any director thereof, or any person authorised by the company to do so, and possession thereof shall be taken by the company whenever desired by the officers." It was provided that the defendant was to reside on the company's premises, and he conducted their business there from the date of the agreement.

On the 9th Jan. 1884 the defendant was dismissed by the company, receiving a week's salary in lieu of notice.

On the 12th Feb. this action was commenced, in which the plaintiffs asked for an account of the

defendant's transactions as their agent, and for an injunction restraining the defendant, his agents or servants, from stating to the plaintiffs' customers, or any other person or persons, that the plaintiffs were about to stop payment, or were in difficulties, or insolvent, or making any statements to the above or the like effect, and from in any manner slandering the plaintiffs, or injuring their reputation or business; and also from giving notice to any of the plaintiffs' customers not to pay the plaintiffs any moneys due or owing to the plaintiffs in respect of the hire of machines or otherwise, and from in any manner intermeddling with the plaintiffs' customers, or making use of the knowledge or influence he acquired as the plaintiffs' agent so as to injure the plaintiffs or their business; and also from giving notice to the post-office, or any other persons, requiring the letters addressed to the defendant at the plaintiffs' residence, or their office used by him while he acted as the plaintiffs' agent, to be re-directed and sent to the defendant, and from in any manner interfering with the plaintiffs opening and taking possession of such letters other than those relating to the defendant's private affairs; and for an order that the defendant should forthwith withdraw the notice which he had already given to the post-office at Portsea, requiring letters to be re-directed, as above mentioned, and deliver up to the plaintiffs all letters which had already been so re-directed other than those relating to the defendant's private affairs.

The customers of the company were chiefly seamstresses, or other working people, and from affidavits made by them it appeared that the defendant had made statements such as the following:

To one, that the plaintiffs' firm was a swindle, and that he could supply a better machine than the one she had purchased from the plaintiffs; to another, that she need not pay the plaintiffs any of the money remaining due for a machine, as it had been supplied by himself; to another, that she need not pay for a machine until the defendant was settled with in court; to another, that she need not pay the plaintiffs any more money for a machine she had hired; to another, that she had better not pay the plaintiffs any more of the instalments on a machine she had bought, as they were bankrupts; to another, that a machine she had bought from the plaintiffs would only last three months longer; to another, that he must not pay anybody but the defendant for a machine he had bought, as it was his property, and that the defendant was going to stop all his customers from paying any money till he got his account against the plaintiffs settled; and similar statements to several other persons.

On leaving the plaintiffs' service the defendant gave notice to the post-office at Portsea to forward to him at his address in Landport all letters addressed to him at the company's place of business. The defendant, in his affidavit, deposed that, with the exception of two, all the letters which had been so re-directed to him referred only to his private affairs, and he returned those two to the senders, saying that he was no longer connected with the plaintiffs. He alleged that he was to some extent a partner with the plaintiffs, as he had bought in certain stock, for which he had not been paid, and that an arrear of salary

(a) Reported by W. C. BRIS, Esq., Barrister-at-Law.

was due to him. These statements were, however, denied by the plaintiffs' manager.

One of the plaintiffs' witnesses deposed that on the 2nd Jan. 1884 she hired a machine from the defendant, as manager of the plaintiffs' business, and that on or about the 24th Jan., thinking that the defendant was still their manager, she called on him, and asked him to take the machine away, which he did, and she paid him 7s. for the hire of it. The defendant did not communicate this to the plaintiffs until the 21st Feb., when he called at their office at Portsea, and tendered the machine, together with the 7s. This the defendant admitted in his affidavit. It also appeared that the defendant had received letters with money enclosures, which he had not handed to the plaintiffs until some time after.

On the 7th March 1884 the plaintiffs moved for the injunction mentioned above.

*Northmore Lawrence* for the plaintiffs.

*Onwald*, for the defendant, referred to

*Bullen & Leake's Precedents of Pleading*, 3rd edit. p. 306;

*Underwood v. Parks*, 2 Str. 1200;

*Barnes v. Holloway*, 8 T. R. 150.

PEARSON, J.—Upon the materials now before me, the only conclusion I can come to is, that this is a case of gross dishonesty on the part of the defendant. The defendant having been an agent to the company, and having been discharged from their service, has thought it consistent with his duty to go about among the customers of his late employers and to make all manner of statements about their position and in depreciation of the goods supplied by them such as are calculated to be injurious to their business. On that part of the case, independently of any other question, there must be an injunction to restrain the defendant from continuing such proceedings. Then, in regard to the letters addressed to the defendant at the plaintiffs' place of business, it appears there is a clause in the agreement entered into between the plaintiffs and the defendant that all letters, though addressed to the defendant, unless referring to his private affairs, should be deemed to be the property of the company and might be opened by any director or person authorised by the company, and that possession thereof should be taken by the company whenever desired by the officers. Now the defendant has given directions to the post-office authorities that all letters addressed to him at the plaintiffs' place of business are to be re-directed to his private address. This applies to all the letters so addressed to him, and it would be evidently impossible for the authorities of the post office to distinguish between the letters concerning the business of the firm and those concerning the defendant's private affairs. I have therefore to consider whether all the letters addressed to the defendant ought not to go to the company in the first instance. The terms of the clause in the agreement are, that all the letters are to be considered as the property of the company unless referring to the defendant's private affairs. It is submitted on behalf of the plaintiffs that it is impossible that anyone should know this without inspecting the letters. I agree with this, but for the defendant it is said that the meaning of the clause is this: "That only letters which are shown not to be the defendant's private letters are to be opened by the company."

But in *Sheppard's Touchstone*, 7th edit. p. 87, I find it laid down that in the construction of a deed you are at liberty to transpose the words in a sentence in order to make it sensible; and I find that I have only to transpose the words "may be opened by any director or any person authorised by the company to do so," which are in this sentence, and to put them in before the words, "though addressed to the said E. O. Bean," and then the sentence is perfectly easy to be understood. And this is evidently what was intended, for otherwise it would be impossible for the plaintiffs to open any of these letters. I therefore have no difficulty in granting the injunction to restrain the defendant from giving instructions to the post-office to re-direct letters to his private address, but these letters are to be sent to the plaintiffs' place of business, and they must undertake to forward to the defendant any letters which they have reason to believe refer to his private affairs.

From this decision the defendant appealed.

*Onwald* for the appellant.—The defendant had a right to have all letters addressed to him forwarded to his new address, and he has only received two which did not relate to his private affairs. The injunction with reference to withdrawing the notice to the post-office is mandatory, and the court will not grant such an injunction upon an interlocutory application, except in special cases:

*Bonner v. Great Western Railway Company*, 48 L. T. Rep. N. S. 619; 24 Ch. Div. 1.

There is no case in which the court has granted an injunction against oral slander. Such a case should be tried before a jury. There is only one case in which it has interfered by interlocutory injunction to restrain a written libel:

*Hill v. Hart Davies*, 47 L. T. Rep. N. S. 82; 21 Ch. Div. 796.

*Northmore Lawrence* for the plaintiffs.—Since the Judicature Acts the court will restrain libellous statements which are calculated to injure a business:

*Thorley's Cattle Food Company v. Masham*, 42 L. T. Rep. N. S. 851; 14 Ch. Div. 763;

*Thomas v. Williams*, 43 L. T. Rep. N. S. 91; 14 Ch. Div. 864.

It cannot make any difference in principle whether the statements are written or oral. [COTTON, L.J.—Do you insist on retaining the words "or to any other person or persons?"] If the injunction applies only to statements to customers the plaintiffs will be satisfied. [COTTON, L.J.—Then we need not hear you further on that part of the case.] Then with reference to the notice to the post-office. The evidence shows that the defendant received letters containing money for the plaintiffs, and gave them no notice of it until after this action had been commenced. The defendant admits that he received two letters belonging to the plaintiffs since his dismissal, but, as he managed a large business for them it is almost certain that he has received more. In *Stapleton v. The Foreign Vineyard Association* (11 L. T. Rep. N. S. 77) an order was made providing for the opening of letters under circumstances somewhat similar to the present. This is a case in which a mandatory injunction should be granted on a motion.

COTTON, L.J.—This is an appeal from an inter-

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locutory injunction granted by Pearson, J. against the defendant, who had formerly been in the employ of the plaintiffs, and whose engagement was put an end to in the beginning of January last. The injunction went to two points—first, to restrain the defendant from making certain libellous statements with reference to the trade and business of the plaintiffs. The order has not yet been drawn up, and therefore we do not know the exact terms of it, but the indorsement of Mr. Northmore Lawrence's brief which has been handed up to us is "to restrain the defendant, his agents and servants, from stating to the plaintiffs' customers, or to any other person or persons, that the plaintiffs are about to stop payment, or are in difficulties, or insolvent, or making any statements to the above or like effect, and from in any manner slandering the plaintiffs in their business, and also from giving notice to any of the plaintiffs' customers not to pay to the plaintiffs any money due or owing to the plaintiffs in respect of the hire of machines or otherwise." The registrar, who is in court, tells me that he thinks the words "or any other person or persons" would not have been in the order if it had been drawn up, because in the registrar's note the only word is "customers." Now, with that qualification, the order, in my opinion, is clearly right, and it was only because we thought that Mr. Lawrence probably would insist upon the insertion of these words, "or any other person or persons," that we asked him whether he objected to their being struck out. It appears from the evidence that statements such as are prohibited by the order were made by the defendant. Here is a man who had been in the employ of the plaintiffs making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The court has of late granted injunction in cases of libel, and why should it not also do so in cases of slander? It is clear that slanderous statements such as were made to old customers in this case must have a tendency materially to injure the plaintiffs' business; they are slanders therefore spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade the plaintiffs may clearly come to the court. There is no doubt more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what is said. But when the defendant is proved to have made certain definite statements such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. Then the second part of the injunction, which is in part mandatory, restrains the defendant from giving instructions to the postmaster as to his letters, and orders him to withdraw a notice that he has already given to the postmaster. Objection is taken to that on the ground that it is a mandatory injunction, and that the defendant had a right to give directions to the postmaster to send his letters to his actual address. I need hardly say anything about the mandatory injunction being granted. This court, when it sees that a wrong is committed, has a right at once to put an end to it, and has no hesitation in doing so by a mandatory injunction if it is necessary for the purpose.

Then as to the merits, undoubtedly a man when he changes his address has a right to give directions to a postmaster to send on to him his letters, but that assumes that they are his letters; and what we find here is, that the defendant was formerly residing at the plaintiffs' office as a servant of the plaintiffs, and a very large proportion of the letters addressed to him were undoubtedly letters relating to the business of the company, though of course there might be some letters which would be marked "private." By means of his notice to the postmaster the defendant has got at least some letters which ought to have been treated as the letters of the plaintiffs, and to have been sent on to them. Instead of doing that the defendant has opened them, and not until some time afterwards has he given them to the plaintiffs, or offered to them the money intended for them which was in the letters. There is also a case where money was paid to the defendant for the hire of a sewing machine of the plaintiffs, and the machine was returned, and he did not for some considerable time send the money or the sewing machine to the plaintiffs. The defendant having so acted, the case is in my opinion one in which it is the duty of the court to interfere, and to see that he does not by reason of his having been employed in the plaintiffs' house of business obtain letters which are intended for them, and really belong to them, but which have come, under his directions given to the postmaster to his own private address. Some of them in consequence of their being forwarded to him at his own house have admittedly not gone, as they ought to have gone to the address of those persons who had been his employers. I do not rely in any way on the terms of the agreement, because that was an agreement which was to last during the engagement, which engagement has now been put an end to; but we ought, in my opinion, to interfere, and I think that the proper order will be to continue the injunction as regards the defendant's notice to the post-office on the conditions that the plaintiffs must undertake, in addition to the undertaking they have already given, not to open the letters which are addressed to him at their office except at two hours in the day, in the morning and afternoon when the post comes in, and that the defendant shall have liberty at those hours to attend there, and also that they must undertake to deliver to him, instead of forwarding to him, any letters which relate to his private business. Then comes the question of costs. We have slightly modified the order as it comes before us, yet I think that ought not to prevent the appellant, who in substance has failed, from paying the costs of the appeal.

BOWEN, L.J.—I am of the same opinion. The appellant complains of this interlocutory injunction in both its parts, and I will take them one after the other. The first part of the injunction restrains the defendant from making or publishing any slanderous statements about the plaintiff company or their business. Now, has the court jurisdiction to grant such an injunction? It seems to me to be clear that it has. There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the plaintiff company. It has been held since the Judicature Act that a plaintiff is

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entitled to the protection of the court against a wrong of that sort which is contained in a written document; that is to say, the court will restrain the publication of a libel which is immediately calculated to injure the property and trade of the person against whom it is directed. Then can there be any distinction in principle between a slander which is contained in a written document and a slander which is not? In the cases of *Thorley's Catile Food Company v. Massam* (*ubi sup.*) and *Thomas v. Williams* (*ubi sup.*) the court interfered to restrain the slander which was placed upon paper, so that clearly in the case of such written slander as is naturally attended with injury to property and business, the court has jurisdiction to interfere, and it appears to me that the same principle must apply to spoken slander. Then I come to the next question, about the notice to the postmaster. The defendant changes his address from the plaintiff company's office to a private residence, and sends to the postmaster a notice that all letters addressed to him at the plaintiffs' office are to follow him to his own residence. Now, a man has a right, when he changes his address, to tell the postmaster to send his own letters after him; but it is obvious that he has no right to tell the postmaster to send somebody else's letters after him. The question here is whether the defendant has not done something more than tell the postmaster to send his own letters after him—his letters relating to his own private business; and I think he has, because letters addressed to an agent at the office of his principal are frequently addressed to him as a servant, though there may of course be among them private letters which belong in law to him. There may be signs which would show whether the letters belong to the servant or to his master—for instance, words written on the envelope. But the servant has no right, merely because letters are addressed to him, to say that they are his own if there is nothing on the envelopes to show that they are his own, and not his employer's letters. Therefore, his notice to the postmaster is clearly too large, because all the letters which are addressed to him at his place of business do not belong to him. That is obvious in principle, and is shown to be true in fact, because he has actually had letters sent to him which do not belong to him. I think, therefore, the injunction in that respect is right. I do not in the least rely upon *Stapleton v. Foreign Vineyard Association* (11 L. T. Rep. N. S. 77), which indeed is not in point; but it seems to suggest a *modus vivendi* in this case, which is, that the letters should be opened by those persons to whose premises they are addressed, but in the presence of the appellant, and that they should be handed over to him if they appear to relate to his own private affairs.

FRY, L.J.—I am of the same opinion. It must not be taken that, by our omitting the words "any other person or persons," we decide that the court can only grant an injunction with regard to customers. If Mr. Lawrence had insisted upon those words, it would have been necessary to decide whether they could be inserted, but, as he did not, it is unnecessary for us to give any opinion on the point. I conceive that the court has plainly jurisdiction to grant injunctions against slander, as well as against libel. At the same time I am not unconscious of the inconveni-

ence which would result from trying actions for slander on motions to commit. I think that requires careful consideration in any case in which the court is asked to grant an injunction against slander. Then, with regard to the notice to the postmaster. It seems to me, for the reasons given by Bowen, L.J., that the notice was too large, and I come to that conclusion from the very simple fact that it has induced the postmaster to send to the defendant letters which belong to the plaintiffs. Then the question as to who is to open letters is undoubtedly one of considerable difficulty, for this reason, that the court is averse from interfering with a legal right except so far as is absolutely necessary, and in the present case the court would not desire to interfere with the legal right in the letters. But that right cannot be ascertained until they are opened; they must be opened by somebody, and therefore the court has to determine who is to open them. There are many reasons which induce me to think that the plaintiffs are the proper persons to open them. In the first place, the letters are addressed to their place of business; and in the next place, there appears to be a presumption *prima facie* that most of the letters addressed to the defendant coming there are letters which are addressed to the defendant on their business; and lastly, the defendant has certainly behaved, with regard to some of the letters, and with regard to his other relations to his former employers, in a manner which is not creditable to him, and which, as between him and the plaintiffs, renders it more expedient that the opening should be done by them in his presence than by him in their presence. I therefore entirely agree with the opinion which has been expressed in that respect by their Lordships.

Solicitors for the plaintiffs, *Michael Abrahams, Son, and Co.*

Solicitor for the defendant, *A. W. Mills.*

Wednesday, May 7.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re GREAT BERLIN STEAMBOAT COMPANY. (a)

*Fraudulent agreement—Rescission—Winding-up.*

*In order to enable a company to show a good balance at their bankers in case of inquiries there, B. placed money to their credit, which they were to hold in trust for him.*

*Some of the money was, with B.'s consent, drawn out, and afterwards the company was ordered to be wound-up.*

*Held (affirming the decision of Bacon, V.C.), that B. was not entitled to have the balance paid to him.*

THIS company was formed on the 21st April 1882 to acquire and work a concession from the German Government for the running of a line of steamers on the river Spree and the ship canal from Berlin to Spandau. The nominal capital was 50,000*l.* in 10,000 shares of 5*l.* each, but no allotment of shares was ever made, and no shares were subscribed for except the seven shares agreed to be taken by the subscribers to the memorandum of association, and for which they had not paid.

J. P. Bowden deposed that, about the 21st March

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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1883, he was applied to through his solicitors, by the directors of the company, to transfer a sum of 1000*l.* to the credit of the company at their bankers, Messrs. Glyn and Co., so that they might have a creditable balance in case of inquiries from certain Berlin bankers, with whom they were endeavouring to place a number of the shares of the company, it being agreed that the sum was not to be used for the general purposes of the company, and that the company were merely to hold the sum as trustees for him. He also deposed that on the 21st March 1883 the following resolution was passed by the board :

Resolved to accept 1000*l.* for a period of one month from Mr. J. P. Bowden for the purpose of having it placed at Messrs. Glyn, Mills, Currie, and Co., to the credit of the company, for the purpose of having a creditable balance in case of inquiries from Berlin bankers, but not for the general purposes of the company, such money to be returned intact at the expiration of one month. No cheque to be drawn by the company unless countersigned by the financial secretary *pro tem.*, the company merely holding such sum as trustees for the said J. P. Bowden. Further, to appoint Mr. A. E. Bunn financial secretary *pro tem.* for two months certain without salary, or until the 1000*l.* is repaid, but with power for the said A. E. Bunn to resign at seven days' notice within that period.

Bowden placed the 1000*l.* to the credit of the company, and subsequently, on the application of the directors, he allowed different sums to be paid out of the money for the purposes of the company, which were not alleged to be improper.

The money was drawn out by cheques countersigned by the above-mentioned A. E. Bunn, who was one of Bowden's solicitors, and a balance of 99*l.* 15*s.* only was left. It appeared that the company never had any other money to its credit besides the 1000*l.* received from Bowden.

It appeared that no Berlin banker ever made any inquiry with reference to the funds of the company, and in Nov. 1883 a letter was received from Berlin from which it appeared that no such inquiry was probable.

On the 12th Jan. 1884 an order was made for the compulsory winding-up of the company. Bowden made an affidavit in opposition, in which he stated he was a creditor for 1350*l.*, but did not mention the 99*l.* 15*s.*, which was then standing to the credit of the company.

Bowden put in a proof against the company for 1350*l.*, but that did not appear to include the 99*l.* 15*s.*

On the 21st Feb. 1884 Bowden took out a summons in the winding-up for the payment to him of the 99*l.* 15*s.*

The application was adjourned into court, and came before Bacon, V.C., on the 7th March 1884, and was dismissed with costs.

From this decision Bowden appealed.

*Upjohn* for the appellant.—The company are trustees of the balance of the 1000*l.* for the appellant. If there is fraud on the face of the transaction, the purpose was never carried out, as no inquiries were ever made by any Berlin bankers. The appellant is therefore entitled to this money :

*Symes v. Hughes*, 22 L. T. Rep. N. S. 462 ; L. Rep. 9 Eq. 475 ;

*Taylor v. Bowers*, 34 L. T. Rep. N. S. 938 ; 1 Q. B. Div. 291 ;

*Knatchbull v. Hallett*, 42 L. T. Rep. N. S. 421 ; 13 Ch. Div. 696.

*Marten, Q.C.* and *Ryland* for the respondent.—This was a fraudulent attempt to deceive, not only the Berlin bankers, but the public, and was continued until the commencement of the winding-up, when the rights of the parties were fixed. *Knatchbull v. Hallett* does not apply, as this is a case of a fraudulent loan, not of a trust.

*Upjohn* in reply.

BAGGALLAY, L.J.—In my opinion this appeal fails. On the 21st March 1883 a resolution was passed by the directors in these terms: [His Lordship read the resolution.] It is not disputed that the 1000*l.* was placed by the appellant to the credit of the company at the bank of Glyn and Co. for a fraudulent purpose. But the appellant says that the money was never applied for any fraudulent purpose, that the purpose came to an end, and that he is entitled to have the money back as being impressed with a trust in his favour. What happened was, that about 900*l.* was drawn out pursuant to resolutions of the directors with the consent of the appellant, for purposes which were not fraudulent, and was applied accordingly. In November last a communication was received by the directors from a person who was negotiating for them at Berlin, from which it appeared that no applications had been made by any Berlin bankers, and that none were to be expected. In the view I take of the case I think it was then open to the appellant to say at once, "The purpose for which this money was advanced cannot be carried into effect; pay me back the balance." But the appellant did not recall his money. It was possible, though not probable, that applications might still be received from Berlin bankers, and that the scheme might be carried out. The appellant, however, did nothing to repudiate the arrangement, and so matters remained until the presentation of the petition to wind-up. Then, after a winding-up order has been made, he brings forward his claim. There have been cases in which a party who has parted with his property under a fraudulent arrangement has nevertheless been allowed to recover the property, but this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding-up.

COTTON, L.J.—I am of opinion that the decision of the Vice-Chancellor is right. I think it the just result of the evidence that the balance now in dispute is earmarked as part of the money which the appellant advanced. Then the appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers if inquiries are made—a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by a private arrangement it was not to be their money. Then it is said that a person who parts with his property for a fraudulent purpose may repudiate the bargain and get the property back. I give no opinion whether, in November last, the appellant could have done so. He did not attempt to do so, but waited till the event happened which put an end to the purpose for which the money was deposited. He left the money at the bank as long

as the possibility of carrying out the illegal purpose continued, and it is now too late for him to reclaim it. Assuming that he had the right to repudiate the bargain, he has, in my opinion, lost that right.

LINDLEY, L.J.—I am also of opinion that the decision of the Vice-Chancellor is correct. I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the appellant's case. But if it was a case of trust, the appellant must show what the trust was. He does so, and shows an illegal trust, since the purpose of the advance was to give a fictitious credit to the company. The trust at first was to last only for a month. The sum was drawn upon, and the residue was left in the hands of the company to get them credit. If the case is one of debt the appellant is not entitled to be paid in full. Whether it was a loan or a trust, I think that the appellant might have recalled the money at the end of the month. He did not do so, but left it where it was until the commencement of the winding-up. The object for which the advance was made was attained, as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it is too late for the appellant to repudiate the bargain and claim the money.

Solicitors for the appellant, *Arnold E. Williams and Bunn.*

Solicitor for the liquidator, *Montagu Hawkins.*

Friday, June 13.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Ex parte CUNNINGHAM; Re MITCHELL. (a)

*Bankruptcy—Petition—Domicil of debtor—Onus of proof—Officer in the British army—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 6, sub-sect. 1 (d). In order to come within sub-sect. 1 (d) of sect. 6 of the Bankruptcy Act 1883 the debtor must be domiciled in England as distinguished from Scotland or Ireland.*

*As a rule the onus is on the petitioning creditor to show that the debtor is domiciled in England, though he may produce such an amount of prima facie evidence of an English domicil as to throw the burden of disproving the domicil on the debtor.*

*The fact that the debtor has an English name and is an officer in the British army, does not raise a presumption that he has an English domicil as distinguished from Scotch or Irish, as a Scotchman or Irishman entering the British army does not lose his domicil of origin.*

*Yelverton v. Yelverton (1 L. T. Rep. N. S. 194; 1 Sw. & Tr. 574) and Brown v. Smith (15 Beav. 444) followed.*

*The cases relating to Anglo-Indian domicil commented on.*

This was an appeal by a petitioning creditor against an order of Mr. Registrar Hazlitt dismissing a bankruptcy petition presented by Andrew Cunningham against Lieutenant-Colonel Mitchell, Royal Engineers.

On the 5th Sept. 1882 Mitchell commenced an action for damages against Cunningham in the Queen's Bench Division, and Cunningham delivered a counter-claim for 16l.

The action was tried on the 8th Nov. 1883, when the jury could not agree as to Mitchell's claim, but gave a verdict in Cunningham's favour on his counter-claim, and judgment was entered accordingly with costs, which were afterwards taxed at 119l.

In the writ issued by Mitchell in this action he was described as "of No. 17, Glendower-mansions, Harrington-road, South Kensington, in the county of Middlesex," and in an affidavit in the action sworn by him on the 9th March 1883 he was described in the same way.

Mitchell not having paid the amount of the judgment debt and costs, Cunningham caused a bankruptcy notice to be served upon him in respect thereof, with which he failed to comply, and on the 7th March 1884 a bankruptcy petition was presented against him.

In Sept. 1881 Mitchell was appointed to the command of the Royal Engineers in Guernsey and Alderney, and had an official residence in Guernsey. The bankruptcy notice and the petition were by leave of the court served on him in Guernsey.

The petitioning creditor's solicitor made an affidavit in which he said that, to the best of his knowledge and belief, the debtor was domiciled in England, and that the head-quarters of the Royal Engineers was at Chatham. In another affidavit he said that the debtor was residing at his official residence in Guernsey.

On the 26th May 1884 the debtor made an affidavit in which he said that, from the 8th Sept. 1881, when he commenced his official duties in Guernsey, down to the date of his affidavit, he had resided at his official residence in Guernsey, and had had no other residence, and that the head-quarters of the Royal Engineers, as to the Guernsey district, were in Guernsey. He said that occasionally during the above-mentioned period he had obtained leave of absence, and upon such few occasions had temporarily stayed at No. 17, Glendower-mansions, South Kensington, which was an hotel.

The petition was heard on the 2nd May 1884, when the Registrar dismissed it on the ground that the debtor was not domiciled in England, and that within a year before the presentation of the petition he had not ordinarily resided nor had a dwelling-house or place of business in England.

The petitioning creditor appealed.

On the hearing of the appeal it was stated that the debtor was by birth an Irishman (though there was no evidence to that effect), and the case was argued on that assumption.

*Lyons* for the appellant.—The affidavit filed by the debtor in the action shows that within a year before the date of the presentation of the petition he has ordinarily resided or had a dwelling-house in England, and therefore the case comes within sect. 6, sub-sect. 1 (d) of the Bankruptcy Act 1883. He also holds a commission in the British army, and is therefore a domiciled Englishman, whatever his domicil of origin may be, even if he is a Scotchman or Irishman by birth. [*Sidney Woolf*, for the debtor, referred to Dicey on the Law of Domicil, p. 139.] He may retain his domicil of origin for some purposes. In *Forbes v. Forbes* (Kay, 341) it was held that a Scotchman by birth who entered into the military service of the East India Company, acquired an Anglo-Indian



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domicil, but if he left the service and returned to his own country his domicil of origin reverted, unless he had shown an intention of abandoning it. [COTTON, L.J.—Does that apply to a Scotchman entering the British army?] There are similar decisions as to officers entering the military service of a foreign sovereign:

*Ommaney v. Bingham*, cited 5 Ves. 757;

*Hodgson v. De Beauchesne*, 12 Moo. P. C. 285;

*Somerville v. Somerville*, cited 5 Ves. 750.

For the purposes of the present case a Scotchman or an Irishman stands in the same position:

*Bruce v. Bruce*, 5 Ves. 761; 2 B. & P. 229, n.

In *Yelverton v. Yelverton* (1 L. T. Rep. N. S. 194; 1 Sw. & Tr. 574) the jurisdiction of the Divorce Court was in question. The onus is on the debtor to show that he is not a domiciled Englishman.

*Sidney Woolf*, for the debtor, was not heard.

BAGGALLAY, L.J. referred to sub-sect. 1 (d) of sect. 6, and continued:—It appears to me that it is not established that the debtor “within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England.” But the question remains whether he is domiciled in England, and I am of opinion that the onus is on the petitioning creditor to show that the debtor is domiciled in England. I can quite conceive that there may be cases in which there may be such an amount of *prima facie* evidence of an English domicil as to shift the burden on to the respondent. But all the evidence we have in the present case is, that the debtor bears a name which might be that either of a subject of Her Majesty or of a citizen of the United States of America, and he holds a commission in the military service of the Queen. That he might hold if his domicil was Scotch or Irish, or possibly even Indian. It has been argued that the mere fact that a man is serving the Queen of England in her army makes him an Englishman, though his domicil of origin was Scotch or Irish. I cannot assent to this. The present case has been argued on the assumption that the debtor's domicil of origin was Irish. The rules of law on the subject may be arranged under three heads: (1) A subject of Her Majesty entering into the military or naval service of a foreign power acquires a domicil in the country of that power; (2) a subject of Her Majesty entering Her Majesty's military or naval service does not thereby lose his domicil of origin, which may be English, Scotch, or Irish; (3) there are some anomalous cases in which a subject of the Queen had entered into the service of the old East India Company, and it was held that he had what was called an Anglo-Indian domicil. Such cases can hardly arise now, because the separate government of the East India Company has ceased to exist, and the army in British India is now part of the Queen's army. Perhaps those cases rather depended on the notion that the officer had entered into the service of a *quasi*-foreign power. But I think the second of the rules I have mentioned applies to the present case. Whether Colonel Mitchell's domicil of origin was Scotch or Irish when he entered the service of the Queen, he did not thereby lose his domicil of origin. If, as has been assumed, his domicil of origin was Irish, he has never forfeited or abandoned that domicil. The petitioning creditor, therefore, has not established what sub-sect. 1 (d) of sect. 6 requires, and

the registrar's decision was right. The case of *Hodgson v. De Beauchesne* (12 Moo. P. C. 285) was a peculiar case. The testator in that case went to India in the military service of the East India Company, and thus acquired an Anglo-Indian domicil. He returned to England on furlough, and while on furlough he went to reside in France, and died there. He had while residing in France acquired the brevet rank of Major-General in Her Majesty's army, and, being still an officer in the Indian army, he was always liable to be recalled to India on active service. It was held that the presumption raised by his residence in France of his intention to put off his English domicil and acquire a French domicil was rebutted by the other facts, it being incompatible with his duty as an officer to acquire a domicil in a foreign State.

COTTON, L.J.—I agree in the reasons which have been expressed by Baggallay, L.J., but I think it right to add a few words. It is not suggested that the debtor has within a year ordinarily resided or had a place of business in England. It is said that in the writ and in an affidavit filed in the action he described himself as of “No. 17, Glendower-mansions, Harrington-road, South Kensington.” It turns out that that house is an hotel, and though a man might ordinarily reside at an hotel, his occasional going there would not make it his dwelling-house. The great contest, however, has been on the question of domicil. I agree that the onus of proof is on the petitioning creditor, though of course there might be cases in which there was *prima facie* evidence to shift the burden. I am of opinion that “domicil in England” means in England as distinguished from Scotland and Ireland, as well as from foreign countries, because Scotland and Ireland have their own separate legal tribunals. It is meant that the debtor's domicil must be strictly in England, as distinguished from other parts of the United Kingdom. What is the *prima facie* evidence in the present case? The debtor is an officer in the Royal Engineers, the head-quarters of the Engineers being at Chatham. It is said that this establishes that his domicil is English. I am of opinion that that conclusion is erroneous. No doubt, if a foreigner enters the British army and resides in England, his domicil will be in England. But is there in the present case any *prima facie* presumption that the debtor's domicil is in England? It is said that a Scotchman by entering the service of the East India Company acquired an Anglo-Indian domicil. I take exception to the expression “by entering the service” of the East India Company. The ground of the decisions in those cases was, that the officer was residing in England, under circumstances which showed that he intended to abandon his domicil of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicil. This is really what was said by Wood, V.C. in *Forbes v. Forbes* (1 Kay, 356): “When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to



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be *animo et facto* in India." A Scotchman entering into the British army does not by that fact alone acquire a different domicile. His residence in England is only a temporary one for the purpose of discharging his military duties. All we know in the present case is, that the officer holds a commission in the Engineers, and his residence in Guernsey is merely for the purpose of discharging his duty as an officer. That duty does not require his permanent residence at Chatham. The point was really decided in *Yelverton v. Yelverton* (1 L. T. Rep. N. S. 194; 1 Sw. & Tr. 574), and in *Somerville v. Somerville* (10 Ves. 750) it was assumed that the mere acceptance by a Scotchman of a commission in the English army did not make him lose his domicile of origin. I am of opinion that those cases were rightly decided. It is said that this view is contrary to the cases in which a Scotchman has entered into the Russian or Dutch military service. But it is not the mere fact of entering into the foreign service, but the going to Russia or Holland under circumstances which would require the officer to reside there permanently, which brought about the change of domicile. All that was decided in *Hodgson v. De Beauchamps* (12 Moo. P. C. 285) was this, that an officer in the English army, who was also in the service of the East India Company, could not while he was in those services acquire a domicile in a foreign country, because that would be inconsistent with the duty which he owed to the Queen and to the East India Company. In my opinion the decision of the registrar was right.

LINDLEY, L.J.—I am of the same opinion. It is incumbent on the petitioning creditor to prove, if it is disputed, that the conditions presented by sub-sect. 1 (d) of sect. 6 exist. Upon the facts it is pretty plain that Colonel Mitchell has not within a year before the date of the presentation of the petition ordinarily resided or had a dwelling-house in England. The evidence shows that the residence at Kensington was a temporary one at an hotel. It is said, however, that he is domiciled in England, and the first question is, on whom is the onus of proof? I think it is on the petitioning creditor. Has he discharged it? It is true that the debtor has an English name, and that he is an officer in the English army. But these circumstances alone do not raise any presumption that his domicile is English as distinguished from Scotch or Irish, though it may be they raise a presumption that he is a British subject. It is said that, whether his domicile of origin was Scotch or Irish, it became English by his entering into the English army, and in particular by his entering the Royal Engineers whose head-quarters are at Chatham. I think that this is not a correct view of the law. This depends on whether that which Mr. Dicey says in his book correctly represents the result of the authorities. He says (p. 139): "A soldier or sailor in the service of his own Sovereign retains the domicile which he had on entering the service, wherever he may be stationed," and he refers to *Yelverton v. Yelverton* (1 L. T. Rep. N. S. 194; 1 Sw. & Tr. 574) and *Brown v. Smith* (15 Beav. 444). I think that his statement is fully borne out by those authorities. The point appears to me perfectly plain. It is not suggested that those cases have been overruled, but reliance has been placed on the cases relating to Anglo-Indian domicile.

Those cases were anomalous and exceptional, and the theory of them is not very clear. I think it was correctly explained by Turner, L.J. in *Jopp v. Wood* (4 De J. & S. 623). He said: "At the time when those cases were decided the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the Government of this country; and it may well have been thought that persons who had contracted obligations with such a government for service abroad could not reasonably be considered to have intended to retain their domicile here. They in fact became as much estranged from this country as if they had become servants of a foreign Government." Looking at what the Lord Justice there says and at what Wood, V.C. said in *Forbes v. Forbes* (Kay, 341), it may well be that the fact of the residence in the East Indies may have introduced an anomaly into the law of domicile. While they were law those cases very much confused the English law of domicile, and they were always anomalous cases. But when we are asked to say that, by merely entering into the English army, an Irishman loses his domicile of origin, I think there is no authority for the proposition.

Appeal dismissed.

Solicitor for the appellant, E. R. Keels.

Solicitors for the respondent, Lewis and Lewis.

Tuesday, March 25.

(Before BRETT, M.R., BAGGALLAY and

LINDLEY, L.JJ.)

STOCK v. INGLIS. (a)

*Marine insurance—Insurable interest—No specific appropriation of goods to contract—Property not passed to the assured—"Free on board."*

D. and Co., sugar merchants of London, agreed in writing to sell to the plaintiff, a merchant at Bristol, 200 tons of sugar of a certain quality as regards saccharine matter, at the price of 21s. 9d. per cwt. f.o.b. Hamburg. The sugar was to be shipped from Hamburg to Bristol, and payment was to be made by cash in London in exchange for bills of lading. D. and Co.'s agents at Hamburg, in performance of this contract and also of another Bristol contract for another 200 tons of sugar, shipped thence per the steamship City of Dublin 400 tons of sugar, and consigned the same to Bristol. D. and Co.'s usual course of business was, as the plaintiff knew, not to apportion particular bags of sugar to particular buyers at the time of shipment, but to apportion the various bags and the bills of lading representing them between their various buyers at a particular port, after the sugar had been shipped and after D. and Co. had received the bills of lading. This was done in order that D. and Co. might with comparative accuracy make up to each buyer the amount of saccharine matter contracted for by him. The City of Dublin was lost on the voyage from Hamburg to Bristol, before any appropriation of sugar had been made by D. and Co., but D. and Co. afterwards appropriated 200 tons to the plaintiff and sent him an invoice, and the plaintiff thereupon paid for the sugar so appropriated to him. The plaintiff had a floating policy on goods, and on hearing of the loss

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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*declared thereunder in respect of these 200 tons of sugar in the City of Dublin.*

*Held, in an action on such policy, that the plaintiff had an insurable interest in such sugar, because, although the property had not passed to him, the words f.o.b. in the contract made between the parties, having regard to their knowledge of the course of business, showed it to be their intention that the 200 tons bought by the plaintiff should be at his risk, and that he should be liable to pay for it whether it arrived or not.*

*Judgment of Field, J. (47 L. T. Rep. N. S. 416) reversed.*

This was an appeal from a judgment of Field, J., on further consideration (reported 47 L. T. Rep. N. S. 416).

The plaintiff was a Bristol merchant and sought to recover from the defendant, an underwriter at Lloyd's, under a "floating" marine policy on goods in respect of a loss of 3900 bags of sugar shipped on board the *City of Dublin* from Hamburg to Bristol.

The facts, which are very fully set out in the judgment of Field, J., were as follows:—

The sugars which were lost had been shipped at Hamburg for Messrs. Drake and Co., London merchants, by their forwarding agents there, in intended performance of two written contracts for sale entered into by Drake and Co. with two Bristol buyers in Jan. 1881. At the time of the loss, on the 4th Feb., the position of things with regard to these contracts was as follows: By the earliest of these two contracts (the 7th Jan.) Drakes agreed to sell to a Bristol firm (W. Beloe and Co.) 200 tons of sugar, price 21s. 9d. per cwt. net, f.o.b. Hamburg, for 88 degrees net saccharine contents. Sugar to analyse between 85 and 92 net, 6d. per cwt. to be paid or allowed for each degree above or below 88, but anything above 92 not to be paid for, and should the average analysis of whole contract exceed 90 such excess not to be paid for. For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading. By the second contract of the 12th Jan. Drakes agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. After the loss it became for the first time known to Drake and Co. and to the plaintiff that Beloe and Co. had entered into the contract of the 7th Jan. with Drakes, for the purpose of enabling them to execute a contract previously made by them on the same day with the plaintiff for 200 tons at an advanced price. At the time of shipment and loss, therefore, all that Drakes knew was that they had engaged to sell 400 tons destined for Bristol, i.e., 200 to Beloe, and 200 to the plaintiff, and although plaintiff knew that he had 400 tons coming from Hamburg, i.e., 200 to be shipped by Drakes, and 200 to be shipped by someone under Beloe, he did not know that Drakes were the shippers of the latter 200, nor did Drakes know that Beloe was under any contract to deliver, or plaintiff under any contract to take, 200 tons contracted for by Beloe. The ultimate destination of the whole 400 tons was thus Bristol, deliverable by Drake and Co., f.o.b. at Hamburg during the month of January. The ordinary course of business, and which course was known to the plaintiff, was for Drakes' forwarding agents at Hamburg to ship by that boat of the Hamburg and Bristol line of

steamers next due to sail after the time fixed for delivery, and the *City of Dublin* was the one in turn for departure at the end of the last half of January. The plaintiff, on the 31st Jan., in writing to Drakes, expressed his hope that the 200 tons of the 12th were on the steamer then due to leave Hamburg, and in reply he received a letter from Drakes, that this sugar was not only at Hamburg, but that there would probably be extra expense chargeable to him owing to delay in steamer's arrival out, and consequent delay in departure. About the same time Drake and Co. also advised Hermann and Thielnehmer, their Hamburg forwarding agents, that they had sold 400 tons for Bristol, and gave them the necessary directions as to which bags were to be shipped for that port, begging them to engage room by the *City of Dublin*, and send the bills of lading to London as soon as possible. The whole of the sugar which Drake and Co. had appropriated to satisfy the two contracts together had not arrived, however, at Hamburg at the time of the departure of the steamer, and in consequence Hermann and Thielnehmer were not able to ship by the *City of Dublin* more than 3900 bags, and they advised Drake and Co. of this short shipment, proposing to send the 100 short shipped by the next steamer due to sail on the 15th Feb. They did, however, ship 3900 bags, and took several bills of lading by which they were made deliverable to "order, Bristol," but no appropriation was made by them of any specific bags; that is to say, as to which of the bags were to be Beloe's, and which of them the plaintiff's, but the whole 3900 were shipped in one undistinguishable mass, and all were consigned simply "order Bristol." This was in accordance with the usual course of business of Drake and Co., which was not to fulfil contracts of this kind by appropriating the sugar to each buyer at the time of shipment, but to ship enough to satisfy all the contracts they might have for sugar, which were deliverable at any particular port, and after the shipment to apportion the sugar shipped between the buyers at that port according to each contract. The apportionment was made so that no part of the sugar to be supplied under any contract should exceed 92 degrees net saccharine matter, and that the average should not be more than 90, for all net above, though paid for by Drake and Co. in Germany, would, under the terms of the contract, go for nothing in England, and so be a loss to them. It was therefore the usual course of business for Drake and Co. not to make the apportionment until they had got the bills of lading, when by comparing them with the certificates of the analyses of the sugar made in Germany, and which were duly forwarded to them in London, and had references to the marks and number of the bags in which the sugar was packed, they could ascertain the net saccharine contents of each lot of bags, and could allot the bags to their different buyers at the port for which they were shipped, so as to correspond in respect of the specific quantity of net sugar with the degree contracted for. Messrs. Drake and Co.'s transactions of this character were very extensive, as well with the plaintiff as others, and the general course of business between them and their buyers had been for the buyer to bear the cost of the insurance against sea risks from the time of delivery, and the Court of Appeal drew

the inference that, as a matter of fact, both the plaintiff and Beloe and Co. knew that it was the course of business of Drake and Co. to apportion and appropriate the sugar to the contracts with their different buyers in the way above described after and not at the time of shipment. The *City of Dublin*, with the 3900 bags on board, left Hamburg on the 2nd Feb. 1881, and was lost with her cargo on the morning of the 4th. On the 4th Feb. Drake and Co., who had then got the bills of lading, apportioned the 3900 bags between Beloe and the plaintiff, and they made out invoices to each accordingly, that to Beloe and Co. showing an average percentage on the whole of 89.5875, and that to the plaintiff of 89.35, both averages therefore being kept under 90. News of the loss arrived before these invoices were posted, and the plaintiff anticipating that he might have the 200 tons on board coming to him under his contract, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy sued on for any loss in respect of those 200 tons. In the letter to the plaintiff of the 4th Feb., in which Drake and Co. inclosed the invoice to the plaintiff for the 1900 bags, they proposed that the contract should be cancelled as to the 100 short shipment, and to this the plaintiff assented, but this was done after both parties knew of the loss. The plaintiff and Beloe and Co. subsequently respectively paid the contract price, and obtained the bills of lading for the sugars specified in their respective invoices, and Beloe and Co. afterwards sent an invoice of the 200 tons of sugar sold by them to the plaintiff, who thereupon paid the price of these and received the bills of lading in respect thereof. The plaintiff then declared under the floating policy in respect of this last-mentioned sugar. In consequence of the loss of the ship and cargo, the plaintiff, who had made two sub-contracts with the Bristol Sugar Refining Company for the sale to them of the sugar he had contracted to buy of Drake and Co. and Beloe and Co. at an advanced price, failed to realise the profit he had contracted for. Upon these facts the plaintiff's right to recover was denied by the defendant on the ground that no property in the sugar had passed to him before the loss; and, secondly, that at the time of the loss he had no insurable interest in the sugar itself, and that even if he had an insurable interest in "profits," he was not entitled to declare the loss in respect of that interest upon a policy on "goods."

Field, J., before whom the action was tried, was of opinion, on further consideration, that the plaintiff had neither property nor insurable interest in the sugar, and that, as he was not entitled to recover for a loss of profit under a policy like this on goods, the defendant was entitled to judgment, and he gave judgment for the defendant accordingly.

The plaintiff appealed.

*Charles Russell, Q.C. and Reid, Q.C. (Dankwerts with them)* for the plaintiff.—The plaintiff had an insurable interest in the sugar, because as soon as it was shipped *f.o.b.* at Hamburg it was at his risk, even though no property in it had passed to him prior to the apportionment. The plaintiff here contracted to pay for the sugar, whether it arrived or not, and he expressly took all the risks of the voyage. They cited the following cases:

*Lucena v. Craufurd*, 2 B. & P. (N. R.) 269;  
*Jouce v. Swann*, 17 C. B. N. S. 84;  
*Wilson v. Jones*, 14 L. T. Rep. N. S. 65; L. Rep. 1 Ex. 103;  
*Barclay v. Cousins*, 2 East, 544;  
*Anderson v. Morice*, 32 L. T. Rep. N. S. 355; 35 L. T. Rep. N. S. 506; 1 App. Cas. 713;  
*Appleby v. Myers*, 16 L. T. Rep. N. S. 669; L. Rep. 2 C. P. 651;  
*Castle v. Payford*, 26 L. T. Rep. N. S. 315; L. Rep. 7 Ex. 98;  
*Jackson v. Anderson*, 4 Taunt. 34;  
*Hill v. Secretan*, 1 B. & P. 315.

*Cohen, Q.C. and Barnes* for the defendant.—The plaintiff had no property, nor any insurable interest in the sugar. The price was not ascertainable until the sugar had been appropriated, and therefore at the time of the loss there was no liability to pay the price; the case therefore of *Anderson v. Morice* (*ubi sup.*) is an authority in favour of the defendant. They cited

*Seagrave v. Union Marine Insurance Company*, 14 L. T. Rep. N. S. 479; L. Rep. 1 C. P. 305;  
*Ebworth v. Alliance Marine Insurance Company*, 29 L. T. Rep. N. S. 479; L. Rep. 8 C. P. 596;  
*Stockdale v. Dunlop*, 6 M. & W. 224;  
*Brown v. Hare*, 4 H. & N. 823.

*Reid, Q.C.*, in reply, referred to the judgment of Lord Brougham in

*Cowasjee v. Thompson*, 5 Moo. P. C. 165, at p. 173.

BRETT, M.R.—I think that no one can deny that this is a case of extreme difficulty and of great nicety. In my opinion it is the duty of a court to lean in favour of an insurable interest if possible, because when an underwriter who has received his premium takes the objection that the assured had no insurable interest, he takes an objection which is technical, and which has no real merit in most instances, and for that reason I have always felt it my duty to lean in favour of an insurable interest if possible. Of course we must not assume facts which do not exist, and we must not stretch the law beyond its proper limits; but we must, I think, approach the consideration of the question with a mind to find in favour of an insurable interest, if the law and the facts will allow it. In this case it seems to me to have been proved that there was in Bristol a course of business—I do not think it amounted to a custom of trade—in this sugar trade, and that this course of business consisted in this: Where sugar was shipped at Hamburg for Bristol by a particular shipper in sufficient quantities to fulfil all the orders that he had from Bristol, and where the price of the sugar depended upon the amount of saccharine matter in the sugar, it was impossible to be very exact in allocating to each contract the exact amount of saccharine matter to which it was entitled. In consequence of this difficulty the course of business was for the shipper to take bills of lading of small quantities of the sugar, so that, when he saw the analyses of the quantities of the sugar, he could, by distributing the bills of lading according to those analyses, allocate to each contract out of the sugar shipped the exact amount of saccharine matter to which that contract was entitled. Now it seems to me that, whether as a fact that allocation could or could not have been done before shipment, it never was done before shipment, but was always done in England. That is the inference which I draw from the evidence. Then the plaintiff is a dealer in this sugar business; he is a buyer certainly, but he has made many contracts of this kind with

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persons who sold this kind of sugar. That being the course of business by the seller, the sugar to which the buyer would be entitled depended upon the distribution of the bills of lading according to the analyses, and the exact price which the buyer would have to pay depended also upon that distribution. I cannot then believe that a buyer who had dealt in this sugar trade did not know of this course of business, and I draw the inference that he did know of it. If so, then the course of business was known to the plaintiff and Messrs. Drake and Co. at the time the contract of sale was made, and I think to Beloe also and to all persons trading in sugar between Hamburg and Bristol. Now the contract is made in writing for the purchase and sale of a quantity of sugar on the terms "free on board" by persons who knew the course of business which I have described, and the question is, what is the true construction of that contract having regard to the knowledge of the parties with respect to the course of business in such cases? Now it is not denied that, if the goods shipped are specific goods, the words "free on board" mean more than that the goods are to be delivered on board the vessel at the shipper's expense. If the goods are specific goods the words "free on board" mean that the goods are to be delivered on board at the expense of the shipper on account of the buyer, and in such a case the goods would be at the risk of the buyer from the time when they were shipped, whether they were lost or not on the voyage. If that is the meaning of the words "free on board" in a contract for the purchase and sale of specific goods, even though payment is not to be made on delivery of the goods on board, but at some other time, and even though the purchaser cannot obtain delivery until he has paid cash or accepted bills against the bills of lading, then the question arises whether there can be a contract made on the terms "free on board," which can be fulfilled without the delivery on board of any specific goods at the time of shipment. That question may be tested thus: Can you make such a contract with regard to part of a bulk cargo? Is there any mercantile or legal reason why a person should not agree to sell to another person so much out of a bulk cargo, or ex such and such a ship, upon the terms that if lost the loss shall fall on the purchaser and not upon the seller? I see no reason against this, and if such a contract can be made, then it is made when you put the words "free on board" in a contract to buy and sell a certain quantity of a bulk cargo ex such and such a ship. In such a contract some meaning must be given to the words "free on board," and what meaning can be given to them with regard to the unseparated part of the cargo except the meaning which would be given to them if the contract was dealing with specific goods? What is there contrary to business or law in those words "free on board" meaning in such a contract "I sell you twenty tons out of fifty, I paying the cost of shipment, and you bearing the risk of whether they are lost or not?" I think it is not a bit more inconsistent with business and law, that parties should make such a contract with regard to part of a cargo, than that they should do so with regard to a whole cargo, or with regard to specific parts of a cargo, and therefore the only remaining question is whether this is such a contract. Now, taking the surrounding circumstances

into consideration, the circumstances of the course of business known to both buyer and seller, I think that both these contracts of Messrs. Drake and Co. with Beloe and with the plaintiff were that the buyer should pay for the sugar that might be allocated to him, and that he should be bound to accept such sugar, and further that the seller should not run the risk of arrival, but that the buyer should be bound to pay the price against the allocation of bills of lading whether the sugar arrived or not. Therefore, if that is so, when Beloe sold to the plaintiff he sold in truth that contract, and the plaintiff became liable to Beloe to pay for the sugar whether it arrived or not, and he was already liable to Drake and Co. upon the same terms, and therefore upon the non-arrival of the sugar he would suffer a money loss. It is not only that he would not only make a profit, but he would suffer a money loss, and therefore the question that was raised about *Anderson v. Morice* (*ubi sup.*) does not arise. Directly one arrives at the true meaning of the contract the case falls within known principles of insurance law, and I cannot doubt that here the plaintiff had an insurable interest. Therefore I think our judgment ought to be in favour of the plaintiff.

BAGGALLAY, L.J.—I am of the same opinion, and I shall express my reasons for agreeing with the Master of the Rolls very concisely. I am of opinion that the appellant is entitled to succeed, upon the ground that at the time of the loss the goods were at his risk. The argument in support of that view has been based on two reasons: one, the fact that the goods were to be "free on board;" the other, the course of business in this particular trade. It has not been denied that where the goods are specific goods the words "free on board" place them at the risk of the buyer from the time of shipment; but it has been suggested that it is different when the goods are not specific, but are, as in the present case, a certain proportion of goods out of a larger bulk. What authority is there for this suggested difference? No authority has been cited to show that there is a difference; what reason, then, in law is there for such a difference? I think it very difficult to suggest any, and if called on to express an opinion I should assent to the argument of Mr. Reid. But I prefer to rest my decision upon the general course of business in regard to transactions of this kind. I think it is impossible to come to any other conclusion than that the distribution of the bills of lading, with reference to the analyses of the different sugars which were the subjects of the different contracts, was the ordinary course of business in transactions of this character, and that both parties knew it to be so. Consequently, the goods were at the risk of the purchaser at the time of the loss, and he had an insurable interest for which he is entitled to claim.

LINDLEY, L.J.—In this case the action is brought upon a policy of insurance effected upon goods, and the only question for us to consider is whether the plaintiff had an insurable interest in those goods at the time when the policy was effected. Now, the plaintiff's interest in those goods arises out of a contract, and the first question is, what is the meaning of that contract? The contract is for 200 tons of sugar, free on

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board at Hamburg, the price to be paid in London against bills of lading, and the sugar to answer a certain description as regards saccharine matter. First, let us examine that contract by itself without reference to any particular course of trade. No particular sugar is specified, and it seems to me that such a contract might be performed in two different ways. Two hundred tons of sugar, answering the description, might be shipped free on board at Hamburg, and appropriated to the contract at the time of shipment, and then the property would pass to the buyer at the time of shipment, and the goods would then be at his risk. That is one way, and perhaps the ordinary way of performing such a contract. But there is another way of performing the contract, and here it is that a difficulty arises. Messrs. Drake and Co., the sellers of the sugar, conducted their business in a particular way, and the plaintiff, who was a merchant at Bristol, and had had dealings of this sort with Messrs. Drake and Co., knew of their course of business. That course of business was not to appropriate a certain quantity of sugar to a particular buyer at the time of shipment, but to ship enough sugar to satisfy all the contracts for sugar deliverable at a particular port, and then after shipment to apportion out of that bulk the quantities deliverable to the buyers at that port. It is plain that this was the course of business, and that the plaintiff knew of it to this extent at all events, that having had dealings with Messrs. Drake and Co. for some years he had been in the habit of insuring the sugar he bought from them directly it was shipped. What is left obscure is whether the plaintiff knew exactly how the appropriation was effected. If we once come to the conclusion that the plaintiff was fully aware of Messrs. Drake and Co.'s course of business, then all difficulty vanishes. My difficulty is one of fact, but on the whole I come to the conclusion that the plaintiff knew that Messrs. Drake and Co.'s course of business was not to appropriate quantities of sugar to a particular buyer at the time of shipment, but to ship enough sugar to fulfil their Bristol contracts, and then to appropriate particular bags to particular buyers after shipment. Now, what is the meaning of this contract, having regard to these circumstances? It must mean that out of the quantity of sugar shipped to satisfy the Bristol contracts, the quantity shipped to answer each contract shall be at the risk of the buyer. There is nothing, so far as I can see, in point of law, to exclude the existence of such a contract as that. But it is said that you cannot have a contract by which the goods are to be at the risk of the buyer, unless they were appropriated to him at the time of shipment. I think that is too wide a proposition. I see no reason why a person should not agree to buy and pay for a certain portion of a bulk cargo on the terms that such portion should be at his risk during the voyage, even though no portion be appropriated to him until the ship is unloaded. I agree with Field, J. that there was no appropriation of goods in this case so as to pass the property to the plaintiff, but I think it is plain that the intention was that the 200 tons of the cargo should be at the plaintiff's risk. Then the whole difficulty vanishes, because, if that be so, the plaintiff clearly had an insurable interest. I therefore think that the judgment of Field, J., which pro-

ceeded on the ground that the plaintiff had no property in the goods, cannot be supported, and that this appeal must be allowed.

*Judgment reversed.*

\*Solicitors for the plaintiff, *Hollams, Son, and Coward.*

Solicitors for the defendant, *Bubb, Waltons, and Bubb.*

Nov. 26 and 27, 1883, and April 9, 1884.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.J.J.)

BURDICK v. SEWELL AND ANOTHER. (a)

*Ship—Bill of lading—Indorsement of, by way of security for money advanced—Liability of indorsee for freight—Passing of property in goods—Bills of Lading Act (18 & 19 Vict. c. 111), s. 1.*

*The mere indorsement and delivery of a bill of lading by a shipper of goods by way of security for money advanced to him by the indorsee passes the property in the goods to the indorsee so as to make him directly liable to the shipowner for freight under 18 & 19 Vict. c. 111, s. 1.*

*So held by Brett, M.R. and Baggallay, L.J., Bowen, L.J. dissenting.*

*Judgment of Field, J. (48 L. T. Rep. N. S. 705) reversed.*

THIS was an appeal by the plaintiff from the judgment of Field, J. upon further consideration, in favour of the defendants (reported 48 L. T. Rep. N. S. 705).

The action was brought by the plaintiff, as owner of the steamship *Zoe*, to recover the sum of 174l. 8s. 9d. in respect of freight for the carriage of goods from London to Poti in Russia.

The defendants were bankers at Manchester, to whom the shipper had delivered the bill of lading for the goods indorsed in blank as security for advances made by them to enable the shipper to pay for the goods which he had caused to be manufactured in this country.

The facts fully appear in the report of the proceedings before Field, J., and are also stated in the judgments hereinafter set forth.

Nov. 26 and 27, 1883.—C. Hall, Q.C. and Edwyn Jones for the plaintiff.

Sir F. Herschell (S.G.) and Danckwerts for the defendants.

The following authorities were cited in the course of the arguments:

*Story on Bailments*, sect. 287;  
*Donald v. Buckling*, 14 L. T. Rep. N. S. 773; L. Rep. 1 Q. B. 585;  
*Barber v. Meyerstein*, 22 L. T. Rep. N. S. 808; L. Rep. 4 E. & I. App. 317;  
*Glyn, Mills, and Co. v. The East and West India Dock Company*, 43 L. T. Rep. N. S. 584; 47 L. T. Rep. N. S. 808; 6 Q. B. Div. 480;  
*The Freedom*, 20 L. T. Rep. N. S. 229; L. Rep. 5 P. C. 594;  
*Lickbarrow v. Mason*, 1 Sm. L. C. 7th edit. 756;  
*Hibbert v. Carter*, 1 T. R. 745;  
*Short v. Simpson*, 13 L. T. Rep. N. S. 674; L. Rep. 1 C. P. 243;  
*Newson v. Thornton*, 6 East, 17;  
*Turner v. Trustees of the Liverpool Docks*, 6 Ex. 543; 20 L. J. 398, Ex., Ex. Ch.;  
*Jemkyns v. Brown*, 14 Q. B. 496;  
*Harris v. Birch*, 9 M. & W. 591;  
*Re Attenborough*, 11 Ex. 461;

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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*Johnson v. Stear*, 9 L. T. Rep. N. S. 804; 15 C. B. N. S. 330;

*Franklin v. Neate*, 13 M. & W. 461;

*Kemp v. Falk*, 47 L. T. Rep. N. S. 454; 7 App. Cas. 573;

*Pease v. Gloahed*, 15 L. T. Rep. N. S. 6; L. Rep. 1 P. C. 219;

*Blackburn on Sale*, p. 297.

*Cur. adv. vult.*

April 9, 1884.—The following judgments were delivered:

BRETT, M.R.—In this case the material facts seem to be, that the goods in respect of which freight is demanded in the action were shipped on board the plaintiff's ship *Zoe*, by one Nercessiantz, to be carried to Poti, in Russia; that Nercessiantz applied to the defendants (who were bankers in Manchester) for, and obtained from them, a loan or advance, and, as a security for the advance, indorsed to the defendants the bill of lading of the goods; that circumstances arose under which the goods were landed and warehoused in Poti, with a stoppage for freight; but the goods were sold under Russian law for duties and charges, and were sold for an amount which left nothing applicable to answer the claim for freight. Thereupon the plaintiff demanded the freight from the defendants. The case was tried before Field, J. without a jury; and he held, as a matter of law, that he was entitled to inquire whether, and he found as a fact, that the intention of Nercessiantz and the defendants was that the transaction was to be only a pledge; that is, that the intention was not to pass and take respectively the whole legal property, subject to an equity as to redeeming it, or as to a balance, if any, after a sale, but to pass and take respectively only a pledge. The learned judge then held, as the result of that intention, that the legal property in the goods did not pass to the defendants, that the Bills of Lading Act did not apply, that there was no contract between the plaintiff and the defendants, and that the plaintiff could not maintain his action for freight against the defendants. Against this judgment the plaintiff appeals. The ultimate question of course is whether under the circumstances the property in the goods passed by the indorsement of the bill of lading to such an extent as to bring the case within the Bills of Lading Act (18 & 19 Vict. c. 111). That depends very nearly, if not quite, upon the question stated by Field, J.: "The question in the present case," he says, "resolves itself into, whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale, or as a mere pledge?" I should rather put the question thus: Does or does not the indorsement of a bill of lading as a security for an advance, as distinguished from an indorsement of it upon a sale of it or the goods named in it for a price, by necessary implication operate in the same way as an assignment of goods by bill of sale, that is, so as to pass the whole legal property in the goods to the assignee, leaving to the assignor an equity in the proceeds beyond the advance secured and expenses; or may evidence be given of other accompanying facts, from which it may be inferred that the intention of the parties was, and therefore the legal result is, that there was only a pledge of the bill of lading, or of the goods

named in it? That question put more tersely is: Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity to the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale? First, let us consider the consequences of the opposite views; let the transaction be treated as a pawn or pledge of the bill of lading, or of the goods. If of the bill of lading, then there is no common law power in the pledgee to use the bill of lading at all; there is no power to sell it before the time when according to the contract of pledge the article pledged is forfeited, and until a late statute an unauthorised sale of it before that time would have passed no right to the vendee; if of the goods, there is no valid pledge unless the delivery of the bill of lading is treated as a delivery of possession of the goods to the pledgee. But a delivery of a bill of lading is not a delivery of the possession of the goods to the pledgee, though, when speaking of its effect to pass property, it has often been said to have the same effect as a delivery of possession of the goods; it gives to the indorsee a right to possession on arrival of the ship on payment of freight. It is because it does not give to the indorsee the possession, but that the possession is in the captain of the ship, that the original vendor may under given circumstances stop *in transitu* the goods in which he has no longer any property, and that the captain has a lien on the goods for his freight, charges, &c. And if the indorsement of the bill of lading is only a pledge of the goods, yet where the pledgee is not otherwise a factor, the mere pledge, before the time of forfeiture given by the contract of pledge, would not by any Factors Act, or any other statute until a recent one, or by common law, have enabled the holder of the bill of lading to sell the goods, or (if he assumed to sell them) to pass any right by such sale. It follows that any merchant, banker, or other asked to advance on the security of a bill of lading must have inquired not only whether it was indorsed for value, but as to what were the terms on which the value was given and the indorsement made. And as to insurance, if the legal property does not pass, inasmuch as certainly in equity the whole interest does not pass, the indorsee for value of the bill of lading cannot insure in his own name for more than his real interest. Whereas, if the indorsement for value was treated as a mortgage, the terms of the equity relating to it were settled between the parties by a contemporaneous writing, and for the breach of those terms there was always between the parties a remedy in equity, and the free dealing with the bill of lading in the general mercantile business of the country was not hampered. He who held the bill of lading with an interest in it could realise his interest by a legal sale, could protect all interests under it by an easy insurance. The purchaser of the bill of lading could buy with safety, and therefore could give a better price. The one view tended, as pointed out by Buller, J., in *Lickbarrow v. Mason* (*ubi sup.*), to inconvenience, the other to facility in mercantile business. He points this out, as it seems to me, as a reason upon which the custom of merchants, on which his judgment was founded, came to be in



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existence. If the general understanding of merchants had not been, in accordance with the verdict of the jury in *Lickbarrow v. Mason*, accepted in its largest sense, there would, one would think, have been cases in the books raising the question; but no such thing is known in any book. The only mode of accounting for this is to say that merchants have treated the indorsement of a bill of lading for value as equivalent to a bill of sale. It has been suggested that a decision in favour of the plaintiff in this case will now hamper trade, because it will make, by reason of the Bills of Lading Act, a merchant who takes a bill of lading only as security for an advance, so as to be in reality only partly interested in the bill of lading, liable for unknown claims under it by the shipowner who granted it. As to the liability to pay freight, it can only be important in such an isolated instance as the present, because the security for the advance can rarely be available until the lien for freight is satisfied. The amount of the advance is always calculated according to the value of the goods less freight, and so in respect of any other claim subject to a shipowner's lien. If the bill of lading, by reference to a charter-party, incorporates other and unusual liabilities, the merchant asked to advance will examine the charter-party, and only advance to a more limited amount. A loaded bill of lading is of little value. A decision in favour of the defendant would retain in the suggested case of a mere pledge the difficulty which the Bills of Lading Act was passed to obviate, namely, that the pledgee will have rights in the property but no rights in the contract. If he desires by the contract to protect the goods and his interest in the goods, which is the first interest invaded by a breach of the contract of carriage, he must revert to the old inconvenience of being obliged to use the pledgor's name. Mercantile convenience seems to me to lean strongly in favour of a decision for the plaintiff in this case. The case, however, must after all depend upon authority; it must depend upon the sense in which it is now considered that the finding of the custom of merchants by the jury in *Lickbarrow v. Mason* (*ubi sup.*) has been adopted by the courts so as to be taken to be the law merchant without further proof. In order to determine this, it may be well to examine some of the cases which were decided before and which were cited in the case of *Lickbarrow v. Mason*, as well as that case and the cases after it. The question is, does the *bonâ fide* indorsement of a bill of lading as security for an advance, as distinguished from an indorsement upon a sale for a price, pass the whole legal property in the goods named in the bill of lading to the indorsee, leaving only equities to the indorser? The third case put by Holt, C.J. in *Evans v. Martlett* (1 Ld. Raym. 271), cited in *Lickbarrow v. Mason*, is "a bill of lading to A., and the invoice only (that is the invoice alone) shows that they are upon account of B.; A. ought always to bring the action, for the property is in him, and B. has only an equity." This does not state in terms whether the bill of lading is originally made to A., or is indorsed to A. The terms are large enough to include an indorsement to A. for value, and then B.'s interest is stated to be only one in equity. The action mentioned is obviously an action of trover. In *Hibbert v. Carter* (*ubi sup.*) the plaintiffs were merchants in

London, agents and general consignees of one Robert Kerr, who was the owner of goods, and shipped them from Jamaica. The plaintiffs having received advice that the goods were shipped, insured them, but before they had effected the insurance Kerr had indorsed the bill of lading to one Dellprat, in Jamaica, for an arrear due on a mortgage. Buller, J. was of opinion that Kerr had no insurable interest, because the indorsement of the bill of lading had passed the whole property to Dellprat, yet Kerr had not sold the goods. The court was of the same opinion as to the legal property, but held that nevertheless Kerr might have an insurable interest. In what respect? Obviously in respect of his equitable interests, his right to redeem, and to a surplus, if any, on a sale. In *Wright v. Campbell* (4 Burr. 2046) the action was in trover by the assignees in bankruptcy of one Richard Scott. Lewis Fontaine shipped the goods and took bills of lading and indorsed one copy to Richard Swanwick in Liverpool, in order that Swanwick might sell the goods for him as factor. Swanwick indorsed this copy to Scott to secure him on his becoming bail for Swanwick, and also as security for a debt due from Swanwick to Scott. Scott demanded the goods on the arrival of the ship, but was refused. The goods were delivered to and sold by the defendants. The action was in trover by the assignees of Scott. There was no sale for a price by Swanwick to Scott. Swanwick being a factor could not pledge to Scott, but as factor he had a right to pass the property to Scott. The decision is that, if the transaction was *bonâ fide*, the indorsement to Scott for value passed the property to Scott. It did so although the value given was not the price for a sale, and Lord Mansfield is reported by Buller, J. to have approved of the case in Lord Raymond, *Evans v. Martlett*, upon an interpretation of it in its widest sense. It was after these views, thus expressed, that arose the case of *Lickbarrow v. Mason* (*ubi sup.*), upon the interpretation of the decision in which the present question depends. In that case the facts were, that Turing and Son sold goods to Freeman on credit, and shipped them to Freeman and sent him bills of lading. Freeman indorsed the bills of lading to the plaintiffs as security for an advance, and became insolvent before the arrival of the goods. Turing stopped the goods *in transitu* by indorsing a copy bill of lading to the defendants to enable them to do so on his behalf. The defendants sold the goods for Turing. Action of trover by the plaintiffs against the defendants. The defendants demurred to the evidence, or, in other words, asserted that there was no evidence on which it could legally be held that the plaintiffs were entitled to succeed. It was argued for the plaintiffs that, as between the consignor and the consignee, the bill of lading is a mere authority by the consignor to the captain to deliver the goods to the consignee, and to the consignee to receive them, and that the consignee cannot transfer a greater right than he has, that is, a right to receive the goods if the authority given to the captain is not countermanded. It was argued for the defendants that the *bonâ fide* indorsement, for a valuable consideration, of a bill of lading to a third person is an absolute transfer of the whole property. It was not suggested on either side that there was a question of intention to be deter-



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mined by a jury on an inference of fact. It is clear that everyone assumed that the bill of lading was indorsed in order to secure to the plaintiffs the amount of their advance, leaving the surplus, if any, for Turing. No one suggested that there was, independently of the indorsement of the bill of lading, a contract of sale of the goods for a price as between Turing and the plaintiffs. Under these circumstances Buller, J. says, "I make the question even more general than it was made at the bar, namely, whether a bill of lading is by law a transfer of the property:" (Smith's Leading Cases, 6th edit. vol. i., p. 710.) He does not say, "whether a bill of lading given under the circumstances of this case is a transfer of the property," but "whether a bill of lading is by law a transfer of the property." It is obvious that he was speaking of a bill of lading indorsed for value. He cites *Wright v. Campbell*, and then says, that "Lord Mansfield in that case said, that since the case in Lord Raymond it had always been held that the delivery of a bill of lading transferred the property at law." "If so," says Buller, J., "every exception to that rule arises from equitable considerations which have been adopted by courts of law." "Thus," he says, "stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, not even a dictum, if properly understood, which impeaches this long string of cases." It has been observed that these statements of the law are not literally correct, because they do not exclude an indorsement to a mere agent. But Buller, J. had already in the same judgment, referring to a case before Lord King, disposed of an indorsement to "a pure factor having no demand of his own." I agree, he had said, that he would have no property, because in such a case the factor is only a servant or agent; "he is merely a servant or agent." But then, he said, "it remains to be proved that a man who is in advance, or under acceptances on account of goods, is simply and merely a servant or agent; for which no authority has been or can be produced." It is with regard to the case of "a man who is in advance on account of goods" that his whole judgment is dealing. The whole case of *Lickbarrow v. Mason* deals with such a person. It is to me impossible to suppose, it seems to me perverse to assume, that the question finally left to the jury was not a question put and understood to be put with regard to such a man. The dispute was between such a man and the plaintiffs. It was with regard to that dispute that the jury found "that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are, after the shipment, and before the voyage is performed, negotiable and transferable by the shipper's indorsement, or transmitting of the same to any other person; and that, by such indorsement and delivery, or transmission, the property in such goods is transferred to such other person." If the contention made now on behalf of the defendants is true, that answer ought not to have been accepted. It made the custom too large. It ought to have contained the limitation "if so intended." If the present contention be true, a question was not asked which

ought to have been asked, namely, did the parties intend the transaction to be a pledge on a mortgage? I cannot bring my mind to believe that everybody concerned in that long discussion omitted to consider the proper limitations of the general principle which everybody was trying to discover, and which Buller, J. expressed. It was then in a case where the bill of lading was indorsed to secure an advance that, after long and exhaustive discussion and two trials, the House of Lords held, without anyone even referring to the idea that in any such case an inquiry must be made as to what was the intention of the parties, that by the general custom of merchants the *bonâ fide* indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee, leaving the ultimate account between the parties to be settled as an equity. Such a decision I cannot depart from. I can be no party to explaining it away. I accept it as I firmly believe it was intended. To do otherwise restores the judgment of Lord Loughborough. The judgment in *Lickbarrow v. Mason* governs the present case. According to it the whole legal property in the goods represented by the bill of lading passed by the indorsement of the bill of lading to the defendants. If so it cannot be doubted that, by virtue of the Bills of Lading Act, the liability under the contract contained in the bill of lading passed also to and against the defendants, and that the plaintiff was and is entitled to recover the freight in dispute. I cannot agree with the judgment of Field, J., and in my opinion it should be reversed.

BAGGALLAY, L.J.—The plaintiff in this action is the owner of the ship *Zoe*, on which certain cases of machinery were shipped and carried to Poti, a Russian port in the Black Sea. The defendants are bankers at Manchester; and, whilst the ship was at sea, they made an advance to the shipper of the goods, who delivered over to them the bill of lading duly indorsed as a security for the loan. No memorandum of charge or other formal document indicative of the intention of the parties was executed, but it was represented by the shipper to the defendants that he was about to proceed to Poti to superintend the delivery of the machinery, that the amount advanced would be repaid before he left England, and that he would call again and make definite arrangements for that purpose. He failed, however to carry out the representations so made by him. The ship arrived at Poti in due course, and the goods not having been cleared within the time limited for that purpose, were sold in accordance with Russian law, but did not realise more than was required to satisfy the demands of the Russian Custom House. The plaintiff thereupon, treating the property in the goods as having passed to the defendants by virtue of the delivery to them of the indorsed bill of lading, and relying upon the provisions of the Bills of Lading Act, demanded from the defendants payment of the freight and incidental charges, and, upon the refusal of the defendants to make such payments, commenced the present action. The action was tried before Field, J. without a jury, and that learned judge held that no sufficient property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading, to render them liable to the plaintiff, and he gave judgment for the defendants. From that judgment

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the present appeal has been brought. The first question for consideration is, what was the effect of the delivery to the defendants of the indorsed bill of lading? With all respect for the contrary opinion expressed by Field, J., and which is, I believe, concurred in by my colleague, Bowen, L.J., I am of opinion that, for reasons which I will very concisely state, the legal property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading. I do not propose to examine or discuss the numerous authorities which have been cited in the course of the arguments upon this appeal. The more important of them have been amply examined by the Master of the Rolls in the judgment which he has just delivered, and had previously been fully examined by him in the case of *Glyn v. East and West India Dock Company* (*ubi sup.*). I shall content myself with referring to that portion of his judgment in the case just mentioned which had reference to the effect of the delivery of an indorsed bill of lading. In that judgment the Master of the Rolls distinguished between the legal effect of the transaction in transferring the legal property in the goods, and the equitable rights that might be reserved to the borrower by express agreement between the parties, or might be implied in his favour from the general circumstances of the case; and after referring to a suggestion that had been made in argument that the indorsement of the bill of lading, when accompanied by such a letter of charge as had been given in that case, might not have the same fullness of effect in passing the property as if there were no letter of charge, he proceeded as follows: "I am of opinion that an indorsement of a bill of lading for an advance does, by the mercantile law of England, pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against the whole world, except some one who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which is still an equity though recognised by the common law courts." This is, in my opinion, a clear and correct exposition of the true effect of the delivery of an indorsed bill of lading as a security for a loan; the legal property in the goods named in the bill of lading passes to the lender, but subject to the equitable rights of the borrower, the nature and extent of which must be gathered from the circumstances of the transaction. It may be, and probably is the case, that certain equitable rights and liabilities were created between the borrower and lender in the present case by the representations made by the former at the time of the loan, and other circumstances of the transactions, but the existence of such equitable rights and liabilities cannot, in my opinion, affect the legal effect of the delivery of the indorsed bill of lading. If it be the true effect of the delivery of the indorsed bill of lading to the defendants that the legal property in the goods passed to them, it can hardly be disputed that they became liable under the

provisions of the Bills of Lading Act to pay the amount of freight claimed from them in the present action.

BOWEN, L.J.—I regret very much to find myself at variance with the other members of the court. In this case there are two questions: The first, whether any and what property in the cargo passed to the defendants upon the indorsement and delivery of the bill of lading; the second, whether the passing of any such property as passed was a passing of "the" property within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), so as to render the defendants liable to freight at the suit of the shipowner. What property, if any, in a cargo afloat passes upon delivery of an indorsed bill of lading, appears to me to be a question of fact in each case that depends, so far as the right between themselves of the immediate parties are concerned, on the express or implied agreement between them. The owner of merchandise may do whatever he pleases with his goods; he may sell them, or mortgage them, or pledge them. It is a pure question of bargain whether he delivers them upon terms which part with the entire beneficial interest in them, or which part with the entire legal interest reserving an equitable right to himself, or which part with a special property only in them, reserving to himself the general and absolute property at law. The freedom of disposition, which owners of property possess when their property is on shore, belongs to them equally when it is afloat. They can, if they please, sell the bill of lading, or transfer it upon terms which amount either to a mortgage or to a pledge. For a bill of lading is a symbol of the goods themselves. The cargo being at sea, no actual delivery of it is possible before the ship arrives. During this period of flotation and transit the bill of lading becomes and remains the token or symbol of the goods, and the delivery and indorsement of the bill of lading is equivalent, so far as the passing of the property is concerned, to a symbolical delivery of the goods. Upon principle and reason, therefore, apart from authority, one would suppose that it is to the agreement between the original parties that we ought to look if we wish to discover the effect as between themselves of a delivery of the indorsed bill of lading, just as it is to the agreement between them that we should look to determine the legal consequences that follow on the corporate delivery of the goods. We should expect, in some cases, to find that the entire property had passed; in others, that there had been some different arrangement. Nobody denies that in many instances the transfer of the indorsed bill of lading passes the complete property, nor, indeed, that it is *prima facie* evidence of its passing. But this does not prove that when the bargain is different the same effect follows, any more than because the property in a watch often passes on delivery, it follows that a watch cannot be pledged or mortgaged. It has been argued before us that there is an implication of law derived from the custom of merchants, that by indorsement and transfer of a bill of lading for an advance the absolute property in the cargo vests in the indorsee. In support of this contention reference has been made to the language of the present Master of the Rolls in the case of *Glyn, Mills, and Co. v. East and West India Dock Company* (*ubi sup.*). The language of Lord

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Bramwell in the same case is, on the other hand, in favour of a different view. Lord Blackburn, in the House of Lords, abstained from expressing an opinion as to which was the true nature of the transaction in that particular instance; but even if the transaction in Glyn, Mills, and Co.'s case had been held to amount to a mortgage, it would not follow that a different transaction did not amount to a pledge only, and the decision would not, as it seems to me, have militated against the principles I have above explained. It was further contended by the appellant that the well-known judgment of Buller, J., in the House of Lords, in the case of *Lickbarrow v. Mason* (*ubi sup.*), lays it down as law that by the indorsement and delivery of a bill of lading the complete property of goods at sea passes, and that on the second trial of the case a Guildhall jury found that there was a custom of merchants to that effect. Both judgment and verdict must, as it seems to me, be read with reference to the facts of the case itself. Freeman, the consignee of the cargo, had sent to the plaintiffs two bills of lading, together with the invoice of the goods, in order that the goods might be taken possession of and sold by them on Freeman's account, and the plaintiffs had accepted and paid bills of exchange to the value of £20l. drawn upon them by Freeman against the goods. "The truth of the case," says Buller, J., "was that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them to pay themselves the £20l. advanced in bills out of the produce, and to be accountable to Freeman for the remainder, if any." It was with reference to this transaction—a transaction of which the very essence was that the property in the goods was intended to pass, if the indorsement of the bill of lading can properly be given this effect—that Buller, J. discusses the question whether the property of goods at sea passes by the indorsement of the bill of lading. What is the proposition of law that he lays down as clear? "That every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee." In other words, property passes by an indorsed bill of lading when it would pass by the delivery of the goods themselves. And it was with reference to the same transaction that the special verdict was found as to the custom. The question of the effect of an agreement between the parties when no property, or only a qualified property, was intended to pass with the bill of lading did not arise, nor was it submitted to the jury. Can it be inferred from a verdict so found that the jury intended to establish a custom by which, on delivery and on indorsement of a bill of lading as between the immediate parties, and apart from the rights of third persons, the property in one man's goods passes to another against the will of both, unless there be some written agreement to control the effect of the indorsement? If the borrower in the present instance had verbally agreed with the bank that the absolute property in the goods was not to pass, but a qualified property only, can it be said that any custom of merchants overrides such oral agreement? And if such is not the law, it necessarily would seem to follow that

such a restrictive agreement can be implied from the nature of the transaction itself, as well as from express words. Read in their widest sense, the words of the special verdict in *Lickbarrow v. Mason* admittedly overstate the law, for the delivery to a servant or agent of a bill of lading with the intention that he shall receive the cargo and hold it for his principal obviously passes no property. Some qualification must be read into the terms of the special verdict, and the proper qualification seems to me to be what I have said. It is not easy to see upon what principle there can be any magical virtue in the symbolical delivery (through the indorsed bill of lading) of goods afloat, beyond what there would be in the delivery of goods ashore, when the question arises between the immediate parties to the agreement. Shortly after the special verdict on the second trial of *Lickbarrow v. Mason* its meaning was discussed in the Exchequer Chamber in the case of *Haille v. Smith* (1 B. & P. 561). Eyre, C.J., in delivering the judgment of the court, intimates that the indorsement of a bill of lading does not itself change the property as a bargain and sale would, but is evidence only of a change, and, as between the original parties, derives its sole virtue and efficacy from the agreement between the parties. This is substantially the same law as that expressed by Buller, J. in *Hibbert v. Carter* (*ubi sup.*), and it is not immaterial, as Field, J. has pointed out, to notice that *Hibbert v. Carter* is a case cited with approval by Buller, J. himself in his subsequent judgment in *Lickbarrow v. Mason*. The mere fact that in many cases before and after *Lickbarrow v. Mason* the transfer of a bill of lading is spoken of as passing the property, that in others it is spoken of as creating a pledge, as in *Meyerstein v. Barber* (*ubi sup.*), and that in others it is spoken of as a mortgage, affords to my mind, therefore, no difficulty. A man may sell, or he may mortgage, or he may pledge a bill of lading by indorsing and delivering it. The question in each case, when the original parties only are concerned, is what was the bargain on the subject? In the present instance accordingly we have to draw the inference as to the effect of the indorsement and delivery from the narrative of the particular transaction. The cargo shipped in England was to be delivered at Poti in the Black Sea. The owner borrowed an advance from the defendants, and as security deposited the bill of lading, saying that he was shortly going out to Poti to superintend the receipt and delivery of the cargo, and that the amount advanced would be repaid before he left England, and that he would call again and make arrangements about it. What have we here except the simplest form of pledge; the deposit of goods as security for a debt, by which the right to the property vests in the pledgee so far as is necessary to secure the debt, the general property remaining in the pledgor? Delivery of possession is no doubt an essential element in any pledge, but it is very old law that constructive or symbolical delivery of possession is sufficient when actual possession cannot be given. "Goods at sea," says Story on Bailments, "may be passed in pledge by a transfer of the muniments of title, as by a transfer of a bill of lading, or by a written assignment thereof. So goods in a warehouse may be pledged by symbolical delivery of the key, and a bill of lading is only a key of the floating warehouse

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where the goods are lying." The counsel for the appellant argued that if a pledge only was intended, no indorsement of the bill of lading was needed. This surely is a misapprehension. The pledgee of goods is entitled to sell them upon default, and without the indorsement of the bill of lading the common law powers of the pledgee would be incomplete. It seems to me that the language of Lord Bramwell in *Glyn, Mills, and Co.'s case*, cited at length by Field, J. in the court below, applies *mutatis mutandis* to this case. I feel great diffidence in dissenting from the view of so considerable an authority on the mercantile law as that of the present Master of the Rolls and Baggallay, L.J.; but, except for their contrary opinion, I should have myself thought that there had been in the present case, as between the original parties, a pledge and nothing more. It remains to be considered whether the pledge of an indorsed bill of lading is such a passing of "the property" as is contemplated by the Bills of Lading Act (18 & 19 Vict. c. 111). I may pause for a moment to observe that it was clearly the opinion of those who framed that statute that the property in goods need not pass by the indorsement of the bill of lading, and that the framing of the preamble and section of that Act shows that the language of the special verdict in *Lickbarrow v. Mason* is not to be read without some qualification. But passing from this, I think the wording of the Act shows that the provision which we have to construe does not apply to the case of a pledge. [See *Fox v. Mott* (30 L. J. 259, Ex.), per Martin, B., as explained in *The Freedom* (*ubi sup.*).] "A" property passes no doubt by a pledge, but not "the" property, which still remains in the pledgor. Was it intended that a banker who only acquired such a limited and special legal interest in a bill of lading as was necessary to secure his advance should be sued for freight? The present is the first case, as far as I know, in which it has ever been suggested that he could. And I cannot help thinking that the many bills of lading pledged daily in the city of London for advances are not taken by bankers under any such idea. I believe that the true view of the law as to this matter also is that expressed by Lord Bramwell in the case of *Glyn, Mills, and Co.*, viz., that a mere pledgee cannot be sued for freight under the Act. He has not got "the" property; he has "a" property only. For these reasons, I agree with the judgment of Field, J., whose careful and elaborate reasonings leave nothing really to be added, and to which I should have added nothing had it not been that I am unfortunately dissentient from the opinion of the Master of the Rolls and Baggallay, L.J. In my opinion, this appeal should be dismissed with costs.

*Appeal allowed.*

Solicitors for the plaintiff, *Lowless and Co.*  
Solicitors for the defendants, *Hare and Co.*

## HIGH COURT OF JUSTICE.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

## ADMIRALTY BUSINESS.

Tuesday, June 17.

(Before BUTT, J.)

THE MAMMOTH. (a)

*Practice—Collision—Costs—Printed evidence for use of counsel in court—R. S. C., Order LXVI., r. 7, and Appendix N.—Counsel.*

*In consequence of the negligent navigation of the M. the steamship P. M. came into collision with the M. and with the D. In a damage action, instituted by the owners of the P. M. against the M., the plaintiffs were successful. In a damage action, instituted by the owners of the D. against the M. to recover damages arising out of the collision between the D. and the P. M., the plaintiffs were successful.*

*In this latter action by agreement between the parties the evidence in the first action, which had been printed in the form of a record for the purposes of appeal, was admitted, and was supplied to the plaintiffs by the owners of the P. M., the defendants refusing to provide them with it.*

*The registrar, on taxation, allowed the plaintiffs, the owners of the D., the amount paid by them to the owners of the P. M. for the printed evidence, and 3d. per folio for this printed evidence provided for the use of counsel in court in accordance with the terms of Appendix N. of the Rules of the Supreme Court 1883. On objection to the registrar's taxation the Court refused to disallow the 3d. per folio.*

*In a collision action where the trial lasted four days, and the damage done exceeded 2000l., the Court refused to interfere with the registrar's discretion in allowing the costs of three counsel.*

*THIS WAS a summons by the defendants in a damage action calling on the plaintiffs to show cause why the registrar should not review his taxation of the plaintiffs' costs by disallowing certain items therein allowed.*

The action was instituted by the owners of the vessel *Dunscore* against the East and West India Dock Company, the owners of the derrick *Mammoth*, to recover damages arising out of a collision between the steamship *Persian Monarch* and the *Dunscore* on the 5th Jan. 1883, in the river Thames, alleged to have been brought about by the wrongful manoeuvres of the *Mammoth*.

Immediately prior to this collision the *Persian Monarch* and the *Mammoth* had been in collision, in respect of which the owners of the *Persian Monarch* had instituted an action against the owners of the *Mammoth*, and in Feb. 1883 the *Mammoth* was found solely to blame for the collision. Thereupon the present action was instituted, and it was agreed that the evidence taken in the previous action should be admitted in this action. Accordingly, application was made by the plaintiffs to the defendants for the record in the previous action, which record had been printed for the purposes of appeal in such action. This the defendants refused to supply, whereupon the owners of the *Dunscore* obtained it

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from the owners of the *Persian Monarch*, the plaintiffs in the previous action.

The owners of the *Dunscore* having proved successful in their action against the *Mammoth*, proceeded to tax their costs, and among other items allowed by the registrar were the charge for the prints of the records together with 3d. per folio on the copies supplied to counsel and the fee of a third counsel. The 3d. per folio was allowed under the provisions of Appendix N. of the Rules of the Supreme Court, which provides that

The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor. In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (*videlicet*): Of any pleading, special case, petition of right, or evidence for the use of counsel in court, and in country agent causes when proper to be sent as a close copy for the use of the country solicitor, at per folio ..... 3d.

To these items the defendants now took objection on the grounds: (1) that there is no rule or scale under the Judicature Act which empowers a taxing officer to allow for prints of a document at 3d. or any other rate per folio which had been printed for and used in another action; (2) that no work or labour was bestowed by the plaintiffs' solicitors on the record to entitle them to such an allowance; (3) that the whole expense of printing such record has already fallen on the defendants in the action brought by the owners of the *Persian Monarch*, and they have also actually paid for prints of such record furnished by the plaintiffs' solicitors to counsel in that action; (4) that under the existing rules only a party to the action in which a document has been printed is entitled to take prints or to charge for prints for the use of counsel; (5) that the employment of a third counsel was wholly unnecessary, and, under the circumstances of the case, unwarranted, and ought not to be allowed on the ground that the evidence of ten of the witnesses was admitted on their evidence taken long before the hearing, and only four witnesses were actually examined at the trial.

With regard to these items, the registrar's notes were as follows:

It appears to me that the defendants' solicitors ought themselves to have supplied the copies, and that on their refusal the plaintiffs' solicitors were clearly entitled to obtain them from the plaintiffs' solicitors in the other action, and to recover the amount paid for them from the defendants. I think, on further consideration, that they are also entitled to the scale allowance of 3d. a folio on the copies supplied to counsel, the whole record having ultimately been admitted by the defendants, besides having been previously admitted for the purpose of cross-examination. It is true that no labour was bestowed by the plaintiffs' solicitors on the record in question, but that is an objection which would apply to the scale allowance in any case where the solicitor claiming is not the solicitor who has printed the record. It is also true that the defendants have already incurred a similar charge for the same printing in the former action, but if they have to pay the charge again it results from their having raised again the same issues which were decided in that action. I have felt some doubt as to the allowance of a third counsel, but, considering that the case promised to be a hard-fought one, that the trial of the action by the *Persian Monarch* had occupied the court four days, that the defendants had appealed, that the issues in that action were in effect to be tried again in this, and that the defendants agreed to pay a sum of 2700l. in settlement of the claim in this action, a sum much exceeding the amount recovered in

the action by the *Persian Monarch*, it appears to me that the plaintiffs were justified in retaining three counsel, as was also done by the defendants.

The summons came on before the judge in chambers, but was adjourned into court.

*Bucknill* in support of the application on behalf of the defendants.—On reference to Appendix N. it will be seen that the person entitled to the 3d. per folio is "the solicitor for a party entitled to take printed copies." That is, the solicitor in the action in which the matter is printed. Here it is the solicitor in an action other than that in which the evidence is printed who is seeking to charge the defendants with this 3d. per folio. The idea in allowing the 3d. per folio was to remunerate the solicitor over and above the price actually paid for the printing, and was by way of compensation for his work and labour in correcting proof, and generally in drawing up the record. In this case the record having been printed in the previous action, the solicitor to the present plaintiffs has been at no trouble, and therefore is entitled to no compensation. There was nothing in the circumstances of the case to warrant the allowance of three counsel. There were only four witnesses examined at the trial, and the issues raised were of no unusual character.

*Kennedy*, for the plaintiffs, *contra*.—There is nothing in the Rules of the Supreme Court expressly limiting the allowance of 3d. per folio to the solicitor at whose instigation the evidence is actually printed. It is the profit allowed to a solicitor in respect of printed evidence for use of counsel, and should be allowed irrespective of the question whether or not the evidence has been printed by the order of the solicitor claiming the allowance. The circumstances are sufficiently special to justify the registrar in allowing three counsel. The case lasted four days, and the amount at stake was large.

*BUTT, J.*—I can see no reason to interfere with this taxation of costs. The first items which I have to deal with are those charges for the prints of the record over and above the sum actually paid for them to the solicitors of the plaintiffs in the action between the *Persian Monarch* and the *Mammoth*. Have any sufficient reasons been shown why I should disallow these charges? It is admitted by the defendants that, if these records had been printed by a party to the action, the plaintiffs would have been entitled to charge at the fixed rate of 3d. per folio under Order LXVI., r. 7. But then it is argued that this rule does not apply when the record is printed by parties other than those to the action in which the record is printed. However, I think that when parties enter into an agreement not to call evidence in the ordinary way, but to admit prints of evidence prepared for appeal in another action, that then this is similar to an agreement that the parties should be in the same position as if it had been necessary to have the same evidence printed under an order. I therefore do not think that the objection to these items is made out. With regard to the costs of a third counsel, I am quite aware of the new rules relating to that subject, but it has not been argued that I am absolutely bound by them. I am of opinion that where damage has been done to the amount of 2000l. it is not unreasonable to have three counsel. I

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therefore think, on the whole, that nothing has been shown me to cause me to overrule the taxing master's discretion in this matter, and I therefore direct these objections to be dismissed with costs.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Freshfields and Williams.*

Oct. 28 and Nov. 4.

(Before BUTT, J.)

THE WILLIAM SYMINGTON. (a)

*Salvage—Practice—Tender—Costs.*

*Where in a salvage action defendants with their statement of defence tender and pay into court a sum of money in satisfaction of the plaintiffs' claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiffs' costs up to the date of the delivery of the statement of defence, unless the circumstances of the case render it just and expedient to order otherwise. In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiffs' costs up to the date of tender.*

THIS was a motion by the defendants in a salvage action, subsequent to judgment therein, to vary the decree by striking out so much as gave to the plaintiffs the costs incurred by them up to the time of tender, and by condemning the plaintiffs in the entire costs of the action.

The action was instituted by the crew and owners of the steamship *Xanitho* against the steamship *William Symington*, to recover salvage for services rendered to the *William Symington*, off the coast of Spain, on May 24, 1884.

The plaintiffs claimed 800*l.* The defendants in their defence alleged a tender and payment into court of 200*l.* which was refused by the plaintiffs in their reply. The defence was dated July 12, and the money was paid into court on July 14.

The action came on for trial on the 24th July, before Butt, J., who upheld the tender of 200*l.* with costs. On counsel for the plaintiffs applying for costs up to the time of tender, Butt, J. said: "I have always had a doubt about the practice of this court. I know the rule in the common law courts was, that if a man declined to accept a tender he went on at his own risk, and he paid the whole costs if he failed. I do not know whether that is the rule here. They will follow the usual course in the registry. I will not decide the matter now. If there is an appeal from the registrar we will have the matter decided."

Upon this the following decree was drawn up in the registry:

The judge having heard counsel on both sides pronounced the tender of 200*l.* heretofore made in this action to be sufficient, dismissed the defendants and their bail from this action and all further observance of justice therein on payment of the costs incurred by the plaintiffs up to the time of the said tender being made, and condemned the plaintiffs in the costs incurred subsequently to the said tender.

The plaintiffs thereupon lodged their costs in

the registry for taxation, but on the defendants alleging that they proposed raising the question as to whether the plaintiffs were entitled to any costs the registrar postponed taxation.

The motion now came on before the judge in court.

*J. P. Aspinall*, for the defendants, in support of the motion.—While the practice of late years in the Admiralty Court has been under similar circumstances to give the plaintiffs the costs incurred up to the tender, it is nevertheless opposed to the practice at common law. [BUTT, J.—We must remember to distinguish between what is called tender in the Admiralty Court and what is known as tender in the common law courts. In the Admiralty Court what is called tender is simply payment into court; whereas, at common law it is an offer of so much in satisfaction of the plaintiff's claim before action brought.] The practice at common law has been to give the defendant the entire costs of the action where the payment into court has been found sufficient. [BUTT, J.—That I think is so, but the practice in the Admiralty Court has been different, and the question is, whether it is a right practice.] It is only since 1869 that the present practice of the Admiralty Court has been unvaried. [BUTT, J.—At the common law I remember there used to be two pleas, viz., tender and payment into court. We must therefore distinguish between the two, inasmuch as in the Admiralty Court payment into court is called a tender.] The question of payment into court has recently been considered by the Court of Appeal, who have decided that the alternative plea of money paid into court as sufficient to satisfy the plaintiff's claim, when held to be sufficient, goes to the whole cause of action, and that judgment should be entered for the defendant, and that the defendant should get all the costs of the action:

*Wheeler v. The United Telephone Company*, 50 L. T. Rep. N. S. 749; 13 Q. B. Div. 597.

The desirability of having one uniform practice in all the courts should be considered, and, inasmuch as costs are in the discretion of the judge, there is no reason why the old practice of the Admiralty Court should not be set aside. [BUTT, J.—That being so, it is a question of which is the more reasonable.] It would seem the more reasonable course because in a salvage action what generally happens is that either the plaintiffs hastily institute their action without giving the defendants time to make a tender before action brought, or else a tender is made, and refused as insufficient, and then action commenced. In either case the action of the plaintiff is productive of unnecessary litigation if the tender is upheld, and hence the defendants should be made to pay all the costs.

*Myburgh, Q.C.*, for the plaintiffs, *contra*.—In the absence of strong reasons, the old practice should be followed. [BUTT, J.—I have always had great doubts on this point, and I have been inclined to think that the prevailing practice is a bad one.] Having regard to the eminent judges who laid down the practice, it is to be assumed that it is a reasonable one. [BUTT, J.—But there is no want of analogy between payment into court at common law and tender in the Admiralty Court, and yet the practice at common law has also been settled by equally eminent judges.] The peculiar circum-

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.



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stances of salvage make the practice a just and reasonable one. The tender is not made until after the plaintiffs have instituted their action, a thing which all salvors are entitled to do. [BURR, J.—But if you refuse a tender after action brought, you would refuse the same tender prior to action brought, and therefore you are really the creator of unnecessary litigation.] It is not the universal practice at common law to give the defendant all the costs of the action when the tender is upheld:

*Buckton v. Higgs*, 40 L. T. Rep. N. S. 755; 4 Ex. Div. 174;

*Greaves v. Fleming*, 4 Q. B. Div. 226;

*Gretton v. Mess*, 38 L. T. Rep. N. S. 506; 7 Ch. Div. 839.

The practice in the Admiralty Court has been to tender a sum of money with costs:

*The Hickman*, L. Rep. 3 A. & E. 15; 3 Mar. Law Cas. O. S. 298; 21 L. T. Rep. N. S. 472;

*The Thracian*, L. Rep. 3 A. & E. 504; 1 Asp. Mar. Law Cas. 207; 25 L. T. Rep. N. S. 889.

[BURR, J.—I do not understand the meaning of a tender with costs. A tender is an offered payment of a sum of money in satisfaction of the plaintiff's claim, and if accepted the person accepting gets his costs as a matter of course.] The Court of Appeal in the case of *The Hector* (5 Asp. Mar. Law Cas. 101; 48 L. T. Rep. N. S. 890; 8 P. Div. 218) upheld the old practice of the Admiralty Court as to costs where both ships are held to blame for a collision, although it is opposed to the common law practice, and in many cases works considerable injustice to successful appellants.

*J. P. Aspinall*, in reply, cited

*Langridge v. Campbell*, 2 Ex. Div. 281; 36 L. T. Rep. N. S. 64.

*Cur. adv. vult.*

Nov. 4.—BURR, J.—This is a suit for salvage services rendered by the plaintiffs to the steamship *William Symington* on the 24th May last. The action was instituted on the 18th June. The defendants, in their statement of defence, which was delivered on the 12th July, denied that the services rendered by the plaintiffs were salvage services, and as an alternative defence they paid into court the sum of 200*l.*, which sum the plaintiffs, by their reply, alleged to be insufficient. The cause was heard on the 24th July, when the court pronounced the sum paid in to be sufficient. A question as to payment of costs has arisen. There is no doubt as to the liability of the plaintiffs to pay the defendants' costs subsequently to the delivery of the statement of defence; but the plaintiffs claim to be entitled by the practice of the court to be paid their costs up to that date. No doubt the general practice of the Court of Admiralty was to give the plaintiffs their costs up to the time of payment into court, or of tender, as such payment into court was called. On the other hand, the invariable practice of the courts of common law was to give the defendants the whole costs of the cause where the only issue was the sufficiency of the amount paid into court, and where he succeeded on that issue. Since the passing of the Judicature Acts these costs, instead of necessarily following the event, are by Order LV., r. 1, in the discretion of the court or judge. I think it desirable that the practice of this division, with respect to costs, should, in the generality of actions, be made to conform, as nearly as may be, to that of the Queen's Bench

Division; and had there been no considerations specially applicable to salvage suits, I should have been disposed to have condemned the plaintiffs in the whole costs. But there are circumstances which render it peculiarly difficult, if not impossible, for plaintiffs in salvage actions to form an estimate of the amount to which they are entitled for the services they have rendered. In the first place, the amount of their remuneration depends to some extent on the value of the salvaged property, and of this salvors are seldom aware until after proceedings in the suit have gone some length. Again, from motives of public policy, and from the nature of the services rendered, their title to remuneration is not a mere *quantum meruit*. Having regard to the weight my predecessors have attached to these considerations, and to the decision of the court in the case of *Buckton v. Higgs* (*ubi sup.*), where, as in this case, the defendant had pleaded payment into court as an alternative defence, I shall exercise the discretion vested in me by ordering the defendants to pay the plaintiffs' costs up to the time of the delivery of the statement of defence. This, however, is a rule from which I should not hesitate to depart in any case in which I thought salvors had acted unreasonably in refusing an offer made before suit. I wish to add that much confusion has arisen both in the Court of Admiralty and in this division from a notion that no payment into court is sufficient unless it be accompanied by an offer to pay the plaintiffs' costs up to that time. In my opinion such an offer is not only unnecessary, but erroneous, and is one which should not be made.

Solicitors for the plaintiffs, *Pritchard and Sons*.  
Solicitors for the defendants, *Fielder and Sumner*.

## House of Lords.

April 24, 25, 28, 29, and May 23.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

MURRAY v. SCOTT.

BRIMLOW v. MURRAY.

AGNEW v. MURRAY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Building society—Validity of rule—Borrowing powers—Priority of creditors—Deposit of deeds—Preference shares.*

A duly certified rule of a building society authorised the directors to borrow money "from time to time as occasion may require," without any limitation of the amount to be so borrowed, and further provided that "any borrowed money shall be a first charge on the funds and property of the society." The society went into liquidation.

Held, that the rule was valid and not ultra vires, but that creditors who had made advances under the rule, and had had title deeds deposited with them by way of security, must deliver up the deeds to the official liquidator, and rank *pari passu* with other creditors for a dividend.

*Dictum in Laing v. Reed* (L. Rep. 5 Ch. 4; 21 L. T. Rep. N. S. 773) disapproved.

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.



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*Judgment of the Court of Appeal reversed.*

*A rule giving the directors power to issue deposit or paid-up shares at a fixed rate of interest, with a right to the holders to withdraw the money in preference to the ordinary unadvanced members is valid, and in the winding-up the holders will be entitled to be paid in preference to the other shareholders.*

*Judgment of the Court of Appeal affirmed.*

THESE were appeals from the judgment of the Court of Appeal (Jessel, M.R., Cotton and Bowen, L.J.J.) in several appeals from the Vice-Chancellor of the Chancery Court of Lancaster (H. F. Bristowe, Q.C.), in cases which arose in the winding-up of the Guardian Permanent Benefit Building Society.

The cases are reported below in 23 Ch. Div. 440 and 48 L. T. Rep. N. S. 134.

The first appeal was from the order made in *Scott's case*; the two others were appeals in substance, though not in form, from the order made in *Calvert's case*.

In the first case the appeal was brought by Mr. Adam Murray, the official liquidator of the Guardian Permanent Benefit Building Society, from an order of the Court of Appeal reversing an order of the Vice-Chancellor. The society carried on business in Manchester. It was formed in 1870, and was enrolled under the Act 6 & 7 Will. 4, c. 32. It was being wound-up in the Lancaster Chancery Court, under an order made on the 14th Nov. 1881. The rules, as originally printed, contained (*inter alia*) the following provisions:—

Sect. 5 provided that members might pay up their shares in advance.

By sect. 31:

The board for the time being shall have power, as circumstances may require, to issue deposit or paid-up shares of the value of 30*l.* each, upon a certificate bearing interest after the rate of 5 per cent. per annum, and such certificate shall entitle the depositor (after one month's notice in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares.

By sect. 32:

The trustees or directors for the time being of this society may, from time to time as occasion may require, borrow and take up at interest any sum or sums of money from the society's banker, or from any banker, or from any other person or persons; any borrowed money shall be a first charge on the funds and property of the company.

By sect. 41:

Any member may withdraw unadvanced shares on giving one clear month's notice. . . . Withdrawals shall be payable in rotation, according to the priority of notice.

By sect. 44:

Whenever there is any balance at the bank not wanted for advances or other claims, the board may at any monthly meeting cause the members of the society who have not received advances either to take an advance as before provided, or to withdraw by ballot as many shares as shall be sufficient to exhaust the balance.

These rules when printed were submitted to the barrister appointed to certify the rules of building societies. He struck out the 31st section, but, notwithstanding this, that section was retained among the rules and was acted upon, the society receiving considerable sums of money by the issue of preference shares in accordance with it. In 1876 the society resolved to alter their rules (*inter alia*) by omitting "30*l.*" in sect. 31,

and inserting "1*l.*" instead—that is, by making the preference shares of the value of 1*l.* instead of 30*l.* The rules as altered were submitted to the barrister, who, apparently forgetting that he had previously refused to certify sect. 31 as it originally stood, certified that section as altered. After this the persons who had taken 30*l.* preference shares exchanged them for 1*l.* shares of the same class, and other persons subscribed and paid for 1*l.* shares. It had been decided by the Court of Appeal in the other cases that sect. 32 was invalid, and that persons who had lent moneys to the society are only entitled to be repaid out of the assets in the winding-up after payment of the sums due to the unadvanced members in respect of their subscriptions on their shares. The holders of the preference shares claimed a right to be paid out of the assets in priority to the holders of ordinary unadvanced shares, and their claim was opposed by the liquidator, on the ground that the creation of the preference shares was illegal, that the rule which authorised the creation had never been duly certified, and that the transaction amounted really to a borrowing in disguise, and was intended to have that effect. The Vice-Chancellor of the Lancaster Court held that rule 31 was invalid, and that the holders of preference shares stood in the same position as persons who had lent money to the society, and were entitled to be paid out of the assets only after the holders of ordinary unadvanced shares. The preference shareholders appealed, with the result that the decision of the Vice-Chancellor was overruled, the court being of opinion that the preference shareholders were entitled to be paid in priority to the other shareholders.

In the other two cases the question was raised whether those persons who had lent large sums to the society on the security of title deeds relating to properties which had been mortgaged to the society were entitled to retain such securities, or were bound to deliver them up to the official liquidator and to rank with the other claimants *pro rata* and *pari passu* against the assets of the society. The Court of Appeal held that a rule giving an unlimited power of borrowing money to the directors of a building society, although it was certified by the certifying barrister, is void, and that persons advancing money under it on the security of the deposit of the title deeds of borrowing members must, in the winding-up of the society, give up their securities and prove against the residue of the assets after payment of the outside creditors and unadvanced members.

Ambrose, Q.C., Maberly, and Edwin Jones appeared for Murray, the official liquidator, the appellant in the first and the respondent in the two other appeals, and contended that a power of unlimited borrowing, such as the 32nd section of the rules purported to give, was *ultra vires* and bad:

*Hill's case*, 22 L. T. Rep. N. S. 777; L. Rep. 9 Eq. 605; *Re Professional, &c., Building Society*, 25 L. T. Rep. N. S. 397; L. Rep. 6 Ch. 856; *Charles v. Brunswick Building Society*, 44 L. T. Rep. N. S. 449; 6 Q. B. Div. 696; *Blackburn Building Society v. Cunliffe, Brooks, and Co.*, 48 L. T. Rep. N. S. 33; 22 Ch. Div. 61; *Laing v. Reed*, 21 L. T. Rep. N. S. 773; L. Rep. 5 Ch. 4; *Ex parte Williamson*, 22 L. T. Rep. N. S. 284; L. Rep. 5 Ch. 309.

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Sect. 31 was never duly certified, or if certified it was bad, as being merely a device for unlimited borrowing, and is repugnant to the Act 6 & 7 Will. 4, c. 32, and the respondents in the first appeal are not in fact shareholders or members at all. See

*Dobinson v. Hawks*, 16 Sim. 407;

*Re Kent Benefit Building Society*, 4 L. T. Rep. N. S. 610; 1 Dr. & Sm. 417.

*Cozens-Hardy*, Q.C. and *Buckley*, for the respondent Scott, argued that sect. 31 was good, and persons who had taken shares under it were members of the society. Every share need not be of the same value. The position of the respondent depends on the contract between the members of the society *inter se*. Even if the section of the rule was not duly certified, the members have acquiesced in it, and acted upon it, so that it is binding in their dealings with each other.

*Davey*, Q.C. and *Hopkinson*, for the appellants Brimelow and Agnew, maintained that there was no illegality in the exercise of a rule properly certified for conferring a power of unlimited borrowing. The distinction between the two cases is, that *Agnew's* case raises the question of the validity of the rule simply, while in *Brimelow's* case we contend that the loan is made valid by sects. 8 and 15 of the Building Societies Act 1874 (37 & 38 Vict. c. 42), and is not invalidated by the repeal of sect. 8 by sect. 1 of the Act of 1875 (38 Vict. c. 9). The assumption of the Court of Appeal as to a power of unlimited borrowing is not borne out by any decided cases. *The Blackburn Society v. Cunliffe* (*ubi sup.*) does not decide the point, and the effect of the certificate is conclusive:

*Denchurst v. Clarkson*, 3 E. & B. 194. See also

*Kelsall v. Tyler*, 11 Ex. 513.

*Laing v. Reed* (*ubi sup.*) was only a dictum unnecessary to the decision, and the only decided case is *Hill's case* (*ubi sup.*). *Chapleo v. Brunswick Society* (*ubi sup.*), *Wilson and Davis's case* (25 L. T. Rep. N. S. 83; L. Rep. 12 Eq. 516), and *Moye v. Sparrow* (18 W. R. 400) were not decided on this point, but on others. No authority exists binding on the House, and apart from authority it cannot be said that a power to borrow is outside the scope of the Act of Will. 4, though not expressly mentioned. See

*Mulloch v. Jenkins*, 14 Beav. 628;

*Grimes v. Harrison*, 26 Beav. 435.

The rule was not intended to affect the rights of borrowers *inter se*. See

*Re Patent File Company*, 23 L. T. Rep. N. S. 494;

L. Rep. 6 Ch. 83;

*Re Florence Land Company*, 39 L. T. Rep. N. S. 589;

10 Ch. Div. 530;

*Re Colonial Trusts Corporation*, 15 Ch. Div. 465.

The amount due to general creditors is small, but we dispute their right to priority on principle. Even if the rule is invalid, lenders who advanced in the face of it are entitled to be paid in priority to members, or at least *pari passu*. See

*Knatchbull v. Hallett*, 42 L. T. Rep. N. S. 421; 13 Ch. Div. 696, overruling *Pennell v. Duffell*, 4 De G. M. & G. 372.

They advanced their money on the consideration of a valid equitable mortgage, and on failure of the consideration they have a right to recover the money:

*Western Bank of Scotland v. Addie*, L. Rep. 1 H. L. Sc. 145;

*Diggle v. Higgs*, 37 L. T. Rep. N. S. 27; 2 Ex. Div. 422;

*Re Phoenix Life Assurance Company*, 2 J. & H. 441;

*Chapleo v. Brunswick Building Society* (*ubi sup.*);

*Houldenworth v. Glasgow Bank*, 42 L. T. Rep. N. S. 194; 5 App. Cas. 317.

The society is not a corporation, but only a number of individuals who have acquired privileges under the Act on condition of having their rules certified, and though they cannot rely on an uncertified rule as against outsiders, yet, as against the society, a rule which they have acquiesced in must be held valid, even if *ultra vires*:

*Spackman v. Evans*, 19 L. T. Rep. N. S. 151; L. Rep. 3 H. L. 171;

*Evans v. Smallcombe*, 19 L. T. Rep. N. S. 207;

L. Rep. 3 H. L. 249;

*Houldenworth v. Evans*, 19 L. T. Rep. N. S. 211;

L. Rep. 3 H. L. 263;

*Phosphate of Lime Company v. Green*, 25 L. T. Rep. N. S. 636; L. Rep. 7 C. P. 43.

*Ambrose*, Q.C. was heard in reply on all the cases.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 23.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: The principal question on these appeals is as to the validity of the 32nd rule, which authorises the trustees or directors of the Guardian Permanent Benefit Building Society to borrow money "from time to time, as occasion may require," without any limitation of the amount to be so borrowed, but with the provision that "any borrowed money shall be a first charge on the funds and property of the society." The words, "as occasion may require," when read in connection with the rest of the rules, necessarily mean when and as there may be occasion to borrow money for the purposes and objects of the society, as defined by rule 1. Any borrowing for other purposes, or other objects, would be a breach of the duty of the trustees or directors under those rules, and certainly cannot be taken to be authorised by the terms of the 32nd rule. In point of fact no money was borrowed or applied for any unauthorised purpose. The 32nd rule has all the force and authority which it can derive from the mutual contract and agreement of the members of the society, and from the certificate and allowance of the barrister appointed for that purpose under the Friendly Societies Acts, incorporated (by reference) into the Act 6 & 7 Will. 4, c. 32, under which this society was formed. Unless therefore it was illegal and *ultra vires* for the members of such a society to make and for the barrister to allow and certify such a rule, the debts contracted by virtue of it are well charged upon the general funds and property of the society, and ought to be allowed and provided for out of such funds and property in priority to the shares and interests of all classes of members. The Vice-Chancellor of the Duchy of Lancaster, and the Court of Appeal, considered it to have been settled, by authorities which they ought to follow, that any rule of such a society, formed under the Act of 6 & 7 Will. 4, by which borrowing money without some limit of amount was authorised, was repugnant to and inconsistent with the provisions of

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that statute, and therefore incapable of being made legal by any consent of members or allowance of the certifying barrister. But, when the authorities which were supposed to establish this proposition are referred to, none of them are found to be really decisions upon that point; they all seem to depend upon a dictum of Lord Hatherley, L.C., in the case of *Laing v. Reed* (*ubi sup.*), to the effect that, although a limited borrowing power, if expressly given by a rule duly certified, would be good (as was decided in that case), a rule authorising the trustees "to raise an unlimited sum of money wholly regardless of the contributions which might be made by the members," would be "contrary to the intent and scope of the Act." I am not sure in what sense these words "wholly regardless of the contributions," &c., were meant by Lord Hatherley to be understood, but I subscribe to the doctrine laid down in the same case by Giffard, L.J., that the test ought to be whether the rule (not being contrary to any express prohibition in the statute) was one which made the society "a thing different from a benefit building society." If not, and if it "merely provided a method of conducting business" (i.e., the proper business of a benefit building society), it could not be illegal or *ultra vires*, being made by the proper authority, and certified in the proper manner. Without disparagement to the weight justly due to those learned judges, who in several later cases have referred, with apparent approval and concurrence, to Lord Hatherley's dictum, I think that in this state of authority the point cannot be regarded as settled, and that your Lordships ought to decide it according to your own view of the true effect of the statute. Upon principle it seems clear that if a borrowing power may be (as both Lord Hatherley and Giffard, L.J. rightly, in my opinion, decided it to be) not only consistent with but reasonably conducive to the proper objects of a benefit building society (though not so necessary as to be implied unless expressly given), it must be competent for the members of the society to make, and for the barrister to certify, a rule conferring such a power, and if it be contended that such a power could only be given under certain conditions and limitations, the law prescribing and defining those conditions and limitations must be in some way discoverable from the statute, otherwise the authority competent to give the power must also be competent to define its extent, and to prescribe the conditions (if any) under which it is to be exercised. In the case of *Laing v. Reed* the power was expressly limited, so that the money borrowed was at no time to exceed two-thirds of the amount for the time being secured by mortgages to the society, and the same limit has since been prescribed by law to societies within the later Act of 1874, by which rules giving borrowing powers are expressly authorised. But the subject is not in any way regulated, or even so much as mentioned, in the Act of 6 & 7 Will. 4, and the particular terms in which Lord Hatherley expressed himself in *Laing v. Reed* were probably influenced by the circumstances of the case which he had then before him. The only limitations of the general power to make rules and regulations conferred by the Act of Will. 4 upon the members of such societies (beyond the necessity of having them certified), which are discoverable from the statute, are generally and

equally applicable to all such rules and regulations. They must be (1) "Wholesome rules and regulations for the government and guidance of the society," that is, of a society formed for the purposes and in the manner defined by the Act; (2) not repugnant to any express provisions of the Act; and (3) not repugnant to the general laws of the realm. It cannot be alleged that the omission of the rule in question to prescribe any fixed or ascertainable limit of the amount to be borrowed is repugnant to any express prohibition of the Act, or to any general law of the realm. Nor can it reasonably be contended that the word "wholesome" renders every rule or regulation (though agreed to by the members of the society and duly certified) void in law, if in the opinion of a court of justice it is of more or less questionable expediency, or not accompanied by all such checks and safeguards as a judge may think desirable for excluding the possibility of any abuse. The only real and true limit of the rule-making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by Giffard, L.J. The power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purposes and in the manner defined by the Act. It might have that effect if the rule authorised borrowing, or the use of money borrowed, for purposes other than those of a benefit building society, as so defined, or if it enabled the trustees or directors to pledge the credit of the individual members of the society without limit in a manner inconsistent with the limitation of the value and amount of the shares and subscriptions by which the common stock or fund of the society was to be raised as prescribed by the Act. But the rule now in question does neither of these things. It only authorises borrowing "as occasion may require," manifestly (as I have already said) for no other purposes than the proper purposes of the society, which appears, by all the other rules, to be a benefit building society, as defined by the Act, and nothing else. And it does not authorise the trustees or directors to pledge, in any way, the personal credit of any individual members of the society (unless indeed they think fit, by way of security only, to pledge their own); it expressly makes all borrowed money "a first charge on the funds and property of the society," of which the base is necessarily the total amount of the contributions of members, and the creditors can have no recourse except against such funds and property. I am therefore of opinion that the 32nd rule of this society is valid in law, and that the appellants in *Brimelow v. Murray* and *Agnew v. Murray* are entitled to rank as creditors against the assets of the society in priority to the members thereof of all classes, including those represented by the respondents in *Murray v. Scott*, as to whom the order, which is the subject of the appeal of *Murray v. Scott*, is, in my opinion, correct, and ought to be affirmed. The only other point on which I think it necessary to say anything is as to the claim of the creditors represented by the appellants *Brimelow* and *Agnew* to special equitable charges upon certain properties mortgaged to the society, the title deeds of which were deposited with them by way of security for the advances made by them under the 32nd rule. I think that this claim is

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inconsistent with the true meaning of that rule, which I understand to be that all the moneys borrowed under it are to have the benefit, equally and *pari passu*, of a first charge upon the general funds and property of the society. If the directors could pledge particular assets of the society to particular lenders under that rule, the other lenders under the same rule would be deprived *pro tanto* of that first charge which the rule gives them, and the successive borrowing operations would have a different incidence upon the funds of the society from that intended and authorised. I therefore agree on this point (though for a different reason) with the reversal by the Court of Appeal of the judgment of the Vice-Chancellor of Lancaster. The several orders complained of by the appeals of *Brimelow v. Murray* and *Agnew v. Murray* ought therefore, in my opinion, to be reversed, except so far as they direct the delivery up to the official liquidator of the deeds and documents therein respectively mentioned; for the rest of both those orders there should be substituted a declaration to the following effect: "That subject to and after payment in full of the costs of the winding-up of the society including the costs of all the appeals to this House, and in the second place of the debts of the creditors of the said society, other than persons having advanced moneys to the society, the assets of the society should be applied in payment of all persons having advanced on loans to the said society, or the trustees or directors thereof, whose claims remain unsatisfied, in full, if the assets are sufficient, or if not, of a dividend *pari passu* and *pro rata*. And that the surplus, if any, should be applied in payment of the amounts due to those members of the society who are represented by the claimant Scott; in full if there be sufficient, if not, in payment of a dividend *pari passu* and rateably, in priority to the members who are not holders of deposit or paid-up shares, and the residue, if any, to the other shareholders." With that declaration (which includes a provision for the costs of all three appeals) these cases should be remitted to the court below.

LORD BLACKBURN.—My Lords: The two appeals in which Murray is respondent involve the same question, and may be treated as one. The appeal in which Murray is appellant raises a different question. All three appeals arise out of the same transaction. The Guardian Permanent Benefit Building Society was founded in 1870 as a building society. It was enrolled pursuant to the Act 6 & 7 Will. 4, c. 32. The society was on the 14th Nov. 1881 wound-up in the Chancery Court of the County Palatine of Lancaster, and on the 24th Nov. 1881 Murray, the appellant in one of those appeals and the respondent in the two others, was appointed official liquidator. If the mortgages given by the advanced members had produced the amount at which they were estimated when taken, the society would have been solvent. But it was apparent that there would be a deficiency, not even yet ascertained, but so great as to make it important to ascertain in what order the different claims on the assets of the society were to rank. It was arranged, with the sanction of the Court of Chancery in the County Palatine, that test cases should be taken, and that statements of fact should be agreed upon. The Vice-Chancellor of the County Palatine first heard the cases relating

to the various classes of persons claiming to be entitled as creditors for money lent to the society, and reserved judgment in five cases—*Calvert's* case and *Whittle's* case, which he rightly held to be undistinguishable, and *Hawkins's* case, *Grimes's* and *Grocott's* cases. His judgment on those five cases was pronounced on the 12th May 1881. In each of those cases he made an order. There was an appeal by the liquidator, and the Court of Appeal made an important variation in the orders in *Calvert's* and *Whittle's* cases. Whittle has since died, and the appeal by Brimelow, his representative, is in form only by him against the order so made in *Whittle's* case, but in substance and reality on behalf of all those represented by either Calvert or Whittle, against the orders made in those cases. In *Hawkins's* case the Vice-Chancellor made an order, which on appeal was reversed. There has not been any appeal to this House on the order of the Court of Appeal in *Hawkins's* case. I do not make out how the orders in *Grimes's* and *Grocott's* cases were dealt with, but there is no appeal to this House on the orders in those cases. The Vice-Chancellor next proceeded to consider the disputes arising on a very peculiar state of facts. The case of the respondents in the case in which Murray is now appellant was selected as a test case. On the 12th June 1881 the Vice-Chancellor of the County Palatine delivered his judgment, and made an order in that case. This order was on appeal reversed, and the appeal in *Murray v. Scott* was by the liquidator against the order of the Court of Appeal in that case. The parties thought it desirable to bring a representative case before this House, in which the important questions raised in *Calvert's* and *Whittle's* cases were not mixed up with a much less important one, and Agnew and Bush, the personal representatives of William Bush, were selected for that purpose. An order was in Feb. 1884 made in their case, which was affirmed by consent in the Court of Appeal on the 24th Feb. 1884. And the appeal in *Agnew v. Murray* is against that order of 24th Feb. 1884. It does not appear to me to have been necessary to have this second appeal, but there is this advantage in it, that the statement of facts agreed on in *Agnew's* case is more recent in date than the others, and the order made in that case shows what is the practical effect of the orders of the Court of Appeal as they now stand. The appeal in *Murray v. Scott* stood first at your Lordships' bar, but the three appeals were heard together. Mr. Ambrose and Mr. Maberly were heard for the liquidator in all three appeals. Mr. Hardy and Mr. Buckley were heard for the respondent Scott in the first appeal. Mr. Davey and Mr. Hopkinson were heard for the appellants in the other two appeals. On the conclusion of the arguments the further consideration of the appeals was adjourned *sine die*. I have come to the conclusion that the orders made in the two cases of *Brimelow v. Murray* and *Agnew v. Murray* ought to be varied in the manner which the Lord Chancellor has stated, and that the order in the case of *Murray v. Scott* is right, and should be affirmed, subject to the effect of the variation in the other orders, which will produce a great practical difference in the result. Before giving my reasons I think it as well to mention some things. The small amount of debts due to outside creditors, a little

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more than 200l., was, by agreement of all parties, ordered in the Vice-Chancellor's court to be paid first, and, as I understood from the statements at the bar, has actually been paid. It was not intended to appeal against this. In this case, it being of no practical or pecuniary importance to consider how far outside creditors should have priority over loan creditors, the point has not been discussed at the bar. I do not mean by saying this to throw any doubt on the propriety of that order as it is, but merely to point out that it is not necessary to express any opinion either way upon it. All three appeals were brought for the benefit of the whole, and by what seems a very reasonable arrangement, which I think your Lordships will sanction, are to be paid out of the assets of the society. I take the facts and figures from the agreed statement of facts in *Agnew v. Murray*. I do not now read it, but refer to it as if it was read. It was not explained what the claims, amounting to 7173l. 12s. 4d., stated in the 19th paragraph to stand on a different footing from the remainder of the 58,907l., were. I guess, though I do not know, that they were those represented by Hawkins, and the same as those mentioned in the order as being those "who during the interval between the 2nd Nov. 1874 and the 22nd April 1875, inclusive, advanced moneys to the said society." Assuming this to be so, and deducting the whole of this from the 58,907l., the appellants in this case represent in round numbers 50,000l., and if the order stands as it is, and those represented by the appellants are to come last, the whole loss, unless the unascertained but serious deficiency exceeds 50,000l., which I should hope was improbable, must fall upon them, and all the others will be paid in full. It was hardly disputed that, if the declaration in the order, "that notwithstanding the rule numbered 32 of the certified rules of the society, the borrowing of moneys by the society, or by the trustees or directors or officers thereof on behalf of the society, was *ultra vires* and invalid and created no liability as against the society in liquidation or the members or assets thereof," was a correct statement of the law, the orders of the Court of Appeal were right, so far as they decided that the persons represented by the appellant could not avail themselves of their specified securities, or claim to come in before the shareholders. But it was denied that this was a correct statement of the law, and it was contended that the persons representing this 50,000l. should at least come in *pari passu* with those represented by *Hawkins's* case. In that case the loss will in the first instance fall upon the shareholders. If, as is possible, though I hope it may prove otherwise, the loss exceeds the amount claimed by the shareholders, it will be of practical consequence whether the specific securities can be made available for the benefit of those lenders who hold them, so as to throw the loss first on the shareholders, and then on the unsecured lenders. If the declaration is a correct statement of the law, it was argued that nevertheless the order was erroneous in so far as it postpones the persons represented by the appellants to the investing shareholders. It was argued that they ought to come in *pari passu* with them. If your Lordships take the same view which I do, it is not necessary to consider this. I propose first to consider the question whether this declaration is or is not a

correct statement of the law, that being I think the most important question in the case, at least as regards the interest of the parties. The Vice-Chancellor of the County Palatine, in his judgment of 12th May 1881, says: "The 32nd of those rules confers upon the trustees or directors thereof a power to borrow money without any limits or restriction as to amount, but in my judgment this power, being without a limit, is bad, and indeed this was almost admitted in the argument, and the point is covered by Lord Hatherley's judgment in *Laing v. Reed* (*ubi sup.*), and other cases." He does not by name cite any other case than *Laing v. Reed*, but evidently thought there were others. In the Court of Appeal Jessel, M.R., in *Calvert's case*, says: "This is a building society with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorised, and that consequently such borrowing is beyond the powers of the society. Still all has been done here perfectly *bonâ fide*. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule, and was binding on the society." He then proceeds to state that on the winding-up it appeared that a large part of what formed the assets of the society was derived from money "obtained in some shape or other from people who lent their money either without security or on equitable deposits or mortgages of property to the society, and the present respondent is one of those persons. Such borrowing from her was unauthorised, and consequently her loan to the society did not create either a legal or an equitable debt from the society to her." Cotton and Bowen, L.JJ. concurred. It appears from the report that the counsel who argued for the then respondent before the Court of Appeal, as well as those before the Vice-Chancellor did not, at least strenuously, deny that the rule was *ultra vires*, apparently relying more upon other grounds. But the very learned judges were not passive instruments in the hands of the counsel, and even if it had been admitted certainly would not have given this judgment unless they had believed that it was settled that, though according to *Laing v. Reed* (*ubi sup.*), the authority of which was not impeached, and which indeed was binding on the Court of Appeal, though not on this House, a rule similar to that in question if it contained a limit as to the amount to be borrowed was good, yet that a rule not containing such a limit as to amount was *ultra vires*. Counsel not having urged the point may account for Jessel, M.R. not entering into the reasons further than saying it "was well settled"; but that does not deprive the now respondent of the benefit of the fact that the judges in the Court of Appeal, two of whom, Jessel, M.R. and Cotton, L.J., had as much experience in this branch of the law as anyone, and certainly much more than I can pretend to, thought it well settled. I for a time thought it probable that there were some decisions not known to me which supported their opinion. The research of counsel has produced all the authorities known to them, and my own research and the inquiry which I have made of the surviv-

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ing members of the Court of Appeal lead me to the conclusion that the whole of the authorities—certainly all the reported cases—have been brought before the House. I will first, before going to the cases, consider the statute 6 & 7 Will. 4, c. 32. It begins with a preamble, "Whereas certain societies commonly called building societies have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies, and the property obtained therewith." And I think it material to see what authority, if any, to borrow would be given to the managers of such a society at common law, and then to consider the language of the Act. The 6 Geo. 1. c. 18, s. 18, commonly called the Bubble Act, had been repealed by 6 Geo. 4, c. 91, and from that time I know of nothing to render it illegal for any number of persons to agree together that each would take a share of a specified amount on which he should bind himself to the others, or to a trustee for the others, to make small periodical payments till the whole was paid up, and to do this for any legal purpose such as the purpose of raising a fund to be applied for the object recited in this preamble; each member as between himself and the other members being liable only to the extent of his share, and as between themselves only liable to pay at the time and in the manner stipulated. In Lindley on Partnership, first edition, p. 152, after examining the authorities, the author arrives at the conclusion in which I agree, that the legality at common law of societies not otherwise objectionable than because the members held shares may be considered as finally established. There might probably be practical difficulty in carrying on such a society with safety, or perhaps at all, without the aid of a statute. In order to apply the fund for the purpose indicated in the preamble to the 6 & 7 Will. 4, c. 32, the shareholders must employ somebody (whether directors or paid agents not members) to transact the necessary business, and, as some expense must be incurred for these purposes, in conformity with the maxim *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud*, the members who gave the agents authority to incur that expense were liable to their principals, and unless either some statute or the bargain made with the persons to whom the liability was incurred confined their recourse to the funds of the society inclusive of the amounts which the society could enforce against the shareholders, those members would be liable personally to the full extent of all their means. The amount of such liabilities to outside creditors would, however, generally be small. In the present case, whilst the whole of the liabilities of the society exceeds 80,000*l.*, the liability to the outside creditors is little more than 200*l.* But it is not necessary for the purpose of managing such a fund to borrow money, and the managers therefore would not merely as such have authority to borrow. The members might, if they pleased, authorise them to do so, so as to charge not only the funds of the society, but also their individual responsibility. It would be very injudicious to do so, but they might do it. I do not think that

even before *Cox v. Hickman* (8 H. L. Cas. 268) it could have been held that they became partners, and so necessarily gave the authority. They might also (I am still speaking of matters as they were before the statute was passed) authorise the managers to borrow money from those who were willing to lend it, on the terms that the lenders should have a charge on the funds of the society, and on the unpaid subscriptions of the shareholders, but should have no recourse against the members further than the society or its trustee had recourse against them, yet give them no authority to borrow on any other terms. And I see nothing to prevent such a bargain being good, though I do see that practically there would be great risk, in the absence of a statute, of not being able to establish that the loans were made on those terms. Now, after reciting this preamble, the Legislature proceed to enable any number of persons to form such societies (which I think they could do at common law), and to make rules "so as such rules shall not be repugnant to the express provisions of this Act, and to the general laws of the realm." And they provide that such rules should be certified and registered, so that all who dealt with the society might see what the rules actually were, and I think that those who dealt with the society could not say that any authority beyond what would be implied from the management of the fund was given, unless it was given by the rules, which they ought to have examined. This removed one great practical difficulty in the way of working such societies. There is no provision in the statute that I can find that prevents the members of such a society from being personally liable to anyone who had a debt exigible from the society, but if the debt was contracted under a rule which required that the debt should only be contracted on the terms that the funds of the society should be liable, and not the persons of the members, the liability would be so limited. Whether any particular rule did so limit the responsibility or not was a question which must have depended upon the construction of the rule. The 6 & 7 Will. 4, c. 32 was not artificially drawn. It is obvious that those who promoted it were influenced mainly by a wish to help the industrious classes to obtain dwelling-houses or small plots of land, and probably supposed that by limiting the maximum of a share to 150*l.* they had secured that the shareholders should use the society only for the purpose of obtaining mortgages not above the value of 150*l.* It was very soon found out that there was nothing to prevent a person who wished as a speculative builder to borrow 15,000*l.* from taking 100 shares if he could find a society willing to lend so much on mortgage. And societies were formed and registered under the Act as building societies on a very large scale. In some of those, rules were framed more or less resembling rule 32 in the present case, under which the managers acted as those of this society have done. In others, without any rule to authorise or purporting to authorise it, the managers of the society acted in the same way. After a protracted parliamentary inquiry the Act of 1874 was passed, repealing the Act of 6 & 7 Will. 4, c. 32, but by sect. 8, amended by the Act of 1875, saving the existing societies unless they registered under the new Act, which the present society has not done. In 1857 Sir Richard Bethell, afterwards Lord West-



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bury, when Attorney-General gave an opinion for the guidance of the certifying barrister which I take from the report in the parliamentary papers 1869, No. 399, p. 121. It was as follows: "I am of opinion that a rule authorising the raising of money for the purpose of the society would be repugnant to the fundamental principles of the society, and that it cannot be certified as a rule in conformity with law and with the provisions of the statute." This opinion was questioned, and in 1869 a bill was filed by William Heron Laing, a member of the Northern Counties Permanent Building Society, on behalf of himself and all other shareholders of the society (except the defendants), against the trustees of that society, for an injunction to restrain them from acting on the 18th rule of that society, which had been, it was admitted on the bill, duly certified by Mr. Tidd Pratt as long ago as 1851. The rule is set out at length in the report of *Laing v. Reed* in 39 L. J. 2, Ch. thus: "18. (1.) That the trustees for the time being may from time to time, as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person, to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received. (2.) That the parties lending money to the trustees of this society pursuant to the provisions herein contained shall be allowed interest for the same at the rate of and not exceeding 5 per cent. per annum, such interest to be payable half-yearly or otherwise, as may be agreed upon, and that all loans shall be repayable to the lender by giving twenty-eight days' notice, on any monthly meeting night of the society. (3.) That for securing the repayment to the person or persons advancing the same, of all moneys to be borrowed by the trustees on behalf of the society as aforesaid, it shall be lawful for them the said trustees to give, or authorise to be given, such form of security as may be legal and as the trustees shall think proper and necessary for and in respect of the same. (4.) That no trustee (unless by his consent expressly signified in writing on the security to be given to any lender) shall become responsible for any sum or sums of money so borrowed as aforesaid. (5.) That the total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance or advances may be required." In the report in the Law Reports, 5 Ch. 4, the rule is very much abridged, and I think the abridgment has misled many persons (including Malins, V.C. in a case which I shall presently refer to) as to what the legal effect of the rule was, and consequently as to what was the actual decision of the Court of Appeal in *Laing v. Reed*, and perhaps, though I say this with less certainty, as to what Lord Hatherley meant in a part of what he is reported as saying. The rule seems to me to limit the recourse of the lenders to the funds of the society and the securities actually given under sub-sect. 3, and to exclude the previous liability of any member, except of those who had given as lenders their personal security. I should have said this even if the sub-sect. 1 stood alone, but when the 4th sub-section is read with it I think

it is quite clear. The 5th sub-section adds a limitation, not as to who should be liable, but as to the amount to be borrowed. The rule now in question, 32, as I construe it, does not contain any power to borrow on the security of the members, that given being only to make the moneys borrowed a first charge on the society's funds and property, and therefore so far is, I think, identical with that of *Laing v. Reed*. But there is no limitation on the amount to be borrowed, and in that respect the rule now in question differs from that which in *Laing v. Reed* was held valid. The bill was demurred to avowedly for the purpose of raising the question whether the rule was, as Sir Richard Bethell had advised, repugnant and void or not. Malins, V.C. refused to decide this question on demurrer. There was an appeal before the then Lord Chancellor (Lord Hatherley) and Giffard, L.J. The judgments were verbal; conciseness was not among the many merits of Lord Hatherley. The report in the Law Journal was probably abridged, that in the Law Reports is evidently much abridged. After stating that he thought that the demurrer was a proper mode of raising the question of law, he proceeds (I quote from the report in the Law Journal) to say: "If the law prohibits the raising of such sums of money, no certificate of the barrister could make it any better. But does the Act of Parliament in effect prevent or forbid any such arrangement being made as has here been made? If the rule had been a rule by which the society were authorised through the medium of its trustees to raise an unlimited sum of money, wholly regardless of the contributions made by the members, the effect would be plainly contrary to the spirit of the Act." He then describes the Act and what appeared to have been done, and is then reported to proceed: "In substance it comes to this: so far from being contrary to anything in the Act it is simply a regulation by which they say, We are desirous of making available for the objects of the Act (that is admitted by the bill), for the purpose of purchasing freehold lands, our contributions and fines and other payments in the best possible manner for us all; and to say that will injure one or other when the company is framing its rules is nothing to the purpose—they are the best judges of that. The whole body form the rules, each judges for himself, and they carry the rules by a majority, and submit them to the barrister." I think these expressions, which are left out in the abbreviated report in the Law Reports, throw some light on what Lord Hatherley was thinking of when he spoke of raising an unlimited sum of money "wholly regardless of the contributions made by the members." Giffard, L.J.'s judgment is much the same in both reports. Sir Richard Bethell's opinion had been cited in the argument, and Giffard, L.J. evidently had its terms in his mind when he explains what he thinks would be "repugnancy" to the Act, viz., a rule making the society a society different from that specified in the Act. I do not find a word in his judgment to indicate that he relied on the limit of the amount contained in the 5th sub-section. The decision, which has never been reversed or even questioned, was that that particular rule, which, as I construe it, confined the recourse of the lenders to the personal security of such trustees as by express writing made themselves responsible, who were to be indemnified out of the first funds of the society



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and to the securities which might be given to the lenders, and which also limited the amount to be borrowed, was valid. This decision was on the 4th Nov. 1869. On the 17th Dec. 1869 Giffard, L.J. pronounced judgment in *Re National Permanent Benefit Building Society; Ex parte Williamson* (*ubi sup.*), and there he says: "The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent case of *Laing v. Reed* it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But what we have here is a limited benefit building society, without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company or to make the individual members of the company, as members, liable for borrowing money, because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules, they are to receive certain loans." What is here decided is, that a society under this Act has no power to borrow unless its rules authorise it so to do, and that is, I think, as well settled to be law as anything not yet decided by this House can be. I do not think that the actual decision in *Laing v. Reed* ought to be put higher than that a rule which authorised borrowing, but was so expressed as on its construction not to make the members as such liable for the money borrowed, and which also had a limit as to the sum to be borrowed, was valid. It left it open to anyone to say that, had not both these limits existed, *non constat* that the decision would not have been different. And I think also that the language of Lord Hatherley is such that it might fairly be argued that Lord Hatherley attached weight to the limit as to amount contained in the 5th sub-section of the rule. I do not think that could be said of Giffard, L.J. And the Legislature in the Act of 1874, by the 14th section, expressly limited the liability of members, as such, in societies under that Act, in all cases. And in the 15th section, whilst by the first sub-section authorising borrowing, and thereby showing that the Legislature did not think it expedient to adopt Sir Richard Bethell's opinion that all borrowing was repugnant to the fundamental principle of such a society, they did also by the 2nd sub-section show that they thought it expedient at least to put a limit on the amount to be borrowed. But though such limit as to the amount which the trustees are authorised to borrow is obviously highly expedient, I do not see how such a limitation on the amount can on any principle be said to affect the question whether the borrowing is repugnant to the principles of the society. As Mr. Davey forcibly put it in his argument, whether there should be a limit on the amount is a question not of principle but of expediency. If all borrowing power is repugnant to the fundamental principle of the society, it cannot be that a power to borrow a sum limited in amount is not repugnant. But though this is my opinion, it certainly was not that of Malins, V.C. In March 1870 *Hill's case* (*ubi sup.*) came before Malins, V.C. There had been a set of rules certified by the barrister, amongst which had been a rule empowering the directors to

borrow money, but on the revision of those rules in 1861 that rule was, in consequence of the opinion of Sir Richard Bethell, struck out. The rules subsequent to 1861 contained no power to borrow. The revision of the rules had been apparently conducted in a somewhat slovenly manner, and the 19th rule, as certified in 1861, contained language that alluded to the rule previously struck out. The Vice-Chancellor said it did not give any power to borrow at all. That being so, all that it was necessary to decide was that there was no power to borrow, so that members were not liable as individuals to pay calls made in the winding-up for the purpose of paying the lenders, and that was apparently all that the Vice-Chancellor did decide. But though it was quite unnecessary, in a case where there was no such rule, to say anything about the validity or invalidity of a rule giving a borrowing power, the Vice-Chancellor did give a judgment on that question, expressing his dissent from *Laing v. Reed*, which, even if wrong, was binding on him, and to my mind his reasoning is unsatisfactory. Yet it is upon this altogether unnecessary opinion, and, as far as I can discover, upon this alone, that Jessel, M.R. must have acted when he said that it was settled. Malins, V.C. assumes, without giving any reasons for it, that a rule giving a power to borrow, if valid at all, must give a power so as to enable those who borrowed to pledge the credit of the members as individuals. Whether a rule which authorised the managers to pledge the members as individuals was ever certified or not I do not know; it certainly would be eminently inexpedient that there should be such a power. Whether, if such a rule existed, it would be valid is a question which has never, as far as I can find, been raised; it certainly was not raised in *Laing v. Reed*. I think there is ground for saying that Lord Hatherley meant to say that a power to raise money on the security of the individual members, irrespective of the amount of their contributions, would, in his opinion, be repugnant to the objects of the Act. I am by no means prepared to decide that question either way until it arises, which it never has hitherto, and certainly does not in the present case. But a rule giving power to borrow from those who were willing to accept as their only security the funds of the society, including the contributions which members might as such pay to the society, and the personal liability of such persons as chose to pledge their personal liability, stands on a very different footing. The Vice-Chancellor does not seem to have perceived that there might be such a distinction, and certainly not to have perceived that such a distinction did exist in the rule in *Laing v. Reed*. The only other case of those brought before your Lordships' notice which I think it necessary to refer to is *Re Professional, Commercial, and Industrial Benefit Building Society* (*ubi sup.*) in 1871. The language of James, L.J. has been cited as showing that he was under the impression that *Laing v. Reed* was to be understood in the limited sense put upon it by Malins, V.C. in *Hill's case*, and though it is clear that no such point needed to be decided by James, L.J., I think that any opinion which he expresses on such a point is worthy of great attention. There had been an additional rule made in March 1870, which on inquiry at the registrar's office it appears was

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duly certified, though the expressions attributed to James, L.J. had made that seem doubtful. That rule was in terms not substantially differing from the first sub-section of rule 18 in *Laing v. Reed*. It did not contain anything equivalent to the 5th sub-section. The question to be decided was, whether the society should be wound-up on the petition of persons who, if it was wound-up, would, or at least might be, contributors, but who certainly were not creditors. James, L.J. is reported to have said, "Then the petitioners say, We have a strict right to an order, we are contributors." The Lord Justice points out that no statutable proof of inability to pay its debts was given against the society, and proceeds: "Nor has the insolvency been proved otherwise to the satisfaction of the court. It has not been proved to my satisfaction that there is any debt whatever in respect of which the society could be liable. First of all, a society of this kind is not entitled to borrow money except under a particular rule. It is no part of its business to borrow money. It may incur debts, no doubt, to a certain extent: it must, for instance, incur office rent and employ a solicitor and a secretary, and to that extent probably there is always some small amount of debt which everybody of this kind must incur. But beyond this it is very difficult to see what debts it could legally incur." So far, what he says is in exact conformity with what I have endeavoured to state as my view of the law, but he goes on: "But it appears that the society having gone on receiving deposits from persons other than members, and having incurred a debt to its bankers, passed a resolution authorising the trustees to borrow money for the purposes of the society. I am of opinion that, in accordance with the decided cases" (speaking as he was on the 1st Aug. 1871, the decided cases can only have been *Laing v. Reed*, *Ex parte Williamson*, and *Hill's case*) "that resolution was expressed in terms far too wide to make it a valid or binding resolution, and therefore there never was any debt which the society, *quâ* society, could be sued upon." He proceeds to point out that to some extent at least they might come on the funds of the society. Mellish, L.J. is far more cautious. He says: "Then, as respects their liability" (that is, their individual liability as contributors to make good the loans), "I agree with the Lord Justice that in all probability they were never liable to anything, but, even if they were liable, all the alleged creditors of the society have joined in a release, and I have no doubt that that release is an effectual protection." Now, though James, L.J. had not any need to decide this, and may not have put his mind to this point, he does, I think, intimate that his impression was that the rule not limiting the amount of money to be borrowed, was, according to *Laing v. Reed*, not valid. I have already expressed my reasons for coming to a different conclusion, but I think James, L.J.'s expressions are an authority against me. I do not think, however, it can in any possible view of it be held to settle the law. If the rest of the noble and learned Lords agree with me in thinking that a rule authorising borrowing so as to charge the funds of the society, but not the persons of the members, is valid, though there is no limit such as that in the 5th sub-section of the rule in *Laing v. Reed*, it is necessary to decide

whether the specific securities pledged to the lenders can be made available. That, I think, is a question depending on the construction of the rule. If there had been an express clause enabling them to mortgage specifically property of the society (and perhaps one similar to the 3rd sub-section in the rule in *Laing v. Reed* might be so construed), I think that the reasoning I have submitted to the House leads to the conclusion that the specific pledges would be good; and the same would perhaps follow if such a power to pledge specific property was implied. But there is certainly no express power to pledge given, and I think that the terms of the rule, which make all the loans a first charge on the funds, which would lead the lenders to believe that in the event of a winding-up at least they would all come in *pari passu*, are quite sufficient to negative an implied power to mortgage, even if such a power could be implied from a power to borrow. I do not, however, think there is any ground for such an implication, even if this did not negative it. The case of *Murray v. Scott*, I think, was rightly decided by the Court of Appeal. I am relieved from any necessity for saying more about it than that I quite agree in the reasons given by the late Master of the Rolls. The result is, that I agree in the proposed judgment.

LORD WATSON.—My Lords: The questions brought before the House in these appeals have been so fully and exhaustively treated by my noble and learned friends that I shall content myself with indicating some of the considerations which have induced me to concur in the judgment which has been moved. One of the most important of these questions relates to the validity of rule 32, which gives the directors power, from time to time as occasion may require, to borrow money from the society's banker, or from any other banker or person. In both the courts below it was assumed to be settled law that the rule was invalid because it does not impose any limit upon the amount which the directors are authorised to borrow. It cannot with strict accuracy be said that the power conferred is absolutely without limit, seeing that it is only to be exercised "as occasion may require," which plainly implies that it is not to be exercised at all except in the case of a loan being required for the purposes of the society in the course of its legitimate transactions as a benefit building society. It is obvious, however, that the kind of limit which was assumed to be necessary in order to validate the rule was that indicated by Lord Hatherley in *Laing v. Reed* (*ubi sup.*), viz., a pecuniary limit proportionate to the trading capital of the society derived from the contributions of its members. I agree with your Lordships that there is nothing in the provisions of 6 & 7 Will. 4, c. 32, which either expressly prohibits or can by reasonable implication be held to disable the members of a benefit building society, whose constitution and powers are still regulated by that Act, from authorising their directors to borrow money, although in the absence of such authority the directors would not have that power. Upon this point *Laing v. Reed*, and the cases which followed it, to which I need not specially refer, are all direct precedents, and so far I do not doubt that they were well decided. But it was contended at your Lordships' bar, and the Vice-Chancellor of the County Palatine, as well

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as the learned judges of the Court of Appeal, seem to have thought, that these cases form a series of decisions to the effect that any authority to borrow given by the members to their directors is wholly void unless it be qualified by a limitation of the amount to be borrowed such as I have described. An examination of these cases, all of which have been already noticed by Lord Blackburn, satisfies me that in none of them was the present question as to the validity or invalidity of that which has been termed an unlimited power to borrow raised and decided. The doctrine that such a power is *ultra vires* of the society, and therefore void, had its origin in the opinion expressed by Lord Hatherley in *Laing v. Reed*, an opinion which was referred to as authoritative in subsequent cases, although the point did not then arise for judicial determination. In *Laing v. Reed* the sum authorised to be borrowed was restricted to two-thirds of the total amount for the time being secured to the society by mortgage, so that there was no question before the court as to the legality of an unlimited power. But it certainly appears to me that Lord Hatherley in that case sustained the power on the express ground that it was limited as to amount, and that the limit was proportioned to that part of its contributed capital which the society had advanced to its members, or lent on mortgage, and I think the noble and learned Lord did intend to lay down the law to the effect that without some limitation of that character the power would have been invalid. I prefer the test of its legality applied by Giffard, L.J. to the rule which he had to consider along with Lord Hatherley in *Laing v. Reed*: "Does this rule merely provide a method of conducting business, or is it a rule making the society a thing different from a benefit building society?" The legality of such a rule appears to me to depend upon the natural and probable results of the due exercise of the power which it confers, and not upon the consequences of its possible abuse by unscrupulous or fraudulent directors. It is quite conceivable that a benefit building society might find legitimate uses for borrowed money to an amount exceeding two-thirds of its contributed capital, and it is also conceivable that a power to take on loan not more than two-thirds might be abused, and the money embarked in transactions foreign to the legitimate business of the society. No power the exercise of which will necessarily or naturally involve a violation of the statutory constitution of the society can be sustained as valid by a court of law; but, on the other hand, it appears to me to be beyond the functions of the court to lay down a hard and fast rule, dictated by considerations of expediency, which may give some societies more latitude than they require, and may restrict the legitimate business of others. I am accordingly of opinion that rule 32 is unexceptionable. As I read the rule it merely empowers the directors to raise money by way of loan when that becomes necessary for the purpose of carrying on the proper business of the society, and it does not appear to me to admit of serious dispute that the sums actually borrowed by the directors, though of large amount, were exclusively employed by them for that purpose. There is another question, attended with much nicety, and of great importance to some of the litigants, which relates to the right of those creditors who lent money to the

society upon the faith of specific securities. What would have been the precise rights of those creditors if rule 32 had not contained the declaration that "any borrowed money shall be a first charge on the funds and property of the society," or if there had been added to the rule the further declaration that it should be lawful for the directors to give lenders such form of security as might be legal, and as the directors might deem proper, are questions which I do not think it necessary for the purposes of the present case to determine. The rules of this society do not give, at any rate they do not expressly give, authority to the directors to borrow on mortgage, and the declaration in rule 32 appears to me to be so expressed as to qualify the power of the directors, and to fix the security which is to be given alike to all lenders to the society. As the rule stands it conveys an intimation to lenders that all loans are to constitute a first charge upon the assets of the society, and it would, in my opinion, be inconsistent with any reasonable construction of the rule to hold that the directors were thereby authorised in the first place to borrow largely on the faith of that intimation, and then to make over the whole property and funds available for payment of these loans in pledge to preferable creditors. I have therefore come to the conclusion that lenders holding specific securities must nevertheless come in *pari passu* with unsecured creditors who have advanced money to the society in reliance upon rule 32.

*Order appealed from in Murray v. Scott and others affirmed.*

*Orders appealed from in Brimelow v. Murray and Agnew and another v. Murray reversed, except so far as they direct the delivery up of deeds and documents to the official liquidator.*

*Causes remitted to the court below with a declaration.*

Solicitors for Murray, Pritchard, Englefield, and Co., for Boote and Edgar, Manchester.

Solicitors for the respondents in *Murray v. Scott, Marsland, Hewitt, and Everett*, for Adleshaw and Warburton, Manchester.

Solicitors for the appellants in *Agnew v. Murray and Brimelow v. Murray, Phelps, Sidgwick, and Biddle*, for Sale, Seddon, Hilton, and Lord, Manchester.

March 21 and 24.

(Before the LORD CHANCELLOR (Selborne), Lords WATSON, BRAMWELL, and FITZGERALD.)

GRANT AND CO. v. COVERDALE, TODD, AND CO. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Ship—Charter-party—Exception in charter-party—Commencement of lay days—Loading prevented by frost.*

*By the terms of a charter-party a ship was to proceed to the port of loading, and there load a cargo of iron in the customary manner from the agents of the charterers.*

*The charter-party contained the following clauses: "Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage at 40s.*

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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per day . . . except in case of . . . frost . . . or any other unavoidable accident preventing the loading." The ship arrived at the port of loading and went into dock, but after the loading had commenced a canal, through which part of the cargo had to pass in lighters in order to reach the dock, was made impassable by a severe frost, and the loading was delayed.

Held (affirming the judgment of the court below), that this delay was not within the exception in the charter-party, which referred only to delays in "loading," which would not have been interfered with by the frost if the cargo had been brought to the dock otherwise than by the canal.

This was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Fry, L.JJ.), reported in 48 L. T. Rep. N. S. 701 and 11 Q. B. Div. 543, reversing a decision of Pollock, B., reported in 46 L. T. Rep. N. S. 632, and 8 Q. B. Div. 600.

The action was brought by the owners of the steamship *Mennythorpe*, the present respondents, against the charterers, the present appellants, for demurrage and damages for the detention of the ship, under circumstances which appear in the head-note.

The case was tried before Pollock, B. without a jury at the Glamorgan Summer Assizes in 1881, when all matters of fact were referred to a special referee to report.

The material facts found by him are set out fully in the report of the case before Pollock, B., who decided in favour of the defendants, but his decision was reversed by the Court of Appeal, as above mentioned, on the ground that the case was governed by the decision in *Kay v. Field* (47 L. T. Rep. N. S. 423; 10 Q. B. Div. 241).

From this judgment the present appeal was brought.

Webster, Q.C. and Moulton (*Bowen Rowlands*, Q.C. with them) appeared for the appellants, and contended that the loading was in fact prevented by frost within the meaning of the exception in the charter-party, for the forwarding of the iron from the wharf by the canal to the dock was all part of the loading and cannot be separated from it. They referred to

*Kay v. Field* (*ubi sup.*);  
*Adams v. Royal Mail Steampacket Company*, 5 C. B. N. S. 492;  
*Hudson v. Ede*, 18 L. T. Rep. N. S. 764; L. Rep. 3 Q. B. 412;  
*Penwick v. Schmals*, 18 L. T. Rep. N. S. 27; L. Rep. 3 C. P. 313;  
*Kearon v. Pearson*, 7 H. & N. 386; 31 L. J. 1 Ex.;  
*Postlethwaite v. Freeland*, 42 L. T. Rep. N. S. 845; 5 App. Cas. 599;  
*Tapscott v. Balfour*, 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Brynmor Jones*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: I believe that none of your Lordships have any doubt that the order appealed from in this case ought to be affirmed. The whole question of course depends upon the terms of the charter-party, and the material terms are these: On the part of the ship-

owner it is agreed that the ship "shall (after discharging her cargo at Middlesbrough) with all convenient speed sail and proceed to Cardiff East Bute Dock, or so near thereunto as she may safely get, and there load always afloat in the customary manner from the agents of the freighter, a full and complete cargo of about 1800 tons of iron." That is the shipowner's contract. The charterer contracts on his part: "Cargo to be supplied as fast as steamer can receive at all hatchways for loading" (I omit what relates to unloading and discharge), "time to commence from the vessel being ready to load and ten days on demurrage over and above the said lay days at 40l. per day (except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading)." Now the exception has reference to the loading and nothing else. It is important to observe with respect to any argument founded on the particular accidents enumerated, frosts, floods, or hands striking work, to which large general words are superadded, that those are in a printed form, and are meant therefore to suit each particular case as far as they can, but they are not introduced in contemplation of any particular case, this or any other. But the mention of "Cardiff East Bute Dock" is a part of the special terms of this particular contract, not of the printed form; it is manifest, therefore, that those words must be applied *reddendo singula singulis* according to the circumstances which may in point of fact be applicable to the particular case in the special contract. You cannot found upon anyone of them an argument of this sort, that it must of necessity have been introduced with reference to the particular place, and the particular circumstances of that place. With that observation I proceed to notice that it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not in any degree absolve him from the consequences of keeping the ship too long. That was decided, under circumstances very similar in many respects, in the case of *Kearon v. Pearson* (*ubi sup.*), and decided expressly on the ground, as was pointed out I think by all the learned judges, certainly by Bramwell, B., by Wilde, B., and by Pollock, C.B., that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing. Now it really appears to me that when you observe that this exception in the contract is limited to "accidents preventing the loading," the only question is, what is the meaning of "loading," and whether this particular frost did, according to the facts, prevent the loading. There are two things to be done; the operation of loading is the particular operation in which both parties have to concur. Taken literally it is spoken of in the early part of this charter-party as the thing which the shipowner is to do. The ship is to "proceed to Cardiff East Bute Dock," "and there load the

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cargo." No doubt for the purpose of loading the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation, everything before that is the charterer's part only. It would therefore appear to me to be most unreasonable to suppose, unless the words make it perfectly clear that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation, which are no part whatever of it, and are perfectly distinct from it, but belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board, and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be. They mention "strikes, frosts, floods, and all other unavoidable accidents preventing the loading." If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfilment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance, or to be brought by sea, or to put it on the railway, or bring it in any other way in which it is to be brought. All those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time, but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word "loading?" Are those things any part of the operation of loading? Nothing I suppose is better established in law with regard to mercantile cases of this kind than the maxim *Causa proxima, non remota, spectatur*, and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute Dock can make no difference whatever in principle if it was not the place of loading. If the cargo had to be brought from this wharf on the Glamorganshire Canal, however near it was, if it had to be brought over a passage which in point of fact was impeded, and over which it was not brought to the place of loading, to say that the wharf on the Glamorganshire Canal was upon a fair construction of the words within the place of loading, appears to me to be no more tenable than if the same thing had been said of a place a mile higher

up the canal where, according to the actual contract, the persons were to supply the iron, and the owner of the iron might have been found. That really is quite enough to dispose of the whole argument. The case of *Hudson v. Ede* (*ubi sup.*) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission in point of fact of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as for instance that the goods should be brought across part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically according to known mercantile usage the only place from which they can be brought to be loaded, the parties must be held to have contracted that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And of course, if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded at the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact some parts of this very cargo not only could be, but actually were, brought up by carts to the East Bute Dock and put on board the ship, and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you are to look at the interest of the charterer. But, if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it, whatever the cause of his not doing it may be, whether it be his not being willing to incur an unreasonable expense or whether it be any other cause. Under these circumstances I think that your Lordships can have no hesitation in affirming the judgment appealed from, and I move your Lordships to do so with costs.

Lord WATSON.—My Lords: I am of the same opinion. This vessel had reached her destination at the East Bute Dock, and thereupon it became the duty of the charterer to load the vessel; that is to say, to bring the cargo either to the wharf or by means of lighters to the vessel's side and to put it on board her. The exception which he pleads is an exception in his favour, upon the obligation thus incumbent upon him, and it is for him to show that it extends to the case which he now maintains. I am of opinion that it cannot be so extended. I think that in this case "loading" means loading in the East Bute Dock, and I am not prepared to assent to a construction of this charter-party which would imply that the word "loading" had as many different meanings as there happened to be different merchants or manufacturers of iron rails in Cardiff who happened to select a different locality in order to store their rails for the purposes of shipment.

Lord BRAMWELL.—My Lords: I am entirely of the same opinion. Whether, if these parties had met and talked over the possibility of frost preventing the passage of the iron from Crawshay's Wharf to this ship, or down the Glamorganshire Canal to Crawshay's Wharf, or any other

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conceivable difficulty arising from frost, whether in that case the shipowner would have agreed to bear the risk of it, the charterer bearing none of the risk of it, is more than I can say. It is utterly impossible to speculate upon such a thing as that. All that we can do is to deal with the particular words that they have used, as to which it is very likely that neither of them had in their minds any definite meaning. But the words to my mind are tolerably plain; they relate entirely to something which prevents the loading, that is to say, the actual putting on board of the cargo, and I think, when you couple that with the expression in the earlier part of the charter-party, that the vessel is to "proceed to the East Bute Dock or so near thereunto as she may safely get, and there load," the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented.

Lord FITZGERALD.—My Lords: I also concur. One of the terms of the contract itself was performed: the ship arrived in due course at Cardiff East Bute Dock, the place of loading according to the contract, where she was, in the language of the contract, "to load in the customary manner from the agents of the freighter a full and complete cargo of about 1800 tons." "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." "Time to commence from the vessel being ready to load." "Demurrage over and above the lay days at 40l. per day, except" (*inter alia*) "in case of frosts preventing the loading." There is another provision which is not undeserving of attention: "Steamer not to require to load before 9th Jan." It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all the risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage would have arisen.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Clarke, Rawlins, and Co.*

Solicitors for the respondents, *Shum, Crossman, Crossman, and Prichard, for Turnbull and Tilly, West Hartlepool.*

## Judicial Committee of the Privy Council.

June 10, 11, 12, and 25.

(Present: The Right Hons. Lord WATSON, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir R. COUCH, and Sir A. HOBBHOUSE.)

PLIMMER v. THE MAYOR OF WELLINGTON. (a)

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

*Foreshore — Licensee — Irrevocable licence — Compensation — Equitable right.*

*The equity to arise from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated.*

*P. erected a jetty on the foreshore of the harbour of W. under a revocable licence from the Crown to use it for the purposes of a wharfinger; afterwards, at the instance of the colonial Government, he extended the jetty, and made other additions to it, and it was for some time used by the Government for immigrants.*

*Held (reversing the judgment of the court below), that the licence had become irrevocable, and that the equitable right so acquired by P. was "an estate or interest in land" which could be the subject of compensation under local statutes.*

*Ramsden v. Dyson (L. Rep. 1 H. of L. 129) discussed and explained.*

THIS was an appeal from a judgment of the Court of Appeal of New Zealand upon a special case.

The question was, whether the appellants had any such estate or interest as would entitle them to compensation under the colonial statutes in respect of certain lands which were vested in the respondents, the corporation of Wellington, by a colonial Act, in the year 1880.

The Court of Appeal in the colony answered the question in the negative.

The facts of the case appear fully from the judgment of their Lordships.

*Webster, Q.C. and Olivier* (of the New Zealand Bar) appeared for the appellants, and argued that the case put forward by the respondents amounted to this, that the appellants had only a tenancy at will of the bed of the sea. There is nothing illegal in such an erection as this. See *Hale De Portibus Maris* and *De Jure Maris* in *Hargreave's Law Tracts*:

*Attorney-General v. Terry, L. Rep. 9 Ch. 423; 30 L. T. Rep. N. S. 215;*

*Orr-Ewing v. Colquhoun, 2 App. Cas. 839.*

This erection was made with the knowledge and at the instance of the Government, and therefore we have a good equitable title:

*Attorney-General v. Lord Lonsdale, L. Rep. 7 Eq. 377; 20 L. T. Rep. N. S. 64;*

*Reg. v. Betts, 16 Q. B. 1022.*

The case of *Cory v. Bristow* (2 App. Cas. 262; 36 L. T. Rep. N. S. 594) shows that moorings or piles are an occupation of the soil. At all events we have a good title under the Statute of Limitations, which has been adopted in the colony, as our lessor acquired the fee by lapse of time:

*Day v. Day, L. Rep. 3 P. C. 751; 24 L. T. Rep. N. S. 856.*

A restriction against alienation does not affect a prescriptive right:

*Mayor of Brighton v. Guardians of Brighton, 5 C. P. Div. 363;*

*Tickle v. Brown, 4 A. & E. 369.*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



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Our predecessor in title had acquired an indefeasible title before the land was vested in the respondents by the Act, so we are entitled to compensation:

*Watt v. Morris*, 2 Bing. N. C. 189.

*Davey*, Q.C. and *C. Elton*, for the respondents, contended that the appellants' lessor was a mere trespasser *ab initio*, or at best a mere licensee with a revocable licence, and consequently they had no estate or interest within the meaning of the Compensation Act:

*Dann v. Spurrier*, 7 Ves. 231.

Acquiescence by the Government gave no title, for Plimmer did not believe that the land was his own, and the dealings of the parties have prevented the Statute of Limitations from running:

*Ramsden v. Dyson*, L. Rep. 1 H. L. 129;

*Hagan v. Byrne*, 13 Ir. C. L. 166;

*Locke v. Matthews*, 13 C. B. N. S. 753;

*Laird v. Briggs*, 19 Ch. Div. 22; 45 L. T. Rep. N. S. 238.

A mere licensee has no occupation within the Act. The bed of the sea cannot be appropriated, it is different from the bed of a river in private ownership. Hale (*ubi sup.*) shows that the utmost which is allowed is the reclamation of land from the sea; the only exception is in the case of weirs belonging to a several fishery. The appellants cannot prescribe for an easement in this case. As to the equity arising from acquiescence, see

*Dann v. Spurrier (ubi sup.)*;

*East India Company v. Vincent*, 2 Atk. 83;

*Duke of Devonshire v. Eglin*, 14 Beav. 530;

*Ramsden v. Dyson (ubi sup.)*;

*R. v. Hungerford Market Company*, 4 B. & Ad. 592;

*Russell v. Watts*, 25 Ch. Div. 559;

*Willmott v. Baker*, 15 Ch. Div. 96; 43 L. T. Rep. N. S. 95.

[Sir A. HOBHOUSE referred to *Dillwyn v. Llewelyn*, 4 De G. F. & J. 517.]

*Ollivier* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 25.—Their LORDSHIPS gave judgment as follows:—The sole question for their Lordships in this appeal is one which is put by the special case stated for the decision of the Supreme Court, viz., "Had the claimants any estate or interest in the land upon which the remains of the jetty stood when such land became vested in the respondents under the Wellington Harbour Board and Corporation Land Act 1880; and, if so, what was the nature of such estate or interest?" The Supreme Court have answered this question in the negative. Their Lordships will state briefly the material facts which explain the question. In the year 1848 one John Plimmer moored an old hulk, known as *Noah's Ark*, in the bed and on the foreshore of Wellington harbour for the purpose of a wharf and store. This was done by permission of the Crown, represented by Sir George Grey. In Jan. 1855 there came an earthquake which raised the ground and so reduced the depth of water; and in order to carry on his business of a wharfinger John Plimmer erected a jetty extending to a considerable distance from the shore. The extension so made is coloured yellow on the plan used for the purpose of this appeal, and the land used for a portion of it is the land mentioned in the question. It was about 190 feet in length.

It is not stated that any permission was obtained for this work. On the 18th Oct. 1855 the then Governor, acting under statutory powers, granted to the superintendent of the province of Wellington a portion of the harbour, including the land occupied by Plimmer. It is not necessary to follow minutely the legal title to the land. It is sufficient to say that, under whatever form, it has been continuously vested in the Government for public purposes, that the use made of it by Plimmer was consistent with those purposes, and that Plimmer might by contract with the Government have acquired a perpetual interest in it for such purposes. Some time before the month of June 1856 John Plimmer, at the instance of the provincial Government, extended his jetty about 112 feet further into the harbour. That extension is shown by the green colour on the plan. He also reclaimed some land, and, at the suggestion of the provincial authorities, built thereon a warehouse or shed for the accommodation of immigrants, who were being introduced into the colony by the provincial Government. From the year 1856 to the year 1863, when the Queen's wharf came into use, Plimmer's jetty and warehouse were largely used for the immigrants, and charges were paid to him by the Government and others for such use. In the year 1857 the Government began to reclaim portions of the harbour included in the grant of 1855 and contiguous to the land in Plimmer's occupation, and they proceeded to make on the reclaimed land a quay nearly at right angles to and across the yellow part of Plimmer's jetty. For the purpose of that work, with the permission of Plimmer, they cut away the shore end of his jetty. But his business was not interrupted thereby, for during the work he used a temporary gangway to connect his severed jetty with the shore, and when the work was completed in the year 1861 he was permitted to connect the remaining portion of the jetty with the breastwork of the new quay. Subject to the alterations above mentioned, Plimmer's jetty or wharf was continually used as a landing place for passengers and goods from the time of the first placing of *Noah's Ark* down to the assumption of possession by the respondents. And in the year 1872 the Government, acting under statutory provisions, declared it to be a legal quay or landing place. The special case sets out in detail certain proceedings taken with reference to the reclamation of ground by the Government, and to a claim of pre-emption by Plimmer, but, in the view their Lordships have taken of the case, those transactions have little bearing on the question. The title of the appellants stands as follows: In 1872 they became yearly tenants of John Plimmer. In 1875 John Plimmer sold to Jacob Joseph his interest in the jetty, then described as a certain freehold wharf which has been duly legalised as a landing place, subject to the yearly tenancy of the appellants. Mr. Joseph subsequently granted to the appellants a lease for the term of twenty-one years, commencing from the 1st Jan. 1879, at an annual rental of 75*l.* The date of this lease is not mentioned in the case. In the early part of the year 1878 the appellants extended the jetty some seven or eight feet, and on the 15th March 1878 the Secretary of Customs wrote to them as follows: "It has been reported to the Government that the wharf known as Plimmer's Wharf has recently been extended. I have there-



fore been directed by the Honourable the Commissioners of Customs to inform you that this wharf has been erected without the sanction or authority of the Government." That letter is the earliest intimation of objection on the part of the Government. It must be taken that the latest extension of the jetty was a trespass. But if the assertion as to want of sanction was meant to apply to the entire wharf, it is at variance with the whole preceding history of the case. The land was vested in the respondents by a statute which came into force on the 1st Sept. 1880. In April 1881 they brought ejectment, to which of course the appellants had no defence, and in Dec. 1882 the respondents took possession. The claim for compensation is made under a statute which came into force on the 13th Sept. 1882, the terms of which may conveniently be quoted here. After reciting the statute of the 1st Sept. 1880, it is enacted by sect. 4: "Every person who immediately before the date of the passing of the said Act had any estate or interest in, to, or out of the lands by the said Act vested in the corporation, or any part of such lands, and every person who has suffered loss or damage by the vesting by the said Act of the said lands or any part thereof in the corporation, may make a claim for and shall be entitled to receive full compensation from the corporation; provided always that, in ascertaining and determining the title of any claimant to compensation, the Compensation Court shall not be bound to regard strict legal rights only, but may award compensation in respect of any claim which the Compensation Court may consider reasonable and just, having regard to all the circumstances." By the terms of the special case, and the proceedings taken in the Supreme Court, there is not in issue before this board any question of compensation to the appellants, except such as depends on their having some estate or interest in, to, or out of the lands vested in the corporation. The appellants desire to rest their claim on the ground that John Plimmer was a trespasser throughout, and that a good title has been gained by possession without payment or acknowledgment. Countenance is given to this contention by the Government letter of the 15th March 1878; but, as before observed, the whole history of the case is against it. It is clear that, at least up to the year 1872, the Government and John Plimmer were acting in accord, and there is no trace of a trespass until the year 1878. It is true that under the Statute of Limitations (3 & 4 Will. 4, c. 27), which the counsel agreed to be in force in New Zealand, it is not necessary to show trespass or adverse possession in order to gain a title by lapse of time. If the original permission is carried back far enough, the title may be gained by mere omission of acknowledgment. But their Lordships are of opinion, and so far they agree with the Supreme Court, that the transactions of 1857-61 amount to a new arrangement. The subject-matter of the occupation was then changed, and changed by consent. And upon this question it makes no difference whether John Plimmer is regarded as a licensee or a tenant at will, for in either case the new agreement obliterates the effect of the previous lapse of time. And as these transactions did not end till some time in 1861, the requisite twenty years had not elapsed by the 1st Sept. 1880, which is the point of time at

which the respondents' interest is to be ascertained. For this reason it is unnecessary to examine whether any subsequent transactions affected John Plimmer's occupation in the same way. The respondents, however, seek to attribute to the transactions of 1857-61 a much stronger effect. They insist that those transactions not only gave a fresh starting point for the lapse of time, but that they entirely destroyed the previous relations between the parties, so that prior agreements or equities cannot be taken into consideration. Their Lordships are asked to hold that the Government entered upon John Plimmer's occupation by its paramount title as owner, and that whatever was left to him was left of pure bounty. It would seem that the Supreme Court accepted this contention. They say that Plimmer did not give his permission to the operations of the Government on the ground that he claimed to be entitled to the fee simple of the land, or that he asserted a legal right to it, but that he came as a suppliant to the Government, appealing not to his legal rights but to the public faith of the province. And they hold that in 1861 he took as a mere tenant at will, and that the occupation remained on that footing until it was lawfully determined by the act of the respondents. In these conclusions their Lordships are unable to agree. They cannot find anything in the special case to show that John Plimmer failed to assert any right he possessed, or that he surrendered anything except by agreement, or that he or the Government acted as if he were at their mercy. The special case is obviously framed with great care so as to express what acts were done by permission, and what were done otherwise. It may be that Plimmer did not claim a fee simple, seeing that he had no ground for such a claim; but it does not at all follow that he did not claim a right of permanent occupation, or that the Government did not recognise such a right. At all events what we know is that there was mutual concession. Plimmer allowed the Government to take away the shore end of his jetty; and the Government allowed him to make a temporary gangway, and, when the works were completed, to have the support of their new quay for his jetty in its altered state. It is easy to imagine how both parties were calculated to benefit by the transaction; but we need not speculate on their motives. Their Lordships rest on the statements in the case, and from those statements they cannot draw any inference except that the transaction was one of mutual agreement between the parties for their mutual benefit, and not one of paramount right on the one side and appeals to mercy or to honour on the other. And the effect of the agreement is to leave John Plimmer with precisely the same interest in the altered jetty as he previously had in the original jetty. What was that interest? Plimmer's original works were erected with the permission of the Government, and their Lordships think that he must be taken to have occupied the ground under a revocable licence to use it for special purposes, viz., those of a wharfinger. Whether the yellow extension was so held when first made need not be discussed, because after the month of June 1856, when the green extension had been made, the whole was certainly held upon the same tenure. In their Lordships' opinion it was still held upon licence to use for the original purposes,

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but by the transactions of 1856 the licence had ceased to be revocable at the will of the Government. The law relating to cases of this kind may be taken as stated by Lord Kingsdown in the case of *Ramsden v. Dyson* (L. Rep. 1 H. of L. 129). The passage is at page 170: "If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (18 Ves. 328), and, as I conceive, is open to no doubt. If at the hearing of the cause there appears to be such uncertainty as to the particular terms of the contract as might prevent a court of equity from giving relief if the contract had been in writing but there had been no expenditure, a court of equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the court would ascertain the terms by reference to the master, and if they could not be ascertained would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a court of equity would give relief, and protect in the meantime the possession of the tenant. If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principle of the decision in *Pilling v. Armitage* (12 Ves. 78), and, like the decision in *Gregory v. Mighell*, seems founded on plain rules of reason and justice." This case of *Ramsden v. Dyson* was strongly pressed in argument against the conclusion to which their Lordships have come, and it was said that Lord Cranworth's judgment, which represented the opinion of the majority, lays it down that an equity of the sort now relied on cannot be raised unless the occupant who improves the land believes it to be his own, and the owner of the improved land knows of that mistaken belief. But there was no disagreement among the judges on the principles of law laid down in that case. Only Stuart, V.C. first, and after him Lord Kingsdown, drew from the evidence inferences of fact at variance with those drawn by the majority of the House, and so brought out a different legal conclusion. The main conclusions of fact to which Lord Cranworth applied his principles of law were, to state them very briefly, as follows: That as to part of the improved land, the tenant, when taking it for building purposes, expressly contracted in writing to hold it at will; that as to

all the land, he was a substantial gainer in point of rent by so holding; that he never believed he had any higher right; that the landlord never knew or suspected what kind of assurance his agent was holding out to the tenant; but that, even if the statements of the agent were to be ascribed to himself, he expressly refused to come under any legal obligation, and the tenant as expressly submitted to trust to the honour of the Ramsden family. In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July 1856 have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible. With respect to the occupant's belief in his own title and the knowledge of that belief on the part of the Government, it may be worth while to remark that the land in question was not like ordinary private property. It was the bed of the sea, useless till somebody converts it to use, and not unfrequently used by unauthorised persons to get profit by accommodating the public. It is difficult to suppose that a person who is so using the sea bed, and the Government who are its owners, can go on dealing with one another in the way stated in this case for a series of years, except with a sense in the minds of both that the occupant has something more than a merely precarious tenure. Their Lordships will not be the first to hold, and no authority has been cited to them to show, that after such a landowner has requested such a tenant to incur expense on his land for his benefit, he can without more and at his own will take away the property so improved. Their Lordships consider that this case falls within the principle stated by Lord Kingsdown as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure, for he took the initiative in requesting it. On this view it becomes quite intelligible why, before the Government interfered with Plimmer's jetty in executing their works of 1857-61, they should have obtained his permission, which on the other view was not necessary. And the subsequent transactions down to 1878, though they do not lend any strong support to the same view, are consistent with it, and are rather more favourable to it than to the opposite one. The Government used, paid for, and gave a legal status to the property which it is now said they might have taken to themselves. The question still remains as to the extent of interest which Plimmer acquired by his expenditure in 1856. Referring again to the passage quoted

from Lord Kingsdown's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fall merely on the ground that the interest to be secured has not been expressly indicated. In such a case as *Ramsden v. Dyson* the evidence (according to Lord Kingsdown's view) showed that the tenant expected a particular kind of lease, which Stuart, V.C. decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as the *Duke of Beaufort v. Patrick* (17 Beav. 60) nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent their money on it, and it was secured to them at a valuation. In such a case as *Dillwyn v. Llewelyn* (4 De G. F. & J. 517) nothing but a grant of the fee simple would satisfy the equity which the Lord Chancellor held to have been raised by the son's expenditure on his father's land. In such a case as the *Unity Bank v. King* (25 Beav. 72) the Master of the Rolls, holding that the father did not intend to part with his land to his sons who built upon it, considered that their equity would be satisfied by recouping their expenditure to them. In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied. In this case their Lordships feel no great difficulty. In their view, the licence given by the Government to John Plimmer, which was indefinite in point of duration but was revocable at will, became irrevocable by the transactions of 1856, because those transactions were sufficient to create in his mind a reasonable expectation that his occupation would not be disturbed; and because they and the subsequent dealings of the parties cannot be reasonably explained on any other supposition. Nothing was done to limit the use of the jetty in point of duration. The consequence is that Plimmer acquired an indefinite, that is practically a perpetual, right to the jetty for the purposes of the original licence, and if the ground was afterwards wanted for public purposes, it could only be taken from him by the Legislature. An analogy to this process may be found in such cases as *Winter v. Brockwell* (8 East, 308) and *Liggins v. Inge* (7 Bing. 6). These cases show that where a landowner permits his neighbour to execute works on his (the neighbour's) land, and the licence is executed, it cannot be revoked at will by the licensor. If indefinite in duration, it becomes perpetual. Their Lordships think that the same consequence must follow where the licence is to execute works on the land of the licensor, and owing to some supervening equity the licence has become irrevocable. There are perhaps purposes for which such a licence would not be held to be an interest in land. But their Lordships are construing a statute which takes away private property for compensation, and in such statutes the expression "estate or interest in, to, or out of land" should receive a wide meaning. Indeed the statute itself directs that, in ascertaining the title of anybody to compensation, the court shall not be bound to regard strict legal rights only, but shall do what is reasonable and just. Their Lordships have no difficulty in deciding that the equitable right acquired by John Plimmer is an interest in land carrying compensation under the Acts of 1880

and 1882. The proper answer to the question will be as follows: That John Plimmer acquired and transferred to Jacob Joseph a perpetual right to occupy and use the land in question for the purposes of a jetty or wharf, and that the interest which the appellants had in the land on the 1st Sept. 1880 was the term which then remained to them under the lease granted to them by Jacob Joseph. Their Lordships will humbly advise Her Majesty that an answer to the foregoing effect be substituted for the answer given by the Supreme Court, and the respondents must pay the costs of the appeal.

Solicitors for the appellants, *J. and R. Gole*.

Solicitors for the respondents, *W. and J. Flower and Nussey*.

Wednesday, June 25.

(Present: The Right Hons. Lord Watson, Sir Barnes Peacock, Sir Montague Smith, Sir Robert Collier, and Sir A. Hobhouse.)

MACKELLAR v. BOND. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

*Law of Natal—Surety—Power of attorney—Renunciation of privileges by married woman—Express words.*

*By the law of Natal a married woman cannot be effectually bound as a surety unless she specially renounces the benefits of the "Senatus Consultum Velleianum," and of the rule "De Authenticis," the effect of which is to render her deed void unless she has expressly renounced her right to plead them.*

*The respondent, a married woman, gave a power of attorney by which she authorised her attorney (inter alia), "in her name to enter into securities . . . of what nature or kind soever, and generally for her and in . . . her name to . . . perform all such acts, matters, and things . . . as may be necessary." Her attorney professed to bind her personally as a surety to a bank for the floating balance that might be due from a firm of J. and Co., and renounced the above-mentioned privileges in her behalf.*

*Held (affirming the judgment of the court below), that in the absence of express words in the power of attorney, or words from which it could be fairly implied that she intended to confer authority to renounce her privileges, the bond of suretyship was void.*

This was an appeal from a judgment of the Supreme Court of Natal under circumstances which appear fully in the judgment of their Lordships.

*H. Matthews, Q.C., R. S. Wright, and Danckwerts* appeared for the appellant.

*Jeune and F. A. Laughton* (of the Colonial Bar), who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellant their LORDSHIPS gave judgment as follows:—This appeal is taken in an action brought at the instance of the appellant, in his capacity of acting general manager of the Natal Bank, for the purpose of enforcing the rights of the bank

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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under a mortgage bond granted upon the 13th Oct. 1882. By that bond one Granger professed, as attorney for the respondent, Mrs. Bond, to bind her personally as a surety to the bank for the floating balance that might be due by a firm of Johnstone and Co. at any time, to the extent of 1500*l.*, and also to mortgage to the bank a property in Church-street, Pietermaritzburg, in further security. By the law which prevails in Natal a lady cannot be effectually bound as a surety, even where she executes the deed by her own hand, unless she specially renounces the benefits of the *Senatus Consultum Velleianum* and also the benefits of another rule, *De authentica*. The effect of these privileges is to render her deed altogether void, unless she has expressly renounced her right to plead them. Mr. Granger has renounced that right on her behalf. He was merely a sub-attorney, authorised specially to that effect by Mr. Bond, the respondent's husband, who held a general power of attorney from the respondent dated the 20th Nov. 1874. If that power of attorney gives Mr. Bond authority to make such a renunciation on behalf of his wife, then these legal privileges were well renounced by his attorney, Mr. Granger, because the general deed of Nov. 1874 gives him authority to delegate. We must, therefore, look to the bond of the 20th Nov. 1874 for the purpose of ascertaining whether the respondent had any power to impose an obligation of suretyship upon his wife, and also to renounce the protection which the law gave her against the consequences of entering into such an obligation. It appears to their Lordships to be doubtful whether the power of attorney gives Mr. Bond any power to bind his wife as a surety. It may be plausibly argued that the words "securities of what nature or kind soever," from their position in the context, can only be held to mean securities for money taken or money given; and the general words that follow—"to perform all such acts and things," and so forth—which were strongly founded upon by the counsel for the appellant, may very naturally be read as powers to perform such acts as are necessary or for the advantage of the wife in relation to the management of her estate. But it is not necessary to determine the precise limits of the power of attorney in that direction, because their Lordships are of opinion that there is no power given by this deed to dispense, on behalf of the lady, with the protection which the law affords her in case of a deed being executed by her, or for her, binding her as a surety. There are no express words in this power of attorney giving her husband such authority, nor do there appear to their Lordships to be any words from which it can be fairly implied that the lady had in view the renunciation of her legal privileges, or that she intended to confer any authority to renounce them on her behalf. These observations dispose of the whole case that is before the board. But it is necessary to advert to one or two other points which have been raised at the bar, not for the purpose of deciding them, but for the purpose of showing that they do not arise, and cannot be decided, in this appeal. First of all it is maintained that, by the law of Natal, Mr. Bond had, by the virtue of his *jus mariti* and right of administration, one or other, or both, power to dispose of all property belonging to this lady which was not expressly reserved as her separate estate, after

marriage. And it was contended that there was evidence, or at least that it might fairly be inferred as a matter of fact, that the property in question, which was mortgaged by the deed of the 13th Oct. 1882, was really property the administration and power of disposal of which rested entirely with the husband. But the mortgage deed, which embodies the transaction between the parties, proceeds on the plain footing that the property thereby given over as security was the separate estate of the lady, and that the husband had only authority to dispose of it—indeed, he professes that he has no other authority—by virtue of the power of attorney which he had got from his wife in the year 1874. It would be a very strong thing in the face of that profession, upon which the mortgage transaction proceeds, to infer from some mere scintilla of evidence—for there is nothing more in this case—that this property stood in such a position that by law Mr. Bond had the sole power of alienation. The authorities that were cited at the bar may or may not be well decided in the circumstances to which they apply. Upon that point it is unnecessary to offer any opinion. It is sufficient to say that there are no facts proved or pleas stated in this case which can raise any question in which they would be available as precedents. The declaration is laid wholly on the bond. It is framed upon the footing that the husband had power to dispose of his wife's property because he was her attorney. There is an attempt, no doubt, to validate his exercise of the power by alleging that the lady had an interest in the firm to cover whose debit balances in account with the bank the security was given; but that is not proved to have been the fact. Then another point was taken, the third plea in the replication being an averment to the effect that at the time of the marriage the value of her estate was very small, and that the property in question, the mortgaged property, had been entirely acquired by the husband's trading, and had been under his uncontrolled administration. It is possible that if those facts had been made out some of the authorities we were referred to might apply. It might be that these facts, if established, would give the husband full authority to alienate the property. But not one word of that allegation has been established by proof. Therefore the only point really raised by the pleadings and by the evidence being whether or not Mr. Bond had, under the power of attorney, authority to renounce these legal exceptions on the part of his wife, their Lordships have no hesitation in coming to the conclusion that the judgment of the court below is well founded. They will, therefore, humbly advise Her Majesty to affirm the judgment of the court below, and to dismiss the appeal with costs.

Solicitors for the appellant, *Travers Smith and Braithwaite*.

Solicitors for the respondent, *Johnston, Harrison, and Powell*.

# Supreme Court of Judicature.

## COURT OF APPEAL.

July 30 and 31.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

WALKER v. HIRSCH. (a)

*Partnership inter se—Share in profits and losses.*

By an agreement signed by W. and H. and Co. it was agreed that for the part taken by W. in the business then carried on by H. and Co., they should pay him a fixed salary of 180l. per annum, and in addition he was to receive one-eighth share of the net profits, and bear one-eighth share of the losses as shown by the books when balanced. W. agreed to leave with the business 1500l., which was not to be withdrawn by him during the continuance of the agreement, and in the meantime interest thereon at 5 per cent. per annum was to be paid to him. The agreement was to continue in force until the expiration of four months' notice in writing on either side, at the expiration of which the sum of 1500l., with any arrears of interest, salary, and profits, was to be paid to W., but H. and Co. were to be at liberty to pay 1500l. to W. on giving one month's notice in writing.

Held (affirming the decision of Pearson, J.), that no partnership *inter se* was created by the agreement, which was only an agreement by a servant to give his services at a fixed salary, with a share of profits in addition, and a similar liability for losses.

Pooley v. Driver (36 L. T. Rep. N. S. 79; 5 Ch. Div. 458) distinguished.

Pawsey v. Armstrong (18 Ch. Div. 698) questioned.

An agreement in writing, made on the 22nd June 1883, between the plaintiff on the one hand, and the defendants, C. Hirsch and E. F. Bernhard, who carried on business as tea and general merchants, under the firm of Hirsch, Fulde, and Co., on the other, was as follows:

For the part taken by the undersigned, H. F. Walker, in the business of tea and general merchants, now carried on at 118, Fenchurch-street, Messrs. Hirsch, Fulde, and Co. agree to pay him a fixed salary of 180l. per annum, payable monthly. In addition, H. F. Walker is to receive one-eighth share of the net profits of the said business, and to bear one-eighth share of the losses thereof, as shown by the books when balanced.

H. F. Walker agrees to leave with the business 1500l., which is not to be withdrawn by him during the continuance of this agreement, and in the meantime interest thereon at 5 per cent. per annum, payable quarterly, is to be paid to him. This agreement is to continue in force until the expiration of four months after notice in writing on either side, and at the expiration of such notice, the said sum of 1500l., with any arrear of interest thereon, of salary and profits, apportioned to that date, shall be paid to H. F. Walker, but Messrs. Hirsch, Fulde, and Co. shall be at liberty to repay the 1500l. to H. F. Walker, on giving one month's notice in writing. H. F. Walker also agrees that he will, during the continuance of this agreement, if desired by Hirsch and Co., leave in the business one quarter of his said share of profits, the money as left to be added to the 1500l., to bear interest, and to be repayable in the like manner.

The plaintiff had been acting as general clerk to the defendants prior to the agreement at a salary of 70l. per annum.

The 1500l. was advanced as agreed.

The name of the firm was unaltered, and the

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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plaintiff's name was not mentioned in any of the circulars or bills of the firm, nor was he introduced as a partner to the bankers or customers of the firm.

He never signed any bills of exchange for the firm, and when he signed letters or receipts for the firm, he signed in his own name "for Hirsch, Fulde, and Co."

On the 1st May 1884 the defendants, being dissatisfied with the plaintiff, gave him written notice to determine the agreement at the end of four months, and shortly afterwards they excluded him from the office.

On the 12th June 1884 the plaintiff brought this action against the defendants, asking that the partnership alleged by him to have been created by the agreement should be wound-up, and for an injunction restraining the defendants from excluding him from the partnership and from dealing with the assets, and for a receiver and manager.

On the 13th June Pearson, J., without deciding whether there was a partnership, declined to grant an injunction or appoint a receiver, but ordered the defendants to pay 1500l. into court.

From the refusal to grant an injunction or appoint a receiver the plaintiff appealed.

Higgins, Q.C. and Jason Smith for the appellant.—The agreement constituted a partnership between the plaintiff and the defendants. Participation in profits and losses is a conclusive test of a partnership, not only as against strangers but as between the contracting parties:

Lindley on Partnership, 4th edit. p. 18;

Pawsey v. Armstrong, 18 Ch. Div. 698.

A partner need not have any interest in the stock-in-trade. An arrangement that one partner shall not accept bills in the name of the firm is not unusual. Until the expiration of the four months the plaintiff is liable for the losses of the business; he is also entitled to have the repayment of his 1500l. secured.

Cookson, Q.C. and Northmore Lawrence for the defendants.—The plaintiff might be held a partner as regards third persons, but whether a partnership *inter se* is created depends on the intentions of the parties as evidenced by the agreement and their action:

Smith v. Watson, 2 B. & C. 401;

Syers v. Syers, 35 L. T. Rep. N. S. 101; 1 App. Cas. 174.

The plaintiff was the servant of the firm before the agreement, and the agreement shows that there was no intention to change his position. They also referred to

Pooley v. Driver, 36 L. T. Rep. N. S. 79; 5 Ch. Div. 458.

and distinguished Pawsey v. Armstrong.

Higgins replied.

BAGGALLAY, L.J.—I am of opinion that we can derive no assistance in this case from the definitions, or attempted definitions, of the word "partners," or the word "partnership," in the various text-books, and, although we may gather general principles from reported cases having reference to partners and partnerships, I do not see that, so far as regards this particular case, we can gain any assistance from those authorities. The question here is, what was the interest conferred upon the plaintiff Walker by the agree-

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ment which was entered into between him and Messrs. Hirsch, Fulde, and Co., on the 22nd June 1883? Now, although this agreement has been read several times, I must, to make my meaning clear, refer to it in its several paragraphs. In the first place, I may note that the document is signed not by A., B., and C., three persons, which is the usual form when A., B., and C. enter into a partnership, but it is signed by H. F. Walker, and, in the name of the partnership, by Hirsch, Fulde, and Co., which was composed of C. Hirsch and E. F. Bernhard. It is a contract between an existing firm on the one hand and an individual on the other. Then the agreement begins with these words: "For the part taken by the undersigned H. F. Walker in the business of tea and general merchants." Mr. Northmore Lawrence suggested that meant that Walker was to continue doing what he had done before in connection with the business—he was to continue to be an *employé* of the business—and that in consideration of the services so rendered by him—and that is the way I read it—he was to receive from Hirsch, Fulde, and Co., from the firm, a "fixed salary of 180*l.* per annum, payable monthly." That is an ordinary agreement between a firm and their servant that he is to receive a fixed salary payable in a particular manner. The agreement continues: "In addition H. F. Walker is to receive one-eighth share of the net profits of the said business, and to bear one-eighth share of the losses thereof, as shown by the books when balanced." That is to say, if the agreement stopped there, that in addition to the 180*l.* per annum Walker is to be credited with one-eighth of the profits of the business of Hirsch, Fulde, and Co., and is to be debited with one-eighth of the losses, if any, in respect of that business. I must confess that appears to me to be an addition to the salary which he is to receive. It is generally supposed that a business will yield a profit, and the share of those profits was supposed to be an addition to his salary. At the same time that was coupled with a condition that Walker was to bear one-eighth share of the losses. I can well understand that, in most cases where there is an agreement, with reference to a particular business, that the parties entering into it shall share the profits and bear the losses in certain proportions, and there is nothing to explain or get rid of those words, there certainly is *prima facie* evidence of an intention to carry on business in partnership. But in all cases the question must depend upon the general terms of the agreement. I can well understand an agreement merely containing this provision as to profits and losses being held to constitute a partnership; but here we have to take that provision in connection with the fact that it is in addition to the salary that Walker is to receive one-eighth of the profits and bear one-eighth of the losses. If that provision as to a share in profits and losses had been intended to create a partnership, one would have expected to find some provision with regard to the assets of the business including the goodwill. We should hardly expect (unless there were an express provision upon that point) that a partnership was intended to be created giving to the party who was entering into it for the first time a right to determine the partnership, and thereupon to share in the goodwill and other assets. But the case does not rest there. "Walker agrees to leave

with the said business 1500*l.*, which is not to be withdrawn by him during the continuance of this agreement." That is to say, in effect, "One of the considerations upon which we engage you at this salary, with this possible addition to your salary, is that you lend to the firm 1500*l.*" Then the agreement provides that, in the meantime, interest on the 1500*l.* at 5 per cent. per annum, payable quarterly, is to be paid to Walker. That is a very common provision in articles of partnership. Where one partner advances more than his proportion of the capital, he is allowed, in priority to other payments, out of the assets of the partnership, interest upon the sum so advanced. I read this simply as an agreement to lend to the company this sum of money, and I think that is borne out by what follows, "This agreement is to continue in force until the expiration of four months' notice in writing on either side." That appears to me to be inconsistent with the idea of a partnership between the three persons in the full and complete sense in which partnership has been alleged on the part of the plaintiff to have existed, namely, that he could have given four months' notice directly afterwards, without having contributed one penny to the capital, or in any way assisted in acquiring the goodwill, and that he was to have the power of winding-up the whole concern, and taking his share. That certainly appears to me to negative the idea that there was any intention to create a general partnership. Then the agreement provides that the whole arrangement is to be determined on four months' notice, at the expiration of which "the said sum of 1500*l.* with any arrear of interest thereon, of salary, and profits apportioned to that date, shall be paid to H. F. Walker." He is to have back the money which he has lent in consideration for his engagement, and is also to have any balance of salary, or of the profits by which his salary was to be augmented. But "Messrs. Hirsch, Fulde, and Co. shall be at liberty to repay the 1500*l.* to H. F. Walker on giving one month's notice in writing." The persons who are to repay are the two gentlemen, Hirsch and Bernhard, described by their partnership name of Hirsch, Fulde, and Co.; and Walker is the person who is to receive the money back again. It appears to me that this is inconsistent with the notion of any general partnership. Then there is a further provision which does not, I think, affect the construction. It appears to me that we have only to look at the agreement to see that no general partnership is created such as that for which the appellant contends. But no doubt there is created, in a sense, a kind of partnership—a kind of joint interest or adventure, namely, that during the time that Walker is in the service of the defendants as clerk, or manager, or whatever else it may be, he is to have a certain fixed proportion of the profits and losses. Then it is suggested that, to a certain extent, there was an arrangement by virtue of which Walker was to have a share, and in that sense, and in that sense only, is there a partnership of a very limited or qualified character as between the plaintiff and the defendants. That is, however, a very different thing indeed from a general partnership between the three persons. Then what right does that limited interest give to the plaintiff? I at one time thought that, if the defendants were improperly dealing with the assets—if they were



improperly preventing Walker from examining into and watching over and guarding against any improper application of the assets, and if I could trace in the agreement anything like a provision that the conduct of the business was to be in any way under his control, the fact of Walker being entitled to that control was an incident to be taken into consideration in dealing with the question whether he should be excluded or not. That did press upon me at one time, and for that reason I was desirous of hearing Mr. Cookson's argument upon that part of the case. But I am satisfied now that we have got all the material and substantial facts before us, and that there was no such understanding. Nor can I find any trace whatever of any such arrangement with him while he is employed in the service of the company as to justify his application to the court to restrain the defendants from doing what *prima facie* they have a right to do, to exclude one of their servants from taking an active part in the management of their business. There was a suggestion that possibly this 1500*l.* might be in danger, but all difficulty of that kind seems to have been removed, because that sum has been brought into court, and is therefore safe. Under these circumstances, it appears to me that the plaintiff has not made out such a case as justifies the only injunction to which I thought it possible he might be entitled, namely, an injunction to restrain the defendants from excluding the plaintiff from the place of business.

COTTON, L.J.—This is an application by way of appeal from a decision of Pearson, J. refusing a motion for a receiver and an injunction. Now the two questions as to receivership and injunction stand on somewhat different grounds. I understand that the plaintiff asks for a receiver to receive and take into his control the assets of the partnership for the purpose of asserting the rights of the plaintiff at the expiration of four months to a share of those assets, including the goodwill. As regards the injunction, he claims to have the defendants restrained from excluding him from taking a share in the management of the business of Hirsch, Fulde, and Co. It was contended on behalf of the plaintiff that the agreement constituted a partnership between the plaintiff and the defendants. Now in this case, as in many other cases, a great deal of argument arises as to what is meant by a word which includes various things. The contention here is that there is a partnership as between the parties to the agreement. Of course the question whether there is, as between the alleged partners *inter se*, depends on very different circumstances from those which have to be considered when the question in dispute is whether there is a partnership as regards third persons. In the latter case the question almost always is whether a man is liable on a contract, not entered into by himself, nor under any express authority given by him at the time in respect of that particular contract, but on a contract alleged by the plaintiff to have been entered into under an implied authority given by the alleged partner to someone else to transact all matters of business relating to the partnership and to bind the alleged partner by any contract entered into with reference to the partnership. It is really a question whether what the defendant in fact has done has made the person who actually entered into the contract

his agent for the purpose of entering into that particular contract. Very different considerations arise when one comes to the question which exists here, whether the parties are partners as between themselves. Now I have used the word "partners," but really the whole question which we have to consider in ascertaining whether there is a partnership as between the parties themselves, and not as between strangers and one or all of the alleged partners, is really this: What rights has the contract entered into given to one of the parties against the other? In other words, what, on the contract between the parties, are the rights which that contract has, *inter se*, given one of them as against the other? With regard to the application in this case for a receiver, it is said that the plaintiff is a partner. If the plaintiff is a partner, he has the right, on the dissolution of the partnership, to have a sale of the assets, including the goodwill; and to have a share of the assets and of all the profits which arise, not only from the ordinary carrying on of the business—not only of what, on the division between the parties according to their arrangement, they consider to be realised profits, but of whatever may arise when the assets are sold from the fact of the price realised by the sale exceeding the price at which the assets stood in the partnership books. Therefore, the plaintiff's contention is that he has a right to have a share and interest in those assets of the partnership, including the goodwill and also to have a share of the profits ascertained by the sale of such assets, as well as the profit arising from the annual carrying on of the business. Now, in my opinion, it is clear, on the face of this agreement, that that was not the intention of the parties. In the first place I am struck with this, that the agreement entered into is not an agreement between the plaintiff and the two defendants, but an agreement between the plaintiff on the one hand, and the firm of Hirsch, Fulde, and Co., of which it is admitted that Walker was not then a partner, on the other hand. Therefore it was an agreement entered into by the firm with Walker as an individual. The agreement does not say that from a certain time he shall be considered as becoming a member of the firm of Hirsch, Fulde, and Co.; but that Hirsch, Fulde, and Co., in consideration of services rendered by him, shall pay him a salary of 180*l.* per annum, payable monthly. That, to my mind, merely amounts to this, that the firm agree to employ a person who will not be a member of the firm, and to pay him a salary of 180*l.* per annum. Then, not in alteration of that arrangement, but in addition to his salary, he is to receive one-eighth share of the net profits of the business, and to bear one-eighth of the losses thereof as shown by the books when balanced. To my mind that shows clearly that he is not to have any such right as he now insists upon. The profit he is to have, or the share of the loss, if any, which he is to bear, is that which is shown when the books are balanced. The foundation of the application for a receiver is, that the plaintiff has such rights as an ordinary partner would have on a dissolution, unless excluded by express contract, to share in the profits arising from the business which was carried on, and to share in those very assets. He is, however, excluded by the agreement saying that his share of "profits and losses are to be such as are shown by the books when



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balanced." In my opinion, that disposes of the case so far as the application for a receiver is concerned. Certain authorities have, however, been referred to, the first of which is *Pooley v. Driver*. *Pooley v. Driver* was an action brought by a third party, who insisted that a contract was binding upon the defendant, who was not a party to it unless it could be shown that he had authorised the person who actually entered into it, and given him an implied authority, by being his partner, to enter into contracts relating to the partnership business. That is entirely outside the case. Another case relied upon was *Pawsey v. Armstrong*. Now, undoubtedly, if that case were binding on this court, it would go far to support the plaintiff's contention, because there, as I understand, Kay, J. laid down this proposition, that if there is an agreement to share profits and losses, whatever the intention of the parties, as expressed in the agreement, may be, that of necessity imposes upon them the position of partners with the consequential right of each member of the partnership to have, on the dissolution, a share in the assets; and of the profits arising upon the sale of those assets. Well, in my opinion, that is not correct as between the parties themselves. Whether they can be said to be partners in the sense of sharing profits or anything else, in order to ascertain the rights which they have as between themselves you must look simply and solely to the fair construction of the contract. But Kay, J. laid down this rule, that if they do share profits and losses, whether they intend to be partners or not, they are partners, and, as I understand it, even if they express by their contract that they do not intend to be partners. I dissent from that, and I express my dissent, lest it should hereafter be said that the court, when that case was quoted and much relied upon, did not express any dissent, and the approval of this court should be assumed. That was attempted in a recent case, and therefore I think it right to give my opinion upon this case. Now, Kay, J. said that if two parties went before the registrar and were married, and then said to one another, "We will not be husband and wife," they would nevertheless be married. Apparently he had not looked at the statutory provision (6 & 7 Will. 4, c. 85, s. 20), which requires that there shall be a solemn declaration in which each of the parties to the marriage says, "I call upon these persons here present to witness that I, A. B., take thee, C. D., to be my lawful wedded wife [or husband]," as the case may be. If in making that declaration they or either of them had superadded, "But we do not intend to be husband and wife," then there would not have been the legal ceremony of marriage provided for by the Marriage Act. But if they had said that to one another secretly, either before or after the ceremony, the law is, that by going through that ceremony before the registrar they are nevertheless husband and wife. That case is, of course, entirely different from this, where the question arises upon what the parties have said in the contract which they have entered into, there being no statute defining what form is to be requisite to constitute partnership. I must therefore decline to follow the reasoning of *Pawsey v. Armstrong*, whatever may have been the evidence as to the agreement in that case between the parties. The application for an injunction is a different matter. The

question with regard to that is, not what rights the plaintiff had in the property, but whether he had any right at all to interfere in the control and management of the business. If he is a mere servant, although having an interest in the profits and losses in addition to a stated salary, I know of no case which would justify the court in forcing upon persons, whether carrying on business, or merely leading ordinary lives and residing in their own houses, servants whom they dislike, and who they think will not assist them in a manner satisfactory to themselves in the conduct of their business, or in the management of their houses. But is there anything on this contract which gives the plaintiff any right to interfere in the management of the business? In my opinion, there is not. This is not a partnership with all the consequences flowing from that position without any restriction. It is, in my opinion, a mere arrangement by the firm with an outsider, on certain terms as regards his salary. If the defendants were, while the plaintiff's money was in the business, about to engage in some entirely different business, and run a risk with the plaintiff's money, it might be that the court would interfere to restrain them from misapplying the assets; that is to say, from applying the assets in a business not contemplated by the parties, and which, according to the contract, they did not propose to carry on. But that is an entirely different thing from forcing them to receive the plaintiff, and to allow him to take part in the management and control of the business of Hirsch, Fulde, and Co., which, if he were a partner, with all the rights incident to that position, he would undoubtedly have. But if the plaintiff is a servant, he cannot do that unless there is some special contract, giving him that right. If he is a servant, I do not say that the court would interfere, even if such a contract existed. That case may arise at some future day, and it is quite sufficient for me to say now that, in my opinion, these parties did not contract that the plaintiff was to have any right to interfere in the management and control of the business. The plaintiff took his chance that these gentlemen would make as large profits as they could and not incur any losses which they could avoid; and therefore, in my opinion, there is no ground for asking the court to interfere in the mode proposed, by injunction, to prevent the defendants from excluding the plaintiff, who has no right by contract, from the place of business, and from the management of the concern.

LINDLEY, L.J.—This case is interesting and not altogether free from difficulty, but it is not to be decided by a short cut, as was suggested by the appellant. It is not to be decided for or against the appellant merely by saying that, because there is in this document a clause which gives him a right to share in the profits and losses, therefore the plaintiff is a partner except so far as the contract has expressly excluded him from the rights of a partner. That is a method of dealing with the case which appears to me to be entirely erroneous. The question is, What is the true construction of this document, and what are the rights of the parties arising from it? Now the document is not a mere contract of loan, or a mere contract of service; nor is it a mere contract of partnership. It partakes of the elements, or of some of the elements, of all those contracts. The plaintiff

has lent money; he is in some respects a servant; he is to the extent of sharing in profits and losses in the position of a partner, but not of a partner with those rights which are supposed to flow from that position. His rights to share in the profits and losses are very peculiar. The agreement is not that the parties shall share profits and losses, but that the plaintiff is to be paid a salary, and, in addition to that, one-eighth of the net profits, and to bear one-eighth of the losses thereof, as shown by the books when balanced. The plaintiff says that he is entitled to a receiver of the profits of this business, and to an injunction to restrain the defendants from excluding him from the management of it or from taking his share in such management. Now it appears to me that he is entitled to neither one nor the other. The 1500*l.* which he leaves in the business, and which is a loan, though not a mere loan, is safe in court. He therefore does not need a receiver on that account. Then the bargain is, not that the partnership is to be dissolved when a moment's notice is given, but four months after notice in writing to determine the so-called agreement or partnership—I would rather not use the word partnership, but agreement. The agreement, such as it is, has terminated, and no such case is made out by the appellant as would justify us in appointing a receiver at all. That part of the case seemed so clear that we stopped the respondents' counsel upon it. Now it did appear to me at one time that there might be a right on the part of the plaintiff to an injunction restraining the defendants from excluding him from taking part in the management of the business, but we must look into that matter a little more and see what kind of management he is entitled to take. Now it is quite obvious, when we look at this agreement and know what the plaintiff has done, that he is not entitled to control the defendants at all in the management of the business. They are the managing partners; he has nothing to do with it except so far as his services as servant or clerk are concerned. Passing by for the moment his interest in the profits and losses, as far as management is concerned, so far as services are concerned he is in the position of a servant, and not in the position of a partner having an equal voice or control in the management of the concern. We are asked to restrain the defendants from excluding the plaintiff from performing the duties of a servant. Well, I do not think he is entitled to that, and it follows therefore that this appeal must be dismissed, and of course with costs. As regards the case of *Parvosey v. Armstrong*, I have not examined it with care, and I do not wish therefore to say anything about it. It will be time enough to consider that case when it is more pressing than it is now.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Lowley and Morley*.

Solicitors for the respondents, *W. A. Crump and Son*.

*Feb. 28 and July 30.*

(Before BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ., assisted by TRINITY MASTERS.)

THE CITY OF CHESTER. (a)

ON APPEAL FROM BUTT, J.

*Salvage—Damage to salving ship—Demurrage—Evidence—Separate award for injuries sustained—Registrar and merchants.*

*In a salvage action evidence of the specific injuries sustained by the salving ship and the cost of repairs thereof, and of demurrage during repairs, was tendered in the Court of Admiralty, and rejected.*

*Held, in the Court of Appeal (Baggallay and Lindley, L.JJ.), that the judge is bound to receive such evidence, and to include the loss shown in his award, except in cases where such evidence is immaterial by reason of the property saved being too small in value to satisfy such loss, or by reason of the services being so trifling as to render it unjust that the loss sustained by the salvors should be borne by the owners of the salvaged property, or where from other circumstances it is obvious that the court cannot give an amount sufficient to cover the loss; but, per Brett, M.R., that the admission of such evidence is entirely in the discretion of the judge, subject to his award being reviewed by the Court of Appeal in the event of its being shown that the rejection of the evidence improperly affected the amount of the award.*

This was an appeal by the plaintiffs in a salvage action from a judgment of Butt, J. delivered on the 1st May 1883, by which he awarded 4500*l.*, to the owners of the *Missouri*, the salving vessel, 500*l.* to the master, and 1500*l.* to the crew, making in all a total of 6500*l.*

The facts of the salvage service were as follows:—

The steamship *City of Chester*, belonging to the Inman line, and of 2713 tons nett, while on a voyage from New York, with 111 passengers on board, was sighted in the Atlantic Ocean, flying signals of distress, on the 10th March 1883, by those on board the steamship *Missouri*. The *Missouri* was a steamship of 5146 tons gross, bound from Boston to Liverpool, with a general cargo and five passengers. On the *Missouri* coming up with the *City of Chester* it appeared that her crank shaft had broken down four days previously, and that she was in need of assistance. The *Missouri* thereupon took the *City of Chester* in tow, and on the 12th March towed her into Halifax harbour, a distance of 229 miles. During the towage there was a heavy sea running, and the *Missouri's* bitts were carried away, her crank shaft was injured, and she was considerably strained. At the time the *City of Chester* was taken in tow, she was in the track of steamers, and had signalled to several for assistance, one of which, the *Suevia*, had towed her for twenty-four miles, on the 6th and 7th March, and had then left her on the ground that her coals were running short.

On the 14th March the *Missouri* left Halifax, and arrived at Liverpool on the 27th.

The value of the *Missouri* was 83,000*l.*; of her cargo and freight, 104,047*l.*; of the *City of*

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*Chester*, 90,000*l.*; and of her cargo and freight, 89,535*l.*

The plaintiffs in their statement of claim claimed such an amount of salvage as to the court should seem just, and if necessary a reference to the registrar, assisted by merchants, to determine the amount of damage sustained by the *Missouri* while rendering the service, it having been therein previously alleged that the *Missouri* had sustained damage, and that in consequence thereof she had to be repaired at Liverpool.

The allegations in the statement of claim with reference to the damage sustained by the *Missouri* were as follows:

She had a list of several degrees during the voyage. Her hull and engines were considerably strained and her hawsers damaged. She also sustained damage when the starboard bitts were torn away, and to her jigger mast. The *Missouri* arrived in Liverpool on the 27th March 1884. She was then docked and surveyed, and it was found as the fact was that the straining to her hull and engines during the towage had been so great that it was necessary to put her into graving dock, to take out her after crank shaft, and to give her a thorough overhaul and repair. The repairs are now in progress, and according to the best estimation that can be made will cost from 2000*l.* to 2500*l.*, and will detain the vessel, whose ordinary demurrage rate is 12*l.* 13*s.* per day, thirty days, and the total cost for damage and demurrage will be from 5900*l.* to 6400*l.*

A number of passengers were engaged to proceed by the *Missouri* on her next voyage to Boston, but in consequence of the detention of the *Missouri* it became necessary to engage passages for them in other vessels at an expense to the owners of the *Missouri* of 107*l.* 5*s.* 3*d.*

The action came on for hearing before Butt, J., assisted by Trinity Masters, on the 30th April 1883.

During the course of the plaintiffs' case evidence was given of the fact that the *Missouri* had been generally strained, that her crank shaft had been injured and that her engines had been loosened. Evidence was then tendered by them of the specific particulars of the injuries sustained by the *Missouri*, and of the fact that the cost of the repairs rendered necessary by the salvage services amounted to between 2000*l.* and 2500*l.*, and that in consequence of such repairs the *Missouri* was detained thirty days, which, taking the demurrage rate to be 12*l.* 13*s.* a day, occasioned a loss of about 3900*l.*, making a total actual loss of over 6000*l.*

The learned judge refused to receive this evidence, or to direct a reference to the registrar and merchants to ascertain the amount of loss sustained both by reason of the injuries done to the *Missouri* and by reason of her detention for repairs. The reasons for his decision appear in the judgment of Baggallay, L.J. In the conclusion, the learned judge awarded the sum of 6500*l.*, of which he apportioned 4500*l.* to the owners of the *Missouri* and the remainder to her master and crew, without making any specific apportionment in respect of the injuries sustained by the salving ship.

From this decision the plaintiffs now appealed.

*Russell*, Q.C. and Dr. *Phillimore* for the appellants, the plaintiffs.—The award of the court below should be varied for two reasons: because the sum awarded is inadequate, and because the learned judge improperly refused to admit evidence to prove the damage sustained by the salvors' ship while rendering the services and the consequential loss by demurrage. Salvage should

be a full and adequate reward for services voluntarily rendered and successfully performed. How can that be given unless the court will allow itself to be informed what the services actually cost the salvors? If a sum is given insufficient to recoup the salvors for the expenses sustained by them in rendering the services, as is the case here, there is no salvage reward at all. The salvors should be put in the same position as they were before the services, and should receive a reward in addition. If the present award is allowed to stand, the salvors are actually out of pocket. A reward necessarily means something over and above the outlay expended. To hold otherwise would cause shipowners to instruct their captains not to save. This question has already been decided in favour of the appellants' contention by the Privy Council, and by Sir James Hannen in the Admiralty Division:

*The De Bay*, 5 Asp. Mar. Law Cas. 156; 49 L. T. Rep. N. S. 414; L. Rep. 8 App. Cas. 559;  
*The Sunnyside*, 5 Asp. Mar. Law Cas. 140; 49 L. T. Rep. N. S. 401; 8 P. Div. 137.

It has been the practice of the Admiralty Court since 1829 to refer the assessment of the actual damage sustained by the salvors to the registrar, and to add the amount so found to the award:

*The Oscar*, 2 Hagg. 257;  
*The Salacia*, 2 Hagg. 262;  
*The Jane*, 2 Hagg. 344;  
*The Saratoga*, Lush. 318;  
*The Albert*, 33 L. J. 191, Ad.;  
*The Mudhopper*, No. 4, 4 Asp. Mar. Law Cas. 103;  
*The Silesia*, 4 Asp. Mar. Law Cas. 338; 43 L. T. Rep. N. S. 319; 5 P. Div. 177;  
*The Crown*, Pritchard's Admiralty Digest, vol. 2, p. 842;  
*The Demetrius*, Ib. p. 847;  
*The Bentinck*, Ib. 858;  
*The Leda*, Ib. 863;  
*The Gladiator*, Ib. p. 827.

The present Rules of the Supreme Court 1863 require particulars of damage to be set out in the statement of claim. Evidence of them therefore must be admissible.

*Webster*, Q.C. and *Myburgh*, Q.C. (with them *Bucknill*) for the respondents.—Salvage operations are undertaken for better or for worse. To compensate salvors for the risk of being unsuccessful and perhaps sustaining damage to their own ship, the court gives very large awards where the salvage is successful. In view of these large awards, the salvor takes the chance of injuring his own property. Cases certainly exist where small current expenses such as the cost of broken hawsers, coal, &c., have been referred to the registrar and merchants. But they are direct injuries arising from the services during the towage. [Brett, M.R.—What do you say if an injury to the shaft is discovered during the towage?] Evidence might be given of the injury, but not of the cost of repairs. The case of *The Martha* (3 Hagg. 434) is opposed to the contention that the damages sustained should be first paid for, and then a reward added to that. The salvors are not insurers, and there is no case which lays down this principle of indemnity contended for. As to the authority of *The De Bar* (*ubi sup.*) it is not binding upon this court, and it is submitted that the principle of that decision is incorrect. The following authorities support the respondents' contention:

*The Enchantress*, Lush. 93; *see also* *Google*

*The Ellora*, Lush. 550;

*The Star of India*, 3 Asp. Mar. Law Cas. 261; 35 L. T. Rep. N. S. 407; 1 P. Div. 466.

Dr. Phillimore in reply.

*Cur. adv. vult.*

July 30.—BRETT, M.R.—At the hearing of this case before Butt, J. the salvors, after giving general evidence that the *Missouri* was strained and her crank shaft injured, claimed, as of right, to give in evidence, either before the judge or the registrar and merchants, before the decree, the specific particulars of the injuries to the ship and machinery, and the specific particulars of the items of the cost of repairing such injuries, and of the estimated time necessary for repairing the same and of the consequent loss to the owners in the nature of demurrage. Butt, J. declined to admit evidence of such particulars either before himself or before the registrar and merchants as required. He further declined, though required to do so, to award any specific sum in respect of the injuries to the salvors' ship, or to her machinery, but awarded generally to the owners of the *Missouri*, as distinct from the more direct salvors, the sum of 4500*l.* The owners of the *Missouri* appealed, insisting upon their right, *ex debito justitiæ*, to give, either before the court or the registrar and merchants before the decree, the evidence which they proffered at the trial; they insisted that there had been a mis-trial on the ground of improper rejection of evidence; they insisted that the judge is bound, on being so required, in every salvage case to admit such evidence, or at all events that he was bound to receive such evidence in the present case. Upon an appeal brought on such grounds the question is not whether the judge ought or ought not in estimating salvage award to take into account and therefore to receive, evidence of the fact that in and by rendering the salvage service the property of the salvors has been injured, but whether in such a case as the present the judge is bound before making his decree to hear evidence, either personally or through the registrar and merchants, of all the specific particulars of such injury, and of all the specific particulars of the loss to the salvors occasioned thereby. It was argued that the judge is bound to receive such evidence in every case, and therefore, of course, in this, or if not in every case, he was in the present case, because the value of the property saved was amply sufficient to allow an amount of reward which would cover the losses suffered by the salvors in rendering the salvage service. In such case it was said the judge is bound to grant an amount of reward which would cover such losses, and therefore bound to ascertain exactly what those losses are. Or it was said he was bound to ascertain such losses in order to consider judicially whether he would or would not grant an amount of reward sufficient to cover them. As to all these contentions the answer depends upon a preliminary question, namely, whether in every case, or in the particular case suggested, the judge is bound to award a sum sufficient to indemnify the salvor. For if he is not, and if from other circumstances in the case he is rightly of opinion that he ought not, the proposition that he must hear the evidence, which upon the hypothesis has become clearly immaterial, is absurd. And an absurd proposition is not a principle of law. Now, as to

the first, that is to say, the absolute proposition, it is clearly not true. Suppose the loss to the salvors by reason of injury to their property, the result of using it in the salvage service, is equal to or greater than the value of the property saved, the award obviously cannot cover such loss, otherwise the supposed salvage would be a saving of nothing. Then the particulars of such loss are immaterial. Suppose it is at the commencement of, or becomes apparent in the course of the hearing, that the loss of the salvors is greater than half the value of the property saved, it is immediately obvious that the amount to be awarded cannot cover the loss of the salvors, because even in the case of derelicts the Court of Admiralty has hardly ever, under any circumstances, and in no known case of non-derelict has ever awarded, as for salvage reward, more than half of the value of the property saved. In such case again, therefore, the suggested evidence is obviously immaterial. It is immaterial even for the purpose of obliging the judge to consider whether he will or will not grant an amount of reward sufficient to cover the loss, because by the hypothesis circumstances have made it clear that he cannot. Then let us consider the more limited proposition. Suppose the danger to the thing saved to have been small, though sufficient to raise a salvage claim, is it true to say that in such a case, if by accident, without fault or negligence, the property of the salvor is greatly injured, the whole consequence of such accident is, according to the large equity of Admiralty law, to fall upon him whose property is saved? Is the mere fact that the property saved is sufficient in value to allow the claim for injury to the salvor to be met, conclusive to oblige the judge, without regard to the other circumstances of the case, to allow the claim? To say that it is would be contrary to the whole principle of salvage reward, and the whole long-continued course of its administration. The danger of an injury to his property so large as to make it wrong on the equities of the case to place the whole consequences of such injury on the owner of the property saved, is one of the risks, and by no means the only risk, which is run by all salvors. The judge is bound to consider, not only the circumstances of loss having been incurred by the salvor, but, in conjunction with it, all the other circumstances which enter into the problem of what in the particular case is a reasonable, and between the parties an equitable, amount of salvage reward. There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of salvage reward. All these circumstances have been repeatedly enunciated by Lord Stowell, Dr. Lushington, and others. It is useless to repeat them. It follows that there is no jurisdiction known the administration of which is more within the discretion of the judge who has to administer it. The moment the judge is of opinion, and is not unjustified in being of opinion, that he cannot give, as a part of the amount to be awarded, the specific loss incurred by the salvor, it becomes impossible to say that he is bound at whatever expense to the suitors, or at waste of his own

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time, to listen to evidence of the particulars of such loss. It follows that in no case can it be predicated that the judge is bound, from the mere fact that it is proffered to him, to admit and entertain and consider such evidence. It may be that in some particular case it can be shown that for want of the knowledge to be obtained from such evidence the judge has not justly determined the amount of salvage which he has awarded. But in such a case an appeal succeeds, not on the ground of the rejection of the evidence, but on the ground of the inadequacy of the amount awarded. The Court of Appeal cannot come to the conclusion that the evidence has been improperly rejected until, from the other circumstances of the case, it has concluded that the only reasonable exercise of discretion was to allow the exact amount of the salvor's loss, or that the discretion cannot, even on the appeal, be fairly exercised without the knowledge of the exact amount. It cannot come to this conclusion until it is clearly of opinion that the amount awarded is in the particular case unreasonably too small, or that it cannot tell whether it was or was not unreasonably small. In truth, a clear conclusion that the amount awarded is unreasonably too small or too large, or that there was not means of determining whether it was unreasonably too large or too small, is the only ground on which an appeal in the case of a salvage award can be successful. The contention, therefore, of the salvors in this case, that the judge was bound *ex debito justitiæ* to receive at the time and in the manner proffered the evidence proffered to him on the mere ground that it was proffered, fails. In no case has it ever been held that the judge is bound to receive such evidence. It must have been offered and rejected many times. It does not appear to have been received in more than a few cases in the books. The absence of any decision to show that it must be received is fatal to the appellants' contention. I have inquired from the most experienced officers of the Court of Admiralty, and find that no one of them has ever known or heard of any case in which, in a salvage action, such an inquiry was ever referred to the registrar and merchants before the decree, or otherwise than as a means of working out a decree which has already adjudged that a part of the salvage reward shall be the actual cost of the repairs and their consequences. The cases of *The Sunnyside* (*ubi sup.*) and *The De Bay* (*ubi sup.*) are not in point. In both cases the evidence was received. In *The Sunnyside* (*ubi sup.*) counsel for a salvor asked questions as to the loss of profits occasioned to the trawler by engaging in the services, and also as to the cost of repairing damages occasioned to the vessel by rendering the services in question. This was objected to as inadmissible, but it was admitted. In his judgment Sir James Hannen says: "I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me it was admissible as an element to be considered in awarding the remuneration to be paid to a vessel which had rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages, and then to be added to the amount

awarded for the actual salvage service. As a rule it appears to me that the amount for loss of trade, and so on, cannot be taken as an actual figure in calculating what the salvage reward is to be. The same remarks apply, though not with the same force, to the question of damage done, but there is a reason in this case why a distinction should be drawn, and I propose to do it for the purpose of this case only." In *The De Bay* (*ubi sup.*) it was contended that some of the items ought not to be taken into consideration at all, as for instance, the loss on charter, and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed "as moneys numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration." Their Lordships, it is stated at page 563 of 8 App. Cas., "are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services;" and later they add: "If there is a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically." This is only a decision that the judge may receive the evidence and may award specific sums. It is no decision that he must do either. That the judge might in this case, and that a judge may in any case, receive such evidence is a proposition which is incontestable. Whether, having received such evidence, the judge has rightly acted upon it is a matter of appeal. But that is an appeal as to the amount awarded. That he may act upon it by directing, as a part of his award, that the specific ascertained amount of the loss be paid to or be realised by the salvor is undoubted, if the other circumstances do not render it unjust that such amounts should be paid or realised. Such a specific direction has been given in many cases. It may, however, not be unworthy of observation that in all such cases the value of the property of the salvors has been small. But it follows from the considerations brought forward in this judgment that the judge is never bound to decree in terms, as a part of his award, that such specific ascertained amount shall be paid or realised. The judge is always entitled to award a general sum. It follows that he is not bound to receive evidence of a specific ascertained amount. It remains to be considered whether, in the present case, we are of opinion that the judge could not make a reasonably just award without hearing and considering the proffered evidence. I cannot so adjudge. But after consulting the learned judge of the Admiralty Court, and considering the large value of the property saved, and the undoubted fact that a large injury was suffered by the appellants, I have, with the assent and concurrence of the learned judge of the Admiralty Court, undertaken to reconsider his decree. In the result, we have come to the conclusion to vary his decree as follows: We decree to the owners of the *Missouri* 1000*l.* and the cost of the repairs rendered necessary by the straining and other injuries to the *Missouri* caused by the salvage

services, and the real cost, if any, to the owners of the *Missouri* of any crew kept and paid by them for the service of the ship while she was under repair. Such costs must be ascertained by the registrar and merchants. We leave it to the appellants either to accept that decree or to keep the one which they already have. If they accept our proposed decree they take it subject to this risk, that the costs of this appeal will follow the result of the inquiry before the registrar and merchants. If, however, they should prefer to allow Butt, J.'s award to stand, they may keep it, each side paying their own costs of the appeal.

BAGGALLAY, L.J.—This is a salvage action, and the question involved in the appeal is by what rules, if any, a judge should be guided in such an action in receiving or rejecting evidence, tendered on behalf of the salvors, as to the amount of cost incurred by them in repairing injuries occasioned to their ship by rendering the salvage services, and of the loss arising from the detention of their ship whilst such repairs were being executed. On the part of the appellants, who are the plaintiffs in the action, it has been contended that they were entitled *ex debito justitiæ* either to have such evidence received and dealt with by the judge himself, or to have the matter referred to the registrar and merchants; whilst it has been urged, on behalf of the respondents, that it was at the absolute discretion of the judge to receive or reject such evidence, and that the exercise of such discretion could not, consistently with the recognised practice in salvage cases, be reviewed. In my opinion, each side in so contending put their case too high. As a second point, it was urged on behalf of the appellants, that, under the circumstances of the present case, certain evidence which was tendered and rejected by the learned judge ought to have been admitted. In order that I may make my views clear, as to the alternative contention of the appellants, I must refer, and I shall do so very concisely, to the circumstances under which this appeal has been brought. [The learned Judge then stated the facts as already set out, and continued:] It is not in dispute that at the time when the *Missouri* took the *City of Chester* in tow, and throughout the towage to Halifax, the weather was bad, that the towage was very heavy, and that after the salvage service it was found that the *Missouri* was strained, and her crank shaft fractured; in reference to the fracture, the learned judge, in the course of his judgment, after stating that it might be a very nice question whether the crank shaft was thoroughly sound before the towage services were rendered, expressed himself as follows: "Upon the whole, I think there is very strong reason to believe that the vessel strained considerably during the towage service, and because she had the other very heavy vessel in tow in a heavy sea way;" and again, "I do not think one can shut one's eyes to the fact that there was a very heavy strain brought upon the vessel, and if it is not proved to demonstration that the injuries were done in consequence of the strain, there is very strong reason to believe that they well might have been." It will be noted that the amount of the loss alleged by the plaintiffs to have been sustained by the owners of the *Missouri* considerably exceeds the amount awarded to them, and that, according to the view taken and acted upon by Butt, J., the

*Missouri* may have rendered the salvage services, not only without any remuneration to her owners, but at a very heavy loss to them; it may be that her owners may have formed an exaggerated estimate of the amount of loss which they have sustained, but they have been deprived of the opportunity of showing that the loss sustained by them is as great as they allege. Now, one cannot help feeling that such a result, in this and other cases, would have a strong tendency to discourage the rendering of salvage services, especially under circumstances similar to those which we are now considering; when from the very first it was evident that the towing of the *City of Chester* to Halifax must be one of a heavy character and involving considerable risk to the salving ship. These views were thoroughly present to the mind of Butt, J., who, in the course of his judgment, alluded to the increasing indisposition to render assistance to vessels in distress, and to the necessity of making liberal awards when such services were rendered—an observation supported in its application to the present case by the fact that another steamer, the *Suevia*, had towed the *City of Chester* for twenty-four hours on the 6th and 7th March, and had then abandoned her on the alleged ground that her own coals were running short. I pass on to consider the reasons assigned by the learned judge for the rejection of the tendered evidence. The question was not dealt with in the course of his judgment, beyond a statement that he was not going to award any amount for the repairs of the crank shaft or for the repairs of the ship; but in the course of the trial, when the rejected evidence as to the detention of the ship for the purpose of her being repaired was tendered, he expressed himself as follows: "I do not think it has anything to do with the question save as evidence of the risk run. If you have so much damage done that it costs you 20,000*l.*, I could not have increased my award. It is all evidence of the risk you have run; you run that risk for better or worse. If you do it without injury at all, you earn so much more; if not you earn so much less." The counsel for the plaintiffs thereupon submitted that it was the duty of the court to see, if possible, that the salvors were not out of pocket; to which the learned judge replied: "I do not agree with that at all, I differ entirely with you there. I think that it may very well be that a vessel rendering salvage services would get such an injury that the owners would be out of pocket." And when, upon the rejection of the tendered evidence, the counsel for the plaintiffs pressed for a reference to the registrar and merchants, the judge observed: "Salvage remuneration is the sort of compensation, or sort of price to pay, for the services rendered, and one of the elements in arriving at that is the risk run by the salvors and their property. Now, in order to appreciate the risk to property, it is very often material to see what did happen, and if you show a collision between two vessels, or if you show straining and damage to the crank shaft of the salving vessel, all that is evidence of the risk, and all that may very properly be taken into account in the award; but what I hold is this, that, taking the risk upon yourself, and having a greater or less amount awarded you in consequence of that risk, you are not entitled, if the risk had gone against you, to say: Now then we claim not only



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our award, but we claim the whole price of repairing the injury done and the demurrage during the delay for such repairs. I do not think you are entitled to that, and if you are not I do not see how any of this is material, beyond the fact that your crank shaft was broken and the body of your engine was loosened, and matters of that sort." I have thought it right to set out at some length the grounds, as stated by himself, upon which Butt, J. declined to entertain the question of the amount of damage sustained by the *Missouri*, either by the reception of evidence adduced before himself, or by a reference to the registrar and merchants. I readily assent to the proposition announced by him, that, in determining the amount of salvage to be awarded in any particular case, one of the matters to be taken into consideration is the amount of risk run by the salving ship in rendering the salvage service, and that in estimating the amount of risk so run, evidence of any injury actually sustained by the salving ship is admissible; but I am unable to adopt the view, apparently held by him, that the amount of salvage award should in no respect depend upon the amount of loss occasioned to the owners of the salving ship by reason of the injury sustained by their ship in rendering the service. Butt, J. put a strong case, but it illustrated his views upon the subject, when he said, "If you have so much damage done that it will cost you 20,000*l.* I cannot increase the award;" and it was evidently present to his mind that the principle upon which he was acting in the present case would, as I have already pointed out, probably leave the owners of the *Missouri* not only unrewarded for their salvage services, but heavy losers through having rendered them. If I rightly appreciate the language used by the learned judge, he considered himself bound, by rules recognised by his predecessors in the Court of Admiralty, to reject the tendered evidence; but he nevertheless at the time when he rejected it expressed himself to the effect that the question involved was of great importance, and one which in his time had never been satisfactorily argued, and that though objections had been from time to time taken and rulings made, it had always been without argument. Though the admission of the rejected evidence or a reference to the registrar and merchants was strongly pressed by the counsel for the plaintiffs, and as strongly opposed on behalf of the defendants, it does not appear that there was any argument upon the question before Butt, J. It has, however, been very ably discussed before us. In the course of the arguments, numerous cases were cited by the counsel for the plaintiffs, in which the Court of Admiralty has decreed payment to the owners of salving ships for the losses sustained by them in consequence of injuries to their ships whilst rendering the salvage services. In some of such cases the court itself received evidence as to the amount of such losses, and in others it referred it to the registrar and merchants to ascertain and report to the court. Amongst others, our attention was directed to *The Oscar* (*ubi sup.*), *The Salacia* (*ubi sup.*), and *The Jane* (*ubi sup.*), all decided by Sir Christopher Robinson, *The Saratoga* (*ubi sup.*), and *The Mudhopper* (*ubi sup.*). I deem it unnecessary to refer to these cases in detail, as since the decision of Butt, J. on the 1st May 1883, in

the case now under consideration, two other judgments have been delivered: the one by Sir James Hannen on the 21st of the same month, in the case of *The Sunnyside* (*ubi sup.*); and the other by the same learned judge in the Privy Council on the 30th June following, in the case of *The De Bay* (*ubi sup.*), in which similar questions arose to those with which we now have to deal. The material facts in the case of *The Sunnyside* (*ubi sup.*) were as follows: On the 7th Nov. 1882 the steamer *Sunnyside* broke down, when she was about twelve miles east of Scarborough, bound for Shields. Salvage services were rendered by several vessels, and amongst others by a steam trawler named the *Monarch*. In the action, which was a salvage action, evidence was tendered by the counsel for the *Monarch* as to the cost of repairing damages occasioned to her whilst rendering the salvage services, and of the loss of profits whilst so engaged, and this evidence was received by Sir James Hannen, though urged by the counsel for the *Sunnyside* to reject it; and in the result Sir James Hannen awarded to the *Monarch* 200*l.* in respect of salvage pure and proper, and 100*l.* beyond that sum for loss of profits and repairs. As before mentioned, this award was made on the 21st May 1883, three weeks after the judgment of Butt, J. in the present case. In the course of his judgment Sir James Hannen, after describing the extent to which he considered that the several vessels had rendered services, and stating that in his opinion the *Monarch* was the vessel which performed the real salvage service, expressed himself as follows: "A question arose at the hearing yesterday as to the admissibility and effect of evidence of what a salving vessel might have earned if she had not been occupied in rendering the salvage service. I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me that it is admissible as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages, and then to be added to the amount awarded for the actual salvage service. I think the loss of earnings and the actual services must be considered under ordinary circumstances together. It is to be remembered that the reason why so high a rate of remuneration is given for salvage service is because of the sacrifices which the salving vessel makes, but to give as it were damages for the sacrifices made, and also a high rate of salvage remuneration, would be to give that remuneration twice over. As a rule, therefore, it appears to me that the amount for loss of trade, and so on, cannot be taken as an actual figure in calculating what the salvage reward is to be. The same remarks apply, though not with the same force, to the question of damage done. But there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only;" and he then proceeded to state why, in the case before him, he thought it right to assess the amount of salvage pure and simple apart from the amount which he awarded for cost of repairs and loss of profits. The decision in the case of *The Sunnyside* (*ubi sup.*) appears to me to affirm the following propositions:



1. In a salvage action evidence is admissible of the cost of repairing damage done to the salving vessel in consequence of rendering salvage service, and of the loss of earnings occasioned by any injury in such service. 2. Such cost and loss are elements for consideration in estimating the amount of the salvage reward. 3. Under ordinary circumstances the amounts of such costs and loss ought not to be taken as "fixed figures" or "moneys numbered" to be allowed in the nature of damage, added to the amount of the reward for actual salvage service, but should be taken into consideration in arriving at the amount to be so awarded. 4. Under special circumstances, of which the case of *The Sunnyside* was itself an illustration, the amounts, when ascertained, of cost incurred for repairs, and of loss of earnings, may properly be taken as "fixed figures," and added to the award for actual salvage service. With respect to the first of these propositions it is to be observed that it goes no further than to affirm that the evidence therein mentioned is admissible, but it must be borne in mind that the only question raised was whether it was admissible. I pass on to consider the case of *The De Bay* (*ubi sup.*), the material facts of which were as follows: In the month of Sept. 1881 the *Mary Louisa*, a steamship of 1287 registered tonnage, in ballast, and bound from Marseilles to a port in Sicily, fell in with the *De Bay*, a screw steamer of 1805 tons register, bound to Rangoon, with a general cargo: the *De Bay* was making signals of distress, having lost her propeller; the *Mary Louisa* towed the *De Bay* to Malta; the services, which lasted about sixty-two hours, were rendered under circumstances of great difficulty and some danger, and it was alleged by the owners of the *Mary Louisa* that their ship sustained considerable damage consequent on the services so rendered. A suit for salvage was brought by the *Mary Louisa* against the *De Bay* in the Vice-Admiralty Court of Malta, the value of the *De Bay*, her cargo and freight, being agreed at 67,000*l.*, and the judge awarded the sum of 3535*l.* for loss and damages, and 5000*l.* for salvage services, making together 8535*l.* From that judgment the owners of the *De Bay* appealed to the Privy Council, and in support of their appeal contended that, in no case, ought the items of loss or damage to the salving vessel to be allowed as "moneys numbered," but that they only should be taken into account generally, when estimating the amount to be awarded for salvage remuneration. They also contended that some of the items of loss or damage ought not to have been taken into consideration at all. The judgment delivered by Sir James Hannen contained passages in the following terms: "Their Lordships are of opinion that it is always justifiable, and sometimes important when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive, sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses and afford an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the

owner of that benefit which it is the object of the salvage service to secure him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvors should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and in addition to this the salvor should receive a compensation for his exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for if no more than a *restitutio in integrum* were awarded there would be no inducement to ship-owners to allow their vessels to engage in salvage services." And again, "their Lordships are therefore of opinion that the learned judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the *Mary Louisa*, and then adding to it an amount for salvage services." Their Lordships, however, having examined into the evidence, did not accept all the items of loss which had been taken into consideration by the judge of the Vice-Admiralty Court, and they further considered, for the reasons expressed in the judgment, that he had awarded too large a sum for salvage remuneration, and they accordingly held that an aggregate of 6000*l.* was sufficient. The case of *The De Bay* has, in my opinion, established the following proposition: that the cost of repairing injuries occasioned by rendering salvage service, and the loss of earnings arising from the detention of the ship whilst such repairs are being executed, ought to be ascertained with precision when possible. In some cases which will readily suggest themselves, the actual cost of repairs and loss of earnings may be immaterial, as for instance if they clearly exceed the recognised limits of salvage award. In such a case it would be a waste of time and money to enter into such evidence. In other cases it may be extremely difficult, if not impossible, to ascertain with exactness the amount of such cost and loss, and in such cases estimates must be adopted in making the general award. During the arguments in the Privy Council, in the case of *The De Bay*, it was urged, as it has been urged before us, that by allowing the cost of repairs and loss of earnings, and then a further sum for salvage, the salvors would receive payment of their losses twice over; but, as was pointed out in the judgment delivered by Sir James Hannen, such a result could only be brought about by the court, after giving the amount of the alleged losses specially, taking them again into consideration when awarding the remuneration, an error into which it could not be presumed that any judge would fall. The cases of *The Martha* (3 Hagg. 434), *The Enchantress* (Lush. 93), *The Elvora* (Lush. 550), and *The Star of India* (1 P. Div. 466; 3 Asp. Mar. Law Cas. 261), were cited on behalf of the respondents, but they do not appear to me to displace the authority of the older cases cited on behalf of the appellants, and which were referred to, approved, and acted upon in the cases of *The Sunnyside* and *The De Bay*. I fully recognise the very large discretion which is vested in the judge when dealing with salvage cases; but it is, in my opinion, a discretion, the exercise of which may be reviewed, and however unwilling a Court of Appeal may be to interfere with a decision at which the judge in the exercise of his discretion has arrived, it is its plain duty to do so when in its opinion the dis-

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cretion has been exercised in a manner which has failed to do complete justice between the litigant parties. The alterations which are occasionally made in the amount of salvage awards illustrate the general principle to which I am adverting, and a rejection of evidence which ought to have been received would appear to be a stronger case for its application. Under these circumstances I cannot assent to the argument of Mr. Webster that the principles enunciated in the judgment in the case of *The De Bay* are unsound; on the contrary, it appears to me not only that they are sound, having regard to past authority, but that they are consistent both with justice and policy, when we bear in mind the purposes for which the jurisdiction of our courts is exercised in salvage cases. For these reasons, and bearing in mind that the property salvaged in the present case was of sufficient value to supply a fund for the due reward of the salvors, I think that the learned judge by whom this action was tried ought either to have received the evidence which was rejected before making his award for the salvage service proper, or to have referred it to the registrar and merchants to estimate the additional allowance for costs of repairs and loss arising from detention.

LINDLEY, L.J.—This is an appeal by the owners of the steamship *Missouri* against a decision of Butt, J. awarding a sum of 6500*l.* for salvage services rendered by the *Missouri* to the steamship *City of Chester*. The value of the salvaged property was 179,000*l.*, and there were 111 passengers on board the *City of Chester*. The value of the salvaging property was 189,000*l.*, and the court apportioned the 6500*l.* awarded as follows: 4500*l.* to the owners of the *Missouri*, and 2000*l.* to the master and crew. The sum of 4500*l.* awarded to the owners of the salvaging ship is a very large sum, but, large as it is, her owners complain that it is not enough to cover the loss they have actually sustained by reason of the services their ship rendered to the *City of Chester*. They allege that the *Missouri* broke her crank shaft, and suffered further injury, and that the cost of repairs alone amounted to between 2000*l.* and 2500*l.* They further allege that it took thirty days to make good these repairs, and, taking the demurrage rate of the *Missouri* to be 128*l.* 13*s.* a day, they estimate their loss occasioned by her detention for repairs at 3900*l.*, making their whole actual loss from 5900*l.* to 6400*l.* By the statement of claim the plaintiffs demanded, if necessary, a reference to the registrar and merchants to ascertain the amount of damage suffered by the *Missouri* in rendering the salvage services. At the trial the plaintiffs tendered evidence in support of their above-mentioned claims, but the learned judge refused to receive it, and he refused to direct a reference to the registrar and merchants to ascertain the amount of loss actually sustained by reason of the injuries done to the *Missouri*, and of her detention for repair. The view taken by the learned judge is expressed at p. 45 of the record. The substantial question raised by the appeal is whether the learned judge ought to have received evidence of the above-mentioned losses, and whether he ought, considering the nature of the salvage services and the great value of the property saved, to have awarded to the owners of the salvaging ship such a sum as would at least cover their losses out of pocket.

I think he ought, and my reasons for so thinking are as follows: Salvage is the compensation made to those by whose assistance a ship or its cargo has been saved from impending peril or recovered from actual loss. The claim to compensation for salvage services is enforceable by action in the Court of Admiralty. The persons in whose favour the claim will be recognised, and the circumstances under which compensation to them will be awarded, have been the subject of judicial decision, and the leading principles applicable to these matters may be taken as settled. If the claimants come within the recognised class of salvors, and the circumstances under which compensation is habitually awarded are proved, their claim is allowed. In such cases the claim is made and allowed, not as a matter of favour which can be granted or refused at the arbitrary discretion of the court, but as a matter of right. The Mercantile Law Amendment Act 1854 (17 & 18 Vict. c. 104), s. 458, clearly recognises this right. It is true the Act in sect. 458 is confined to salvage in the United Kingdom, but by the law of this country the nature of the right does not depend upon whether the salvage services were rendered on the high seas or on British territorial waters. The lien which salvors have is only consistent with the existence of a right to be remunerated for their services, and this lien exists wherever the services may have been rendered. But although the salvors have a right to compensation for salvage services, the amount to which they are entitled is not fixed more definitely than by saying it ought to be reasonable. What is reasonable in any case must depend upon all the circumstances of that case, and different minds will naturally sometimes differ in their views of what is reasonable. But here again some circumstances are always material for consideration, and these have been ascertained by experience, and the court has for its guidance a long course of judicial decision to assist it in coming to a proper conclusion in each particular case. The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved. The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for however meritorious their services, salvors are never awarded such a sum as to make those services useless to those who have to pay for them. The value of the ship and cargo saved is therefore always one element, and a very important element, in considering the amount to be awarded to salvors. There is not, however, any definite rule either as to the proportion of value to be given to the salvors or as to the

proportion to be left for the owners of the property saved: see *The Salacia* (*ubi sup.*). And it is obvious that whilst a small percentage on a very large value might be proper in one case, the same percentage might be a very inadequate remuneration in another case. The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run. Another circumstance which has to be taken into consideration is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save. However strenuous those efforts, however heroic, still, if unsuccessful, they go unrewarded. They have not in the result benefited the owners of the ship or cargo, and there is nothing preserved out of which remuneration can be paid. Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessary to be liberal not only to captains and crews who perform the salvage services, but also to the owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril. The risk of loss or damage to her is often very great, and the damage actually done to her and the loss actually sustained by her owner from delay in her voyage and otherwise may be, and often is, very considerable. Hence one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk, and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favourable attention: see per Dr. Lushington in *The Spirit of the Age* (Swa. 286). Unless, where the salving vessel is a valuable steamer, the remuneration awarded to her owner is sufficient to cover this risk, owners of such vessels will naturally discourage their employment in salvage services; a result which would be very disastrous, and which the court should do what it can to prevent. In order to avoid such a consequence as this it is necessary that the amount of compensation awarded to the owner of the salving ship shall, wherever practicable, be sufficiently large to cover the risk of damage and loss which he ran where fortunately none has been sustained. And where damage and loss have been in fact sustained, and its amount can be ascertained, it is necessary that the sum awarded shall, when possible, be large enough to cover such an amount. This amount, however, ought not to be the measure of the remuneration, for the damage actually sustained may be very small, and there may have been serious risk of sustaining much greater damage. Besides which there is always the risk of earning nothing by reason of the loss of the succoured vessel. The amount of loss actually sustained by the owner of the salving ship can therefore seldom, if ever, be the maximum limit of the remuneration to be awarded to him. Neither can such loss be always the minimum limit. It never can be so where the value of the ship and cargo saved is too small to admit of payment in full of the loss in question. And even where the value is sufficient, the salvage service

may be so trifling as to render it unreasonable to throw the loss sustained by the salvors on the owners of the property saved. But where the salvage services have been dangerous to the salvors, and have occasioned them serious pecuniary loss, and have been highly valuable to the owners of the property saved, and where the value of the ship and cargo saved is ample not only to defray the loss sustained by the salvors in addition to a proper sum for the services of the master and crew of the salving ship, but also to leave a substantial surplus for the owner of the property saved, in such a case the sum to be awarded to the owner of the salving ship ought to be enough to cover her actual loss and whatever additional risk he ran. Of course care must be taken not to fall into the error of remunerating him twice over for the same risk. He must not be remunerated for the risk he ran of suffering the loss, the amount of which is ascertained and taken into consideration as the loss sustained. Another very important reason for ascertaining the amount of pecuniary loss sustained by the owner of the salving vessel is to enable the court to make a proper apportionment of the total sum awarded for salvage services, for it is obvious that no part of that sum which is given to cover the risk run by the shipowner or damage to the ship ought to go to the master or crew. Having thus examined the principles applicable to this subject, it is necessary to turn to the authorities and see how they stand. In *The Oscar* (*ubi sup.*) the value of the salved ship and cargo was 2400*l.*; the sum of 220*l.* was awarded for salvage and apportioned between five sailing smacks; but in addition to this sum Sir Christopher Robinson directed a reference to the registrar and merchants to ascertain the amount of loss and damage actually sustained by the different salvors. Again, in *The Salacia* (*ubi sup.*) the same learned judge awarded 1500*l.* for salvage services, and in addition 600*l.* to the owners of the salving ship for injuries sustained by her, and a further sum of 1000*l.* to them for the loss of a sealing voyage. This last sum was assessed by the registrar and merchants to whom the assessment of this loss was referred. The learned judge remarked upon the report of the registrar and merchants that, "it relieves the court from the task of forming conjectural estimates of such consequences as are attributed to the engagement of the vessel in this salvage service." In all judicial investigations it is desirable to substitute accuracy for conjecture when the expense of so doing is not too great. In *The Jane* (*ubi sup.*) the same learned judge awarded 1200*l.* in all. Of this sum 500*l.* was awarded to the master and crew of the salving ship, and 700*l.* was given to her owners for demurrage, repairs, risks, and expenses. The value of the ship and cargo salved was 7000*l.* The owners of the salving ship claimed 350*l.* for demurrage, repairs, and expenses, and there being no dispute as to these figures, no reference to ascertain them was necessary, and they were accordingly adopted by the court. In *The Saratoga* (*ubi sup.*) the value of the ship and cargo salved was 52,092*l.* The salving vessel was a steamer and was crushed against the landing stage at Liverpool, and was damaged. Dr. Lushington estimated the damage at 150*l.*, the loss of employment when under repair at 250*l.*, making together 400*l.*, and he awarded 600*l.* in all. There

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seems to have been no discussion in this case as to the admissibility or non-admissibility of evidence as to the cost of repairing the damage sustained or as to the loss of employment, but it is plain from the judgment that Dr. Lushington fixed the salvage awarded at an amount sufficient to cover these losses as well as ordinary salvage services. In *The Albert* (*ubi sup.*) Dr. Lushington, in awarding 400*l.* to a cutter which was damaged in saving a ship and cargo worth 1672*l.*, expressly said the 400*l.* included the damage to the cutter. This remark again shows that the salvage awarded ought at all events to cover the amount of damage sustained by the salving ship when the property saved is of sufficient value to enable this to be done. This case is reported with two others. *The Otto Herman* and *The Ella Constance*, and in the head-note it is stated, "in all cases the value of the salving vessel is regarded, and to whatever remuneration is given, must be added a sum to meet any damage she sustains." But I cannot find anything in the judgment in those cases which warrants so wide a proposition. It is evidently inaccurate where the damage done to the salving ship is very great compared with the value of the ship and cargo saved. In *The Mudhopper* (*ubi sup.*) Sir Robert Phillimore expressly decided after argument that the owner of the salving ship was entitled to be compensated for the damage to the ship and for her detention during repair, in addition to what was awarded for salvage services. In this case the principle being decided, the figures were agreed. In *The Sunnyside* (*ubi sup.*) evidence was tendered of what the salving vessel, the *Monarch*, might have earned if she had not been occupied in rendering the salvage service, and also of the cost of repairing the damage done to her. This evidence was objected to on the ground that no fixed sum could be awarded for these matters in addition to the sum given as a salvage reward which covered these items. Sir James Hannen admitted the evidence as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services, and he awarded the *Monarch* 200*l.* for salvage services pure and proper, and 100*l.* beyond that for loss of profit and repairs. The last and most important case in which this question has been discussed was the case of *The De Bay* (*ubi sup.*), decided by the Privy Council. In that case the judge of the Vice-Admiralty Court of Malta had awarded a salving ship 5000*l.* for salvage services and 3500*l.* for demurrage and damages, i.e. 8500*l.* in all. An appeal was brought on the ground that this sum was excessive, and the Privy Council reduced the amount to 6000*l.* The court thought that some of the items of loss were not satisfactorily proved, but the court nevertheless would not disturb the judgment on these items, but the Judicial Committee, allowing them to stand, reduced the 5000*l.* on the ground that the court below having allowed all damages and losses in full had been too liberal in adding so large a sum as 5000*l.* to them. In this case the Privy Council expressly decided that the court below had done right in admitting evidence of the loss sustained by the salving vessel and in ascertaining the amount of such loss, and in fixing the sum awarded high enough to cover such loss and a proper remuneration for the salvage services. It is true that the

decisions of the Privy Council are theoretically not binding on this court, but in cases of mercantile or Admiralty law where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country. Even if therefore I doubted the correctness of the decision in the case of *The De Bay* (*ubi sup.*), I should be disposed to follow it rather than depart from it, and so introduce a diversity of practice where there ought to be no difference in principle. But in fact the cases already referred to seem to me fully to warrant the decision in the case of *The De Bay*, and I do not regard it as introducing any new practice or principle. It must, however, always be borne in mind that the court was there dealing with a case in which the value of the property saved was very large compared with the whole sum awarded to the salvors, and that there was no circumstance to prevent the court from awarding enough to cover the whole loss sustained by them. The conclusion to be drawn from these authorities is, that where the property saved is ample in the sense already explained, and where there is no circumstance which the court can see at once would prevent it from giving an amount of salvage sufficient to cover the loss sustained by the salvors, evidence has been received, and ought to be received, to show the amount of loss actually sustained by the owner of the salving ship by reason of the salvage services, with a view to fix his remuneration at a sum that will cover such loss, and remunerate him for such further risk as he ought to be compensated for. This view is corroborated by the form of statement of claim given in Appendix C, s. 3, No. 6, to the Rules of the Supreme Court 1883. In that form will be found amongst the particulars of a salvor's claim, "Damage done to the salving ship, so much." These forms were settled by persons of great experience; and although of course they are only illustrative and not conclusive on any question of principle, the form in question indicates that, where a salving ship has been injured, the cost of repairing her ought to be stated. If it ought to be stated, evidence in support of the statement ought not to be rejected except in cases where it is useless to admit it. If it be said that the amount of salvage to be awarded is discretionary with the judge, the answer is that his discretion is a judicial discretion and not an arbitrary discretion, and that a judge who excludes evidence on a matter which he ought to consider does not place himself in the position in which he ought to be before his discretion can be exercised. I do not, however, wish to be understood as going further than the court did in the case of *The De Bay* (*ubi sup.*). When the judge has ascertained the amount of loss sustained by the salvors, it still remains for him to decide what amount of salvage is reasonable, regard being had to all the circumstances of the case—the amount of loss sustained by the salvors being only one of them. But unless, owing to the comparatively small value of the property saved, the trifling nature of the salvage services, or some other circumstances, the judge can foresee that it will be useless to inquire into the loss sustained by the salvors, he ought, in my opinion, to receive evi-

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dence of such loss. In the present case the value of the salvaged property was ample not only to defray any amount of remuneration which could be reasonably awarded to the salvors, but also to leave a very large surplus to the owners of the property saved. The salvage service was important, and there was no circumstance to justify the court in coming to the conclusion that the evidence, if taken, would not affect the amount of salvage to be awarded. The learned judge who tried the action awarded to the owners of the salvaging ship 4500*l.*, which is a large sum; but, as already stated, he refused to allow evidence to be given either before himself or the registrar of the loss sustained by those owners by reason of the damage done to their vessel, and by reason of the delay in her voyage. The learned judge, however, had not the assistance of the decision of the Privy Council in the case of *The De Bay* (*ubi sup.*), for that case was not decided till June 1883, two months after the present case was heard by him. Had that decision been reported, the learned judge would no doubt have followed it. For the reasons above stated I am of opinion that the learned judge ought, under the circumstances, either to have admitted the evidence which he rejected, and then to have decided what would be a proper sum to award the salvors, or to have fixed the remuneration for mere salvage, and to have referred the amount of loss to the registrar and merchants, and have added that amount to the former sum. Had he adopted either of these courses, and ascertained as a fact that the salvors' losses out of pocket amounted to between 5000*l.* and 6000*l.*, which is what they allege, I cannot think that he would have considered 4500*l.* sufficient for their remuneration. Whether the judge of the Admiralty Division of the High Court in this or any other salvage action will himself ascertain the amount of loss, or refer it to the registrar and merchants, is entirely a matter for his discretion. But I cannot think it discretionary with him to admit or reject evidence of such loss where, as in this case, there is nothing to justify the rejection of the evidence as useless, and where there can be no difference of opinion as to the ample value of the property saved to admit of the application of the course followed in the case of *The De Bay* (*ubi sup.*). The appeal ought not, in my opinion, to be dismissed, but the order of the court below ought to be varied so far as it relates to the sum of 4500*l.* awarded to the appellants. Unless, therefore, the appellants prefer to take the sum of 4500*l.* awarded them, they are entitled to an inquiry in the terms stated by the Master of the Rolls, in order to ascertain the amount of loss sustained by them, and to add the amount when ascertained to the sum awarded for the use of the ship and the risk of her earning nothing, and this sum we fix at 1000*l.*

Solicitors for the appellants, *Bateson and Co.*Solicitors for the respondents, *Hill, Dickenson, Lightbound, and Dickenson.*

July 1, 3, and Aug. 8.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

SANDERSON v. THE MAYOR, &amp;C. OF BERWICK-UPON-TWEED. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Landlord and tenant—Quiet enjoyment—Breach of covenant—Act of person lawfully claiming through lessor.*

*Where the lessee's ordinary and lawful enjoyment of demised land is substantially interfered with by the act of the lessor, or of those lawfully claiming under him, the covenant for quiet enjoyment is broken, although neither the title to nor the possession of the land is otherwise affected.*

*Defendants demised a farm to plaintiff, with a covenant for quiet enjoyment. Defendants had previously demised an adjoining farm to another lessee, with the right to use the drains through plaintiff's land for the purpose of carrying away so much water as they were adequate to carry. Water escaped from these drains, and caused damage to plaintiff's farm. Part of such damage was owing to the excessive use by the lessee of the adjoining farm of properly constructed drains, and part to the improper construction of other drains which he used properly.*

*Held, that for the first-mentioned damage defendants were not liable, but that the last-mentioned damage was a substantial interruption, by a person lawfully claiming through defendants, of plaintiff's enjoyment of the land demised to him, and so constituted a breach of the covenant for quiet enjoyment, for which defendants were liable in damages.*

*Judgment of Denman, J. varied.*

THIS was an action brought by a lessee against his lessors to recover damages for injury caused to the demised farm by the escape of water under the circumstances mentioned in the judgment of the court, where the facts of the case are fully stated.

The trial took place at Newcastle-upon-Tyne, before Denman, J. without a jury.

The learned judge gave judgment in favour of the plaintiff, and the defendants appealed.

July 1 and 3.—The appeal was argued by Sir P. Herschell (S.G.) (*Lockwood, Q.C.* and *T. W. Chitty* with him) for the defendants, and by *Wills, Q.C.* and *Gainsford Bruce, Q.C.* for the plaintiff.

The following authorities were referred to:

- Hurdman v. The North-Eastern Railway Company*, 38 L. T. Rep. N. S. 339; 3 C. P. Div. 168;  
*Suffield v. Brown*, 9 L. T. Rep. N. S. 627; 4 De G. J. & S. 185;  
*Alston v. Grant*, 3 E. & B. 128;  
*Pyer v. Carter*, 1 H. & N. 916;  
*Watts v. Kelson*, 24 L. T. Rep. N. S. 200; L. Rep. 6 Ch. 166;  
*Wheeldon v. Burrows*, 41 L. T. Rep. N. S. 327; 12 Ch. Div. 31;  
*Ewart v. Cochrane*, 5 L. T. Rep. N. S. 1; 4 Macqueen, 117;  
*Russell v. Watts*, 50 L. T. Rep. N. S. 673; 25 Ch. Div. 559;  
*Richards v. Rose*, 9 Ex. 218;  
*Rylands v. Fletcher*, 19 L. T. Rep. N. S. 220; L. Rep. 3 H. L. 330;  
*R. v. Peck*, 1 A. & E. 822;  
*Anderson v. Oppenheimer*, 5 Q. B. Div. 602;  
*Todd v. Flight*, 9 C. B. N. S. 377; 30 L. J. 21, C. P.;  
*Lord Egremont v. Pulman*, M. & M. 404;  
*Bell v. Twentymann*, 1 Q. B. 766.

*Cur. adv. vult.*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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Aug. 8.—The judgment of the court was read by

FRY, L.J.—In this case there has been some difficulty in ascertaining the facts necessary for the determination of the questions raised; but we think that, from the statements of counsel, and the findings of the referee, the following narrative may be taken as the basis for decision. In the year 1845 a moorland district within the borough of Berwick was inclosed, and a system of drainage formed, the general scheme of which consisted in the construction of long lines of underground drains, converging as they passed from the higher to the lower ground, which were fed by transverse and nearly parallel lines of field drains. There appears to have been one general scheme, which embraced several farms belonging to the defendants, including the plaintiff's farm, and a farm lying above the plaintiff's farm and adjoining it. Three of the long lines of drain coming from the land above the plaintiff's farm met first inside the upper boundary of that farm in a field marked O on the map which has been used in this case, and from thence the water was carried in a larger drain through the remainder of the plaintiff's farm. In 1865 the defendants demised to one Alexander Cairns the farm lying above the plaintiff's farm, the general words of the demise including the words "waters and watercourses." In 1870 the plaintiff entered into the occupation of the farm in respect of which he is now suing, and in 1875 the defendants executed to him a lease of the farm, creating a term as from the year 1870. This lease reserved to the defendants a right to enter upon the demised premises, and view and repair, or make anew, the watercourses which then were, or should at any time during the term be carried through the lands, and to make such alterations therein as they should think necessary, and it also contained a covenant on the part of the lessors that it should be lawful for the plaintiff peaceably and quietly to hold, possess, and enjoy the demised premises during the term, without any eviction, interruption, or denial from or by the lessors, or any person lawfully claiming through or under them. It further contained a covenant by the lessors to drain such portions of the demised land in such manner and at such times as they might deem necessary. At some time prior to the year 1880 some of the water passing down the drains in Cairns' farm escaped at a spot within that farm, and near the borders of the plaintiff's, and more or less filled or saturated a depressed area which has been indicated by the referee on the plan referred to him by a contour line of 220.85 above a datum line, this area lying principally within the boundary of Cairns' farm, but extending also into the plaintiff's farm. From the plaintiff's counsel we understand the point of escape or overflow to have been near where the settling wall is marked on the plan, and the lie of the land makes this very probable, as it is apparently the lowest spot of the depressed area. The plaintiff's land and crops were injured within so much of this depressed area as lies within the plaintiff's farm. In order apparently to correct this result the defendants in 1880 sank the settling well in the lowest spot of the depressed area, and carried a new drain from it in a circuit so as to join the long drains lower down on the plaintiff's farm, and thus relieve the drains

through the upper part of his farm. Since the construction of this new drain in 1880 no damage has, according to the statement of the plaintiff's counsel, arisen in the field O. The fact of this improvement having been made by the defendants in 1880 may suggest to the mind that the original construction of the drainage system in Cairns' land was defective; but no such point has been raised on the pleadings, or by the questions addressed to the referee, and we cannot therefore, as against the defendants, conclude that there was any such defect, but must hold that the overflow was or might have been caused by an excessive user on the part of Cairns of a system properly constructed for the purpose intended. If the system was inadequate for the needs of the farm Cairns should either have done the additional works himself, or have required his landlords, the defendants, to do them. Lower down in the plaintiff's farm than the field O is another field, marked Q, through which was constructed a tile drain conduit, part of the long lines of drainage. This drain was imperfectly made, and has allowed the water to escape between the joints, and has so done damage to a portion of the field Q. The questions for decision are: (1) Has the plaintiff any cause of action in respect of the damage done by the water to the plaintiff's land at O; and (2) has the plaintiff any cause of action in respect of the damage in the field Q? The lease to Cairns in 1865 appears to us to have conferred on him a right to use the drains through the plaintiff's land for the purpose of carrying away from his land so much water as they were adequate to carry, but not to have conferred any right to use the drains in his own land for the purpose of causing on his own land an accumulation of water which should overflow on to the adjoining lands of the plaintiff. It would be giving a very strained and violent effect to the words "waters and watercourses" in the lease of 1865 if we held that they were an authority to the lessee thus to injure at once his neighbour and the soil of the demised farm by an accumulation of water. With regard, therefore, to the damage done to the field O, it appears to us that the defendants are not liable on the ground of causing or permitting the injury, for Cairns, and not they, caused or permitted it. They are not liable on the ground that it is a disturbance by a person lawfully claiming under them, because the lease gave Cairns no lawful claim to do the act complained of. They are not liable on the ground that they demised to Cairns a thing dangerous or injurious to the plaintiff, even assuming such ground to be sufficient, for the drainage system is not found to have been improperly constructed, and it was injurious only when used to carry off more water than it could carry away, and unless on one or other of these three grounds we do not see that the defendants can be liable, whether under their covenant for quiet enjoyment or under the law of trespass or nuisance. In our opinion, therefore, the defendants are not liable for the damage done to field O. As regards the damage in the field Q, different considerations apply, because the damage here has resulted to the plaintiff from the proper user by Cairns of the drains passing through the plaintiff's land which were improperly constructed. In respect of this proper user, Cairns appears to us to claim



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lawfully under the defendants by virtue of his lease, and to have acted under the authority conferred on him by the defendants. The injury caused to the field appears to us to have been, within the meaning of the covenant in that behalf contained in the lease to the plaintiff, a substantial interruption by Cairns, who is a person lawfully claiming through the defendants, of the plaintiff's enjoyment of the land, and so to constitute a breach of the covenant for quiet enjoyment, for which the defendants are liable in damages. In coming to this conclusion, we have not lost sight of the observations on the nature of such a covenant which were made by Willes, J. in *Dennett v. Atherton* (L. Rep. 7 Q. B. at pp. 326, 327). But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected. The judgment of the learned judge must therefore be varied, and in lieu of the directions he gave, there must be a direction to the referee to inquire what damage the plaintiff has suffered from the injury done to the field Q by the water escaping from the drain. As the appeal has been partially successful and has partially failed, there will be no costs of this appeal.

*Judgment varied.*

Solicitor for plaintiff, T. W. Rossiter, for Hoyle, Shipley, and Hoyle, Newcastle-on-Tyne.

Solicitor for defendants, E. Bromley, for Robert Douglas, Berwick-upon-Tweed.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Monday, Aug. 4.*

(Before BACON, V.C.)

Re TURNER; TURNER v. TURNER. (a)

*Administration action—Voluntary settlement—Creditors—Costs.*

*A testator made a voluntary settlement, which was admitted to be void against creditors. The trustee of the settlement paid 580l. 9s. 11d. into court. An administration action was necessary to find out the amount of debts. The claims of the creditors were found to amount to 504l. 3s. 1d. The chief clerk ordered the clear balance 76l. 6s. 10s. to be paid to the trustee, leaving the creditors only a dividend.*

*The summons was adjourned by the defendant, the executor, into court.*

*Held, that the order of the chief clerk was right, and the defendant must pay the costs of the adjourned summons personally.*

WILLIAM TURNER, the testator in this action, made a voluntary settlement of certain policies of life insurance. It was admitted that this settlement was void as against creditors.

The testator died, and the trustee of the settle-

ment paid 580l. 9s. 11d., the sum of money realised from the policies, into court.

An administration action was commenced, and inquiries made as to the amount of the debts, and it was found that there were creditors to the amount of 504l. 3s. 1d.

The chief clerk ordered the clear balance of 76l. 6s. 10d. to be paid to the trustee of the settlement, leaving only a dividend to the creditors after payment of the costs of the action.

The summons was adjourned by the defendant, the executor, into court.

Abraham for the plaintiff, a beneficiary and next of kin.—I support the order of the chief clerk.

P. H. Clifford for the creditors.—The costs of the action should come out of the 76l. 6s. 10d.

E. Ford for the defendant, the executor.

BACON, V.C.—The order of the chief clerk is right; the costs of the adjourned summons must be paid by the defendant personally.

Solicitors: R. Cotton; Mead and Daubeney.

*Monday, Aug. 4.*

(Before BACON, V.C.)

Re PRICE; LEIGHTON v. PRICE. (a)

*Infant—Trustees—Sale of house out of court—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 3, 59, and 60.*

*Where an infant was entitled under a will to a house, the rent of the house to be accumulated until he attained twenty-one, and the house was the only property the infant possessed, and was in bad repair; on summons under the Settled Land Act 1882 the Court appointed trustees, and sanctioned a sale by them of the house out of court.*

THIS was an administration action to administer the estate of Mrs. Price. By her will she devised and bequeathed a copyhold house and furniture to the plaintiff Leighton, an infant now of eleven years of age, and directed the rents to be accumulated until he attained the age of twenty-one years.

Rawlinson for the plaintiff.—I apply by summons that trustees may be appointed under the Settled Land Act 1882, and I ask the court to sanction the sale of the copyhold house and furniture without the expense of going to one of the court conveyancers. The 3rd section of the Settled Land Act 1882 empowers the tenant for life to sell. Sect. 59 provides that, "where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof." Sect. 60 empowers the trustees of the settlement to act for the infant. We wish to sell without sending the matter, which is small, to the conveyancing counsel of the court. The infant is eleven years old, he possesses no other property, it is beneficial for the infant that the sale should take place, as the house is in bad repair, and 220l. at least would have to be spent in repairs before it could be let. Two trustees of position have been found. [BACON, V.C.—Why

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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do you come to me?] The chief clerk doubted whether he had power to order the sale to take place out of court.

BACON, V.C.—I make the order.  
Solicitors, Meredith and Co.

Thursday, May 8.  
(Before KAY, J.)

HOUSEHOLD AND ROSHER v. FAIRBURN AND HALL. (a)

*Patent—Issue of warning circular by patentees—Action to restrain—Infringement—Cross-action for—Undertaking by defendants to proceed with their action—Interlocutory injunction to restrain issue of circular refused.*

*The plaintiffs were the makers of "Rainbow Water Raisers or Elevators," and they commenced an action for an injunction to restrain the defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of the defendants. The plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. The defendants then commenced a cross-action claiming an injunction to restrain the plaintiffs from infringing their patents.*

*Held, that, as there was no evidence of mala fides on the part of the defendants, they ought not to be restrained from issuing the circular until their action had been disposed of, but that they must undertake to prosecute their action without delay.*

PREVIOUSLY to the commencement of this action the following circular was issued by the defendants:

Notice.—Hall's Patent Water Elevators, No. 4757, 1880.—We beg to caution you against using the so-called Rainbow Water Raisers or Elevators, which are direct infringements on Hall's Patents, No. 60, Jan. 24, 1878, and No. 4757, Nov. 20, 1880. Makers, sellers, and steam users will be liable to pay royalty on the same.—FAIRBURN AND HALL, 63, Royal Exchange, Manchester.

On the 26th March 1884 the plaintiffs commenced this action for an injunction to restrain the defendants and their agents from issuing, publishing, or circulating notices, advertisements, or circulars representing or suggesting, or inducing the public to believe, that a certain apparatus known as "Rainbow Steam, Water, and Liquor Raiser" (the letters patent for which were vested in and the property of the plaintiffs) was an infringement of any letters patent vested in or belonging to the defendants or any of them, or that makers, sellers, and users of such apparatus would be liable to pay royalties, or incur any other liability, for or by reason of the making, selling, or using thereof, and for damages and costs.

On the 28th March 1884 the plaintiffs served on the defendants the following notice:

We hereby give you notice that, unless within seven days from the service hereof on you, you give us an undertaking, in strict accordance with the indorsement on the writ of summons herein, dated 26th March 1884, that you will refrain from issuing or causing to be issued or circulated any circulars or bills prejudicial to our clients' interest, we shall immediately proceed to move for an injunction to restrain you from so doing, and also for damages and costs.

On the 7th April 1884 the plaintiffs gave notice

of a motion for an injunction, until the hearing of the action, in the terms of the writ.

On the 26th April 1884 the defendants in this action commenced an action of *Fairburn and Hall v. Household and Rosher*, against the plaintiffs in this action, claiming an injunction to restrain them, their agents, servants, and workmen, from infringing the patents, No. 60, Jan. 24, 1878, and No. 4757, Nov. 20, 1880, and for damages.

The motion now came on for hearing.

*Graham Hastings, Q.C.* and *Whitaker* for the plaintiffs.

*Samuel Hall* for the defendants.

KAY, J.—I confess I feel very great difficulty in this case in granting an injunction after the decisions that have been come to on this subject. It seems to me clearly settled law that, if a man, in defence of his own right, and particularly if that right is secured to him by letters patent, issues circulars to merchants and others who he supposes are infringing his patent, and who he *bonâ fide* believes are infringing his patent, and then supposing him to be challenged to put the patent in course of trial, and he accepts the challenge, the court will not interfere with the issuing of the circulars. The effect of the language of Cotton, L.J. on the subject is, that he has just as much right to warn merchants and others as he has to bring an action against them; and Sir George Jessel, in a case before him as a judge of first instance of *Halsey v. Brotherhood* (43 L. T. Rep. N. S. 366, 367; 15 Ch. Div. 514, 518), said most emphatically, taking his very words: "The person may desist on warning being given, and then there is no occasion for bringing an action. The person may desist, or if he does not desist he may not be worth suing; and a man is not bound, in addition to the loss incurred by the infringement, to incur the further cost of bringing an expensive action. As I said before, I am not aware of any such law; and, were it not for the two cases about which I have to say something, I should say that no countenance to any such doctrine ever was given." Cotton, L.J., in the case of *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company* (49 L. T. Rep. N. S. 451, 453; 25 Ch. Div. 1, 9) says: "You could not prevent them" (that is, the defendants) "from bringing an action against those merchants" (that is, the merchants warned), "and is it to be said that they are to be stopped from warning those merchants, that they render themselves liable to actions when those merchants would naturally complain if an action were brought against them after they had been allowed to go on buying these imported goods without warning?" What the Master of the Rolls said, in the case of *Halsey v. Brotherhood* (*ubi sup.*), was, following the passage I read a little time ago, this: "It is a totally different thing where a man, knowing he has no legal right, threatens proceedings for a collateral purpose. There he may be liable to an action. If a man, with a view to prevent another man carrying on his business—knowing he has himself no patent, or knowing that he has an invalid patent, or knowing that the thing manufactured by the other man is not an infringement—for the purpose of injuring the other man in his trade, threatens the purchasers, or advertises that the thing is an infringement, of course he is liable, like any person who makes a false asser-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

tion to the injury of another in his trade; because it is an untrue assertion, and not made *bonâ fide*. The mere fact of a man mentioning he has a right, and that something is an infringement of it, does not *per se* give a ground of action. It is obvious that such a course of conduct, adopted *bonâ fide*, does not constitute a case in which an action could be maintained; for the essence of the case is the falsity of the assertion, and the want of good faith in making it; that is, the assertion is made, not for the purpose of preserving the alleged legal right, but for a different purpose, and has injured the plaintiff in his trade." Then, after discussing *Wren v. Wield* (20 L. T. Rep. N. S. 1007; L. Rep. 4 Q. B. 730), a very well-known case, which shows that the essence of the right to relief in such a case is that the threat was made *malâ fide*, he goes on thus: "Now I come to the second point, which is rather different. Although the man who gives the notice is not subject to an action for damages, is he liable to be restrained by injunction? I think he would be liable to be restrained by injunction if certain other proceedings are adopted by the persons threatened. If, for instance, the vendor of the machines finds his customers interfered with, and writes to the person who has given the notice, and says, 'My machines are not an infringement; if you go on threatening without bringing an action against me to try that question, I shall apply for an injunction to restrain you from interfering with my trade,' and then the defendant does not bring an action and takes no proceedings (as is the case here), and the plaintiff comes for an injunction, he may be entitled to it if he shows that the defendant's statement is false, because the defendant's threat would be a threat to continue making a statement to the injury of the plaintiff; and if it is a false statement, the plaintiff would be entitled to restrain the continuance of it to his injury, although he may not be entitled to bring an action for damages for the false statement; for if the defendant says, 'I insist that those are infringements, and I will give notice to all your customers,' the plaintiff has a right to try that question by bringing his action for injunction. But if, in answer to that action, the defendant says, 'I did make the statement, and I will make the statement, but the statement is true,' and he proves the statement to be true, it appears to me plain that that is a good defence to the action. I do not think that it is a good defence to the action for an injunction merely to say, 'I made the statement *bonâ fide*,' because, if the defendant is challenged, and says, 'The statement is true, and I now maintain it,' and he fails in maintaining it and it turns out to be false, I think then that *bonâ fides* ought not to defend him from an injunction against continuing to make it. But if he succeeds in showing that the statement is true, that is another thing." What I have got here is this: That challenge was given to the defendants, "Bring your action; try your right." And I hear that since this action they have accepted the challenge, and have brought an action against these plaintiffs to try this very question. Is what the plaintiffs are doing an infringement of the defendants' patents or not? The defendants' patents were the earlier patents in point of date. They have two. The plaintiffs have taken out another patent in England. The defendants say, "What you are doing

under your patent is an infringement of our patent." Therefore, having been challenged as it was proper to challenge them, according to the language of the Master of the Rolls which I have just read, they accept that challenge and bring an action; and, therefore, now the court is in this position, that there is pending before it an action in which this very question, whether it is an infringement or not, is to be tried. What is it the duty of the court to do in that case in the meantime? Most certainly in the meantime, unless there is clear evidence of *mala fides*, the court is not to interfere. The language of Cotton, L.J. in *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company* (*ubi sup.*) is as plain on that point as anything can be. He had to deal with the case in which practically the facts seem to be these: There was an invention which was patented both in Belgium and in England; the Belgian patentee was selling in England goods made under the Belgian patent in Belgium, which of course would be an infringement of the English patent. There was a question raised, whether, not being actually the owner of the Belgian patent, but having the licence to use the Belgian patent from the defendant, to whom it really belonged, that licence gave him power to sell in England. The court came to the conclusion it did not; and therefore the court, for the purpose of dealing with the question, considered them to be in this relative position—one the owner of a Belgian patent, and the other the owner of an English patent for the same invention. Cotton, L.J. says: "The licence is merely a licence, and puts the plaintiffs in no better position than if they were grantees of the Belgian patent. That being so, in my opinion the plaintiffs fail to make out any *prima facie* case to show that these circulars, honestly issued, are in derogation of any contract which the defendants entered into with the plaintiffs." Then come these words: "And I may say, for my own part, I think that where circulars of this kind are honestly issued, the court ought not to interfere, at least till the hearing of the cause, to stop the circulation of them, unless there is a very strong *prima facie* case on the evidence before the court that there is a violation of some contract entered into between the plaintiffs and the defendants." In this case there is not any contract alleged or suggested between the plaintiffs and defendants. There is no violation, therefore, of any contract; and, adopting this language literally, "the court ought not to interfere, at least till the hearing of the cause, where circulars of this kind are honestly issued." I do not find in the judgment of Lindley, L.J. any dissent. The language he uses is this: "Then it is said the balance of convenience would be in favour of granting this injunction. I think it would be so if the plaintiffs could make out a reasonably strong *prima facie* case. I think the appellants' argument upon that point would be, as far as I can see without having heard the other side, unanswerable. It is an irreparable injury to them not to restrain these circulars, and it is no particular injury to the defendants to allow them to go on with what they have been doing, they keeping an account. But then we must consider the rights of the parties; and the plaintiffs are not entitled to restrain the defendants from issuing these circulars, unless they can show some right, which they have not succeeded in

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doing." His Lordship gives that judgment, having just heard what Cotton, L.J. had said in his judgment, which I have read, and he intimates no dissent. I must take it, therefore, to be the opinion of the court, that where the court has the question before it, whether there has been an infringement or not, and that question is raised before it, it is not the duty of the court to grant an injunction in the absence of breach of contract, unless the circulars have been dishonestly issued. The question I have to consider is, whether these circulars have been dishonestly issued. What does dishonestly in that case mean? *Malâ fide*. These judgments, if looked through, and *Wren v. Weild* (*ubi sup.*), and the case of *Dicks v. Brooks* (43 L. T. Rep. N. S. 71; 15 Ch. Div. 22), referred to in the judgment of Lord Coleridge, C.J. in *Halsey v. Brotherhood* in the Court of Appeal (45 L. T. Rep. N. S. 640, 641; 19 Ch. Div. 386, 388), all come to this: that it is not *mala fides* for a man to issue circulars in defence of his own right, if he *bonâ fide* believes that what is being done is an infringement of that right. I read just now a statement which seems to me to be very clear upon that point, and this is what Lord Coleridge, C.J. says: "It seems to be clear law that in an action in the High Court in the nature of slander of title, where the defendant has property of his own, in defence of which the supposed slander of plaintiff's title is uttered, it is not enough that the statement should be untrue; but there must be some evidence, either from the nature of the statement itself, or otherwise, to satisfy the court or the jury that the statement was not only untrue, but was made *malâ fide* for the purpose of injuring the plaintiff, and not in the *bonâ fide* defence of the defendant's own property. It seems to be clear that if a statement is made in defence of the defendant's own property, although it injures, and is untrue, it is still what the law calls a privileged statement; it is a statement that the defendant has a right to make, unless, besides its untruth, and besides its injury, express malice is proved; that is to say, want of *bonâ fides*, or the presence of *mala fides*." Then, later on he says: "Possibly in this case it has been injury to the plaintiff. I am quite content to assume that it has, but it appears to me that a statement made under such circumstances does not give a ground of action merely because it is untrue and injurious to the plaintiff; there must be also the element of *mala fides*, and a distinct intention to injure the plaintiff, apart from the honest defence of the defendant's own property. I feel strongly that there is great force in what Mr. Ince has said about the difficulty in which a plaintiff may be placed by the conduct of a person in the position of the defendant. I do not pretend to be able to answer his observations on that head, but, unless there is *mala fides*, it is one of those instances in which the law, in the interests of society, permits an injury to be done without any remedy commensurate with it." Then Lindley, L.J. says: "*Wren v. Weild* (*ubi sup.*) comes to this, If I am a patentee, so long as I act honestly I am entitled to say, without running the risk of having an action for damages brought against me, that somebody is infringing my patent, or that somebody else's manufacture is an infringement of my patent. If I say that honestly, I am not liable to an action for damages. If I say it dishonestly, I am so liable, and if I know that

what I say is untrue, it would not take much to persuade a jury that I was acting dishonestly, and then an action for damages would lie." In the other case of the *Société Anonyme des Manufactures de Glaces* (*ubi sup.*), Cotton, L.J. also said: "We must assume that those circulars are honestly issued; that is to say, that they are issued by the defendants in the belief that they are required for the protection of their right to the invention." If I am to take that as the definition of what is *mala fides*, then the honest belief of the defendants, although it may turn out to be wrong, is sufficient. But these cases plainly show that if, after the question has been decided by a court of law, the defendants were then to go on issuing circulars, of course then they would be in a position of issuing them dishonestly, because they must be taken to know that which the court of law has decided, and therefore they would be issuing them knowing them to be false, which would be dishonestly. I was pressed in this case to look into the patents and the evidence of certain experts; and this kind of case is made (which is the only ground on which this application could be maintained), that the things are so clearly different, that one is so obviously not an infringement of the other, that it must be dishonest. Well, I certainly cannot come to that conclusion. I have looked into them for the purpose of seeing whether I can fairly come to that conclusion: but not being able to come to that conclusion, I shall express no opinion whatever upon the question of infringement on this occasion. It may turn out at the hearing that there is not really an infringement. On the other hand, it may turn out that there is. I ought not to prejudice that question by any observations I make now. I can imagine certainly a case where the thing is so entirely different that the claim could not be honestly made. That is quite an imaginary case; but it does not seem to me that this is such a case; and I can very well believe, from the cursory inspection which I have been able to make of these patents, that the defendants, whether they are right or wrong (as to which I say nothing), might *bonâ fide* entertain the belief that that which the plaintiffs are doing is an infringement of their patent. If that is possible, then it seems to me, on the authority of the cases I have cited, that I am not at liberty to grant an injunction. But I think I ought to put the defendants under terms to prosecute their action without delay; and certainly there ought to be liberty to apply to renew this application, or for such other purpose as the plaintiffs may think right, in case there is any undue delay in the prosecution of that action.

The defendants' counsel having undertaken that the defendants would prosecute their action with all due diligence, it was arranged that the plaintiffs' action should not be proceeded with until the defendants' action had been disposed of. The costs of the motion were ordered to be costs in the plaintiffs' action.

Solicitors for the plaintiffs, *Hatton and Westcott*.

Solicitors for the defendants, *Yielding and Barlow*.

Thursday, July 24.

(Before KAY, J.)

Re SMITH; CHAPMAN v. WOOD. (a)

*Married woman—Restraint on anticipation—Settled realty—Mortgage of income of.*

By a settlement, dated in 1864, freehold property was conveyed to trustees upon trust to let the same, and pay the rents and annual proceeds to C. S. W., a married woman, during her life, for her own sole and separate use, free from the debts, control, or engagements of her present or any future husband; and "the receipts of her . . . for the said rents and annual proceeds to be given after the same shall become due" to be "good and effectual discharges" to the trustees for the same; and from and after the decease of C. S. W., then upon trust to pay the rents and annual proceeds to her husband, in case he survived her, during his life; with ultimate trusts for sale and division amongst the children and issue of C. S. W. by her then present or any future husband, as should be living at the time of such division.

In 1881 C. S. W. and her husband mortgaged the income of the settled property to secure a loan of 1000*l.*, and in 1883 they further charged such income, together with other property, with the payment of 500*l.* Notices of the mortgage and further charge were duly given to the trustees of the settlement. C. S. W. did not receive any of the money secured thereby, but her husband received the same, and applied the whole in payment of his own debts.

The question was, whether the mortgage was a valid charge upon the income of the settled property, and who was entitled to be paid such income.

Held, that C. S. W. was restrained from anticipation, and her receipt was the only discharge which the trustees could accept.

*Baker v. Bradley* (7 De G. M. & G. 597) followed.

By a settlement, dated the 31st May 1864, and made between John Smith of the one part and Arthur Brickwell and Richard Hemming Chapman, trustees, of the other part, after reciting the title of J. Smith to the hereditaments and premises thereafter described, and that he was desirous of conveying and assuring the same to the uses and upon the trusts thereafter declared in favour of his niece C. S. Wood, the wife of James Wood; J. Smith (in consideration of natural love and affection, and of 5*s.* paid to him by the trustees) conveyed to the trustees a freehold messuage and hereditaments, upon trust that they should let the same and receive the rents and annual proceeds thereof, and (after payment thereof of all necessary repairs and other outgoings) pay the rents and annual proceeds to C. S. Wood during her life, for her own sole and separate use, free from the debts, control, or engagements of her present or any future husband, "and the receipts of her, the said C. S. Wood, for the said rents and annual proceeds to be given after the same shall become due shall, from time to time, be good and effectual discharges" to the trustees for the same; and from and after the decease of C. S. Wood, then upon trust to pay the rents and annual proceeds to J. Wood, in case he survived his wife, during his life; and it was declared that from and after the

decease of the survivor of J. Wood and C. S. Wood, the trustees should stand possessed of the messuage and hereditaments upon trust to sell the same, and to receive the moneys to arise from such sale, and to stand possessed of the residue of such moneys, after payment of costs, upon trust to divide the same amongst all the children of C. S. Wood (either by her present or any future husband) as should be living at the time of such division, as tenants in common, and the issue of such of them as should be dead, such issue to take such share only equally amongst them as their respective parents would have been entitled to if then living.

C. S. Wood was married to J. Wood on the 27th Jan. 1864, and there were four children of the marriage.

By an indenture, dated the 2nd April 1881, and made between C. S. Wood of the first part, J. Wood of the second part, and James Berriman Tippetts and Samuel Gillespy of the third part, C. S. Wood and J. Wood mortgaged the rents and annual proceeds of the said messuage and hereditaments to secure a loan of 1000*l.* and interest; and by a subsequent indenture, dated the 16th June 1883, and made between the same parties, the same rents and annual proceeds were, together with other property, further charged with the payment of 500*l.* and interest.

Notices of the mortgage and further charge were duly given to the trustees of the settlement.

C. S. Wood did not receive any of the money secured by the mortgage and further charge, but J. Wood received the same and applied the whole in payment of his own debts.

An originating summons was taken out by R. H. Chapman, the surviving trustee of the settlement, asking that it might be determined whether or not the mortgage was a valid charge upon the income of the settled property, and who was entitled to be paid such income.

The summons was adjourned into court, and now came on to be heard.

Alfred Smith, for the plaintiff, stated the question.

E. Widdrington Byrne, for the defendant C. S. Wood, contended that she had no power to anticipate her income, and that the mortgage and further charge did not empower the trustee to pay over the income to the mortgagees, but that it must be paid into her hands, and her receipt was the only discharge which the trustee could accept. He relied on *Baker v. Bradley* (7 De G. M. & G. 597, 620; 2 Sm. & G. 531, 561), where the words were similar to those in the present case, except that the direction was that the receipts of the married woman should "alone" be good discharges for the rents and income.

William Baker, for the defendants, the mortgagees, referred to

*Acton v. White*, 1 Sim. & Stu. 429;  
*Scott v. Davis*, 4 My. & Cr. 87;  
2 Jarman on Wills, 4th edit. p. 24;  
2 Bright's Husband and Wife, p. 277;  
2 Roper on Husband and Wife, p. 233;  
*Witts v. Dawkins*, 12 Ves. 501;  
*Browne v. Lisle*, 14 Ves. 302;  
*Gullan v. Trimby*, 2 Jac. & Walk. 451, note.

KAY, J.—This case has been argued very ably, but counsel for the mortgagees has been obliged to say that, according to his view of the matter, there is no meaning to be attached to the words

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"the receipts of the married woman for the income, after the same shall become due, to be good and effectual discharges." But the court must put some meaning upon these words. The whole clause is this: [His Lordship read it and continued:] It appears that there was a gift to trustees of certain real estate in trust to pay the rents and annual proceeds to a married woman for life, for her separate use, and her receipts were to be good discharges to the trustees for the same. I confess that I am not able to suggest any meaning at all for the clause unless it means that this married woman is, according to the usual phrase, to be restrained from anticipation. I turn to the authorities. First of all, I will go to the early case of *Adon v. White* (1 Sim. & Stu. 429), where a testator devised a freehold estate to trustees in trust to pay the rents, as the same should become due and payable, into the hands of his wife and not otherwise, for her life for her separate use, and directed that the receipts of his wife alone for what should be actually paid into her own proper hands should be good discharges to her trustees. Leach, V.C. held that there was no restraint upon anticipation, and that the wife had power to alienate her life estate. The point came before the late Vice-Chancellor of England (Shadwell) in *Field v. Evans* (15 Sim. 375), where in a marriage settlement there was a trust for the separate use of a married woman, and a declaration that the receipts of herself, or the persons to whom she should appoint the income after the same should become due, should be valid discharges for it. The Vice-Chancellor held that she was restrained from anticipating the income provided for her. The only essential difference between that case and the present is, that here the married woman alone is contemplated as being the person to receive the income, whereas there it is contemplated that she might appoint an agent to receive the money. The point came also before the Court of Appeal, consisting of Knight-Bruce and Turner, L.J.J., in *Baker v. Bradley* (7 De G. M. & G. 597; 2 Sm. & G. 531). There the words were that the receipts of the married woman alone, or of some person authorised by her to receive any payment of the rents and income, after such payment should have become due, should "alone be good discharges" for such rents and income. Knight-Bruce, L.J. says: "Having attentively considered Mr. Baylis's will, the view that I take of it is, that, as to the life interest which it gave to Mrs. Baker, the plaintiff's mother, it restrained her from anticipation during her coverture. These words, 'And I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorised by her to receive any payment of the said rents and income, after such payment shall have become due, notwithstanding her said present or any future marriage, shall alone be good discharges for the said rents and income, or for so much thereof as shall be thereby acknowledged to have been received,' seem to me, with the context, to have that effect; and this I should have thought even if the case of *Field v. Evans* had never been decided." Turner, L.J. deals with the matter more fully, and he says: "These words seem to me to import something more than the mere unfolding what is implied in the separate use. Some effect must be given to the words 'after such payment shall have become due,' but

to hold them to be merely descriptive of an incident to the estate would be to give them no effect. If the testator's purpose had been merely to define an incident to the estate, the preceding words, 'and I declare,' &c., would alone have been sufficient for the purpose. It was argued on the part of the defendants that these restrictive words had reference to the agent to be appointed, and not to the receipt; but this argument, if maintainable upon the letter, cannot certainly be supported upon the spirit of the will. Much reliance was also placed by the defendants upon the use of the words "assigns" in the early part of the disposition, but these words would have their operation in the event of the lady becoming discover, and it is of course the duty of the court to put such a construction upon the will as will render it consistent in all its parts." Then he treats the case as being within the authority of *Field v. Evans* (*ubi sup.*). Certainly Turner, L.J. thought that the words which restrained the married woman from anticipation were the receipts of the rents and income after such payment shall have become due shall alone be good discharges. Those are similar to the words which I have here. In that case there was also the word "alone," but I think that makes no difference. I am bound by the authority of *Baker v. Bradley*. I think there is no reasonable distinction to be drawn between that case and the present. I must therefore follow it, and decide that there is a restraint upon anticipation, and the receipt of Mrs. Wood is the only discharge which the trustee can accept.

Solicitors for the plaintiff, *Robinson, Preston, and Stow*, agents for *Pilgrims and Preston*, Hinkley.

Solicitors for the defendants, *F. J. and G. J. Braikenridge*, agents for *Nevill and Atkins*, Tamworth; *Tippetts and Son*.

Friday, July 25.

(Before KAY, J.)

Re D'ESTAMPES; D'ESTAMPES v. HANKEY. (a)  
Marriage settlement — After-acquired property of wife—Covenant to settle.

*By a marriage settlement, dated in 1852, it was agreed and declared by and among the parties thereto, and the husband covenanted with the trustees of the settlement, that all such real and personal estates and effects as the wife should be, at the time of the marriage, or as she, or the husband in her right, should during the coverture become possessed of or entitled to, should, when and so far as the rights, interests, or powers of the husband and wife, or either of them, in or over the same would allow, be conveyed and assigned to the trustees of the settlement upon the trusts therein declared.*

*At the date of the marriage the wife was entitled to a vested reversion in certain personal property. After the death of the husband and wife the reversion fell in.*

*Held, that, although the clause as to settling after-acquired property contained no express covenant by the wife to do so, the act contemplated and intended to be done was an act as much to be done by the wife as by the husband, and conse-*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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quently the reversionary interest was bound by the settlement.

Butcher v. Butcher (14 Beav. 222) followed.

Reid v. Kenrick (25 L. T. Rep. O. S. 193; 1 Jur. N. S. 897) distinguished.

By a settlement, dated 9th June 1825, and made on the marriage of Louis Berthold Edgard D'Estampes with Mira Hawkins Trelawney, and a conveyance of even date therewith, certain real and personal property was settled upon the trusts in that settlement contained, being in effect to pay the income of the trust property to the wife, or as she should appoint, during her life, and after her decease the income of one moiety of the trust money was to be paid to her husband during his life, and subject thereto, and if there should be three children of the marriage, of whom one being a son should attain twenty-one, and the others being daughters should attain that age or marry, and no more than three such children, then one half of the trust property was to be in trust for that one of the three children who, being a son, should first or alone attain twenty-one, and the remaining half of the trust property was to be in trust for the two other of the three children, and to be divided between them in equal shares.

There were three children only of the marriage, one son and two daughters, all of whom attained vested interests; namely, Ludovic Vicomte D'Estampes, Cecile Charlotte Trelawney D'Estampes, and Isabelle Elizabeth Clare D'Estampes.

By a settlement, dated the 8th Sept. 1852, and made on the marriage of Cecile Charlotte Trelawney D'Estampes with William Hankey, after reciting that such marriage had been agreed upon, and was intended shortly to be solemnised, and that upon the treaty for such marriage, William Hankey agreed to transfer to Beaumont Hankey, Robert Dalzell, and Blake Alexander Hankey (the trustees of the settlement), 10,000*l.* Three per Cent. Consolidated Bank Annuities and 954*l.* 10*s.* 9*d.* Three-and-a-Quarter per Cent. Bank Annuities, to be held by them upon and for the trusts and purposes thereafter expressed and declared concerning the same, and also to enter into the several covenants on his part thereafter contained, it was witnessed as follows:

In further pursuance of the said recited proposal, and in consideration of the said intended marriage, it is hereby agreed and declared by and among the said parties hereto, and the said William Hankey, for himself, his heirs, executors, and administrators, doth hereby covenant with the said Beaumont Hankey, Robert Dalzell, and Blake Alexander Hankey, their executors, administrators, and assigns, that, if the said intended marriage shall take effect, all such real and personal estates and effects, and other property, of what nature, tenure, or kind soever, and wheresoever situate or arising, as the said Cecile Charlotte Trelawney D'Estampes shall be, at the time of the solemnisation of the said intended marriage, or as she, or the said William Hankey, in her right, shall during the said intended coverture become seized, possessed of, or entitled to, in any manner or by any means whatsoever, shall and may, when and so soon and so far as the rights, interests, or powers of the said William Hankey and Cecile Charlotte Trelawney D'Estampes, or either of them, in or over the same, will allow, and at the costs and charges of the trust estate, be conveyed, assigned, assured, or made over respectively to and vested in the trustees or trustee of these presents for the time being, according to the several natures thereof, and shall be held by them or him, and their or his heirs, executors, or administrators respectively, in trust to

sell . . . all such parts, and so much thereof, as shall not be in the state of investment hereby required, and to invest all the net moneys therefrom arising in or upon such stocks, funds, or securities as hereinafter mentioned and authorised, and such trustees or trustee shall and may stand possessed, as well of the net proceeds of the sale and conversion of such real and personal estates and other property, as of other the personal estate last aforesaid which shall not require to be sold or converted as aforesaid . . . upon trust to pay to or permit and suffer the said William Hankey or his assigns to receive the interest, dividends, or annual proceeds thereof for and during his natural life for his and their own use; and from and after his decease, in case the said Cecile Charlotte Trelawney D'Estampes shall survive him, upon trust to pay to or permit or suffer the said Cecile Charlotte Trelawney D'Estampes, or her assigns, to receive the same interest, dividends, or annual proceeds, during her natural life, for her and their own use; and from and after the decease of the survivor of the said William Hankey and Cecile Charlotte Trelawney D'Estampes, as to both the capital and annual produce thereof, upon and for and subject to the same trusts and purposes, powers, and provisions in all respects for or in favour of the child or children of the said intended marriage as are hereinbefore expressed and provided concerning the said 10,000*l.* Three per Cent. Consolidated Bank Annuities, and 954*l.* 10*s.* 9*d.* Three-and-a-Quarter per Cent. Bank Annuities hereby settled on the part of the said William Hankey, and the dividends or annual proceeds thereof; and if there shall be no child of the said intended marriage who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain such age or to be married, with such consent as aforesaid, then as to all the said last-mentioned trust moneys, stocks, funds, or securities . . . in trust for the survivor of them the said William Hankey and Cecile Charlotte Trelawney D'Estampes, and his or her executors, administrators, and assigns absolutely.

The settlement also contained a covenant by William Hankey that, if the intended marriage should take effect, and the wife should survive him, then his heirs, executors, and administrators should pay and make good to her yearly during her life such sum of money, if any, as should be required to make up the yearly income, to which she should from time to time be entitled under the trusts of the settlement, to the sum of 1000*l.*

No assignment of the wife's reversionary interest was ever made to the trustees of the settlement.

William Hankey died in 1872, leaving his wife him surviving.

There was issue of the marriage one child only, viz., Mira Charlotte Hankey, who married Joseph Francis Lescher in May 1875.

Mrs. Hankey died on the 2nd Jan. 1878, having by her will, dated the 12th Nov. 1877, devised and bequeathed all real and personal estates, of what kind or nature soever and wheresoever situate, or of or to which she was or might be entitled in reversion, subject to the life interest of her mother, under the settlement of 1825, as to one third part thereof to her brother, and as to the remaining two-third parts to her sister, the said shares to be charged with the payment of certain annuities.

Mira Hawkins Trelawney D'Estampes died on the 23rd Dec. 1883, leaving her husband her surviving, whereupon one moiety of the trust property comprised in the settlement of 1825 became divisible between the parties entitled thereto.

The question was raised as to who was entitled to Mrs. Hankey's one-fourth share of the trust estate: her executor, Eyre Crowe, on the one hand claiming to dispose of it in accordance with her will; or the trustees of her marriage settlement, who claimed to be entitled to it by virtue of the



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covenant to settle after-acquired property, they maintaining that the property was actually settled by that deed.

On the 6th May 1884 a summons was taken out by the trustees of the settlement of 1825, asking that the question might be determined.

The summons was adjourned into court, and now came on to be heard.

*B. F. Norton* for the applicants.

*Graham Hastings*, Q.C. and *Reginald Cust* for the trustees of the settlement of 1852.

*Robinson*, Q.C. and *Vernon Smith*, for the executor, referred to

*Ramsden v. Smith*, 2 Drew. 298;

*Daves v. Tredwell*, 45 L. T. Rep. N. S. 118; 18 Ch. Div. 380;

*Reid v. Kenrick*, 25 L. T. Rep. O. S. 193; 1 Jur. N. S. 897;

*Re Michell's Trusts*, 36 L. T. Rep. N. S. 915; 9 Ch. Div. 5.

[*KAY*, J. referred to *Campbell v. Bainbridge*, 19 L. T. Rep. N. S. 254; L. Rep. 6 Eq. 269; *Willoughby v. Middleton*, 6 L. T. Rep. N. S. 814; 2 J. & H. 344.]

*Hastings*, in reply, referred to

*Butcher v. Butcher*, 14 Beav. 222;

*Re Jackson's Will*, 41 L. T. Rep. N. S. 494; 13 Ch. Div. 189.

*KAY*, J.—I have to determine a question upon the meaning of the covenant, which is familiarly called the "covenant to settle after-acquired property" in a marriage settlement. It seems the marriage settlement was between a lady of full age and her intended husband and trustees, and by it the husband brought considerable property into settlement, and the settlement contained this covenant which I have to construe. The settlement begins with a very short recital. [His Lordship read it and continued:] There is nothing else which it is material to notice until we come to the witnessing part of the deed, which contains the covenant in question. [His Lordship read the covenant, and continued:] Now, at the date of this marriage, the intended wife was entitled to a vested reversion in certain personal property, in which, under her father's marriage settlement, her mother had a life interest. It has not been argued or suggested that that is not an interest within the words of this covenant. It is clearly an interest to which she became entitled at the date of the marriage, and therefore it is quite fair to read this covenant as though that reversionary interest had been mentioned in terms in the covenant. What happened was this: No assignment of that property to the trustees was ever made. The husband has died, and the wife also. The reversion fell in after the death of the husband, and now the question is whether that reversionary interest of the wife is bound by this settlement. First of all, without referring to any authority, if that was an agreement by the wife to make an assignment, *cadit quæstio*—it is quite clear. The argument, however, is that the agreement was not by the wife to make the assignment; that there is an express covenant by the husband, but no express covenant by the wife. That is true, but still there are these words: "And it is hereby agreed and declared by and among the said parties hereto, and the said William Hankey, for himself, his heirs, executors, and administrators, doth hereby covenant" with the said trustees.

Obviously the first part of that must have some effect given to it. I must read the words as meaning "it is hereby agreed and declared by the parties who are making the settlement"—not the trustees, but the persons who are making the settlement with the trustees. It is a covenant; it is by deed; the wife was of full age; she executed the deed; and I must read it *primâ facie* as being an agreement by the wife. Put, as I said, into this covenant an express description of her reversionary interest and it would read thus: "It is hereby agreed and declared by and among the parties hereto, and the said William Hankey, for himself, his heirs, executors, and administrators, doth hereby covenant with the trustees that the reversionary interest to which the said Cecile Charlotte Trelawney D'Estampes is now entitled under her father's settlement shall and may, when and so soon and so far as the rights, interest, or powers of the said William Hankey and Cecile Charlotte Trelawney D'Estampes, or either of them, in or over the same will allow, and at the costs and charges of the trust estate, be conveyed, assigned, assured, or made over respectively to and vested in the trustees." Nothing could be clearer, if that is the way it is to be read, than that the meaning of those words is not merely a covenant by the husband. It is not a covenant by him that he will convey, but it is a covenant by both of them according to their respective powers, as it is worded, that the property shall be conveyed. I take it that, if the property had been described, as I have supposed, in this covenant, the question would have scarcely been arguable that the covenant was not a covenant which would bind the wife to do everything which she could do, according to her powers, to vest this property in the trustees. Therefore, my opinion of the settlement is quite clear and strong that that is the meaning of it. Before I part with the settlement, I will add that it seems to me clear that there is no ambiguity here, and there is nothing for which it is necessary to refer back to the recitals. You cannot refer back to the recitals in construing a deed unless there is an ambiguity. But if there is any reason for saying there is ambiguity, I do not see how the recitals touch it. There is no recital whatever as to the covenant of the wife respecting her future-acquired property. There is a mere recital that the husband will enter into the covenants thereafter contained—a recital which is in the closing words of the recital concerning the settlement of his own property. That does not refer, except generally, to the settlement of the wife's property at all. Now, let me turn to the authorities to see if I am bound to come to a conclusion which would be in any way against my own opinion. The first case, in order of date, is *Butcher v. Butcher* (14 Beav. 222), which is a decision of Lord Romilly's. The words there are: "And it was by the indenture of settlement agreed and declared by and between the said parties thereto, and the said John Butler Hall, for himself, his heirs, executors, and administrators, did thereby covenant, promise, and agree to and with John Mason and Moses Hope (the trustees), their executors, administrators, and assigns, that in case any personal estate, effects, and property, should at any time or times thereafter during the said intended coverture come to or vest in Mrs. Hall, the petitioner, or in the said John Butler



Hall in her right, or by the rights of marriage, the same should be paid, assigned, and transferred by all proper parties without delay from time to time unto" the trustees. Under the will of her mother, who died after the date of the settlement, the wife did become entitled to a reversionary interest in a sum of consols. Her husband died before her, and she then presented a petition for the payment of the fund to her. The Master of the Rolls reserved his judgment, and he obtained copies of the marriage settlements in two cases which had been cited to him of *Thornton v. Bright* (2 My. & Cr. 254) and *Douglas v. Congreve* (1 Keen, 423), and he says: "I find that in both cases the covenants were exclusively those of the husband, and that they contained no covenant or agreement between the other parties. I am confirmed in the opinion I expressed in this case, that there is a covenant by all parties, including the wife, and that she is as much bound by it as her husband. The usual practice of conveyancers is to make the intended husband alone covenant, but then such a covenant is not prefaced by the words 'that it is agreed and declared by and between all the parties.'" That case, to my mind, is absolutely undistinguishable from the present case. The case on which the argument against this construction is mainly founded is the case of *Ramsden v. Smith* (2 Drew. 298), where the words were: "It is hereby further agreed and declared, and the said Frank Ramsden, for himself, &c., covenants with the trustees 'that if any real or personal estate whatsoever, amounting in each case to the value of 100*l.* or upwards, shall at any time or times during the said intended coverture descend, or devolve to, or vest in, the said Elizabeth Smith, or in any person or persons in trust for her, or to or in the said Frank Ramsden in her right, then and in that case, and as often as the same shall happen, he the said Frank Ramsden shall and will make, do and execute,' or concur with the wife in making and executing all proper conveyances, and so on. That case is as plain as can be. There, although there were the words, 'It is hereby further agreed and declared,' there was no covenant by the wife. The act to be done was an act to be done by the husband only. The words are, 'It is hereby further agreed and declared,' and the husband covenants that he will convey. How could that bind the wife? Supposing it had been simply, 'It is hereby agreed and declared that the husband shall convey'—how could that bind the wife to convey? That is not the thing to be done, and that is the whole reason of the judgment in that case, and the learned Vice-Chancellor (Kiudersley), whose judgments one always reads with the greatest possible respect and attention, distinguishes the case on that ground from *Butcher v. Butcher* (*ubi sup.*). Then there was another case cited, which seems to come rather nearer to this, viz., *Reid v. Kenrick* (25 L. T. Rep. O. S. 193; 1 Jur. N. S. 897), before Stuart, V.C. There the clause was: "It is hereby agreed and declared between the said parties hereto, and the said Thomas Whitehead Reid doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said John Kenrick and Robert Rickards, their executors and administrators, that if the said Mary Kenrick, or the said Thomas Whitehead Reid in right of the said Mary Kenrick, his intended wife, shall at or

upon the said intended marriage, or at any time thereafter, become interested in or entitled unto any sum or sums of money, or real or personal estate or effects which already hath or have been, or shall or may at any time or times thereafter be given or bequeathed, or which shall descend to the said Mary Kenrick, his intended wife, then the same shall be and remain, and he, the said Thomas Whitehead Reid, his heirs, executors, and administrators, shall and will permit and suffer the same and every part thereof to be and remain upon the same trusts, and to and for the same ends, intents, and purposes as are hereinbefore mentioned, expressed, and declared of and concerning the said trust moneys, stocks, and premises hereinbefore assigned; and for the better effecting this purpose, that he the said Thomas Whitehead Reid, his heirs, executors, and administrators, shall and will, at any time or times hereafter, upon request, pay, transfer, and deliver over, and join with the said Mary Kenrick, his intended wife, in assigning, conveying, and assuring" any such property. The Vice-Chancellor held that it was impossible in that case that the words of the covenant could extend to anybody but the husband, and he says he can find no words which bind the wife. Of course, it might have been argued, and no doubt was argued, that the former words, "the same shall be and remain," would be enough, coupled with the words "it is hereby agreed and declared," to make the covenant binding on the wife. Obviously the Vice-Chancellor thought these words were controlled by the subsequent words which compel the husband, and compel the husband only, to convey or assign the property. Then, before the same learned judge, came another case of *Campbell v. Bainbridge* (19 L. T. Rep. N. S. 254; L. Rep. 6 Eq. 269), where the words were: "And it is hereby further declared and agreed, and the said Sir J. N. R. Campbell, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with the said trustees, their heirs, executors, and administrators, and every of them, that in case, and at any time or times hereafter during the intended coverture between the said Sir J. N. R. Campbell and G. E. Bainbridge, any real, personal, or mixed estate and effects, amounting at any one time to the value of 500*l.*, shall come to or vest in the said G. E. Bainbridge, or the said Sir J. N. R. Campbell in her right, at law or in equity," then the same shall be conveyed and assigned without delay by the husband and the wife to the trustees. There, although there was no covenant by the wife except such as was contained in the words "it is hereby agreed," seeing the act was an act to be done by the wife as well as by the husband, the Vice-Chancellor held that the fund was bound, and that the wife was bound to join in assigning it. A similar point came before Lord Hatherley, when Vice-Chancellor, in *Willoughby v. Middleton* (6 L. T. Rep. N. S. 814; 2 J. & H. 344), where there was, first of all, a recital that it had been agreed that the intended husband should enter into the covenant therein-after on his part contained in regard to the settlement of the estate and effects to which the intended wife might thereafter, during her intended coverture, become entitled, and the words of the covenant itself were these: "It is hereby agreed and declared by and between all

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the said parties to these presents," and the intended husband "doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said" trustees that, in case the said intended wife, or intended husband in her right, "shall, at any time or times during the said intended coverture, become seised or possessed of, or in anywise entitled to, any real or personal estate or effects, or sum or sums of money whatsoever . . . then, and in any such case, such real and personal estate or effects shall be forthwith paid, conveyed, assigned, and assured, to and in such manner as that the same may become vested in the trustees." At the date of the settlement the wife was an infant, but the settlement contained a covenant by the wife that she would do everything in her power to give effect to the settlement. However, as a matter of construction, there can be no doubt that the learned judge, referring to *Ramsden v. Smith* (*ubi sup.*) and *Butcher v. Butcher* (*ubi sup.*), came clearly to the conclusion that, on a settlement worded like that before him, there was a covenant by the wife (which, of course, would be voidable, as she was an infant) which would have bound her and the fund completely if she had been of age at the time; and, as it was, she was put to her election on the ground, as I understand it, that the settlement was that the fund should be included as against the wife. It was not only as against the husband, but also as against the wife. That is referred to by Lord Selborne in the case of *Codrington v. Lindsay* (28 L. T. Rep. N. S. 177, 179; L. Rep. 8 Ch. App. 578, 591), where he examined a fuller statement of the settlement than is contained in the report of *Willoughby v. Middleton*. Then comes the only other authority to which I shall refer, viz., the recent case before the Court of Appeal of *Dawes v. Tredwell* (45 L. T. Rep. N. S. 118; 18 Ch. Div. 354). There the words were: "It is hereby agreed and declared between and by the parties to these presents, and the said William Henry Dawes doth for himself, his heirs, executors, and administrators, covenant with the parties hereto of the fourth part (the trustees), their executors, administrators, and assigns, that if at any time during the said intended coverture any real or personal estate (other than and except clothes, jewels, and personal chattels) shall descend and devolve upon and vest in the said Kate Tredwell, or the said William Henry Dawes in her right, to the amount in value of 200*l.* at any one time, for any estate or interest whatsoever, then and in such case, and as often as the same shall happen, he the said William Henry Dawes will immediately thereupon, at the costs and charges of the said trust estate, make, do, and execute," and so on. That case the late Master of the Rolls, with the concurrence of the other judges, thought quite undistinguishable from the case of *Ramsden v. Smith* to which I have referred. He said: "Now the rule is, that a recital does not control the operative part of a deed where the operative part is clear. The recital here, as is usually the case, is in general terms; the operative part is in definite terms. There is another rule, that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the subject-matter. If, therefore, the covenant is clear, it cannot be controlled or affected

by the recital. Now it appears to me that the covenant is quite clear. First of all, whose covenant is it? No doubt there are the words, 'In pursuance and further performance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared between and by the parties to these presents, and the said William Henry Dawes doth for himself, his heirs, executors, and administrators, covenant with the said parties hereto of the fourth part, &c.' But the rule is, that where you have such words as 'It is hereby agreed and declared between and by the parties to these presents' that someone will do an act or make a payment, and that someone is a party to the deed, it is a covenant by him with the others, and not a covenant by all of them. Anything more absurd than to hold that a covenant by all of them could not be imagined. Suppose you had these words: 'Provided always and it is hereby agreed and declared between and by the parties to these presents, that the said A. B. shall pay 5000*l.* to the said C. D. on the 6th Jan. next,' it would be absurd to say that this amounts to a covenant by C. D., the recipient of the money, that A. B. shall pay him, as well as a covenant by A. B. that he will pay him. If, therefore, we find that no act is to be done except by one of the parties, these words only amount to a covenant by that one party with the others." That is the test. I have no right to take from these words, "It is hereby agreed and declared by and among the parties," their reasonable force, unless the context compels me to do so. The context would compel me if the act to be done, as expressed upon the face of the covenant, was an act to be done by the intended husband only. There is no such thing expressed here. On the contrary, it is as plain as if it had been put into so many words, that the act contemplated and intended to be done is an act as much to be done by the wife as by the husband. The effect of holding the contrary would be this: If, at the date of the settlement, the wife had been entitled to 10,000*l.* standing in the names of her trustees, and the husband had never reduced that into possession, it would not be bound. Or, taking another case, supposing a sum of 10,000*l.* was held on trust for the wife, so that her husband could not reduce it into possession, it would not, according to the argument which has been addressed to me, be included in the settlement. In my opinion, there is no ground for such an argument. It is quite clear that this reversionary interest is bound by the settlement, and I decide accordingly. There will be a declaration that Mrs. Hankey's one-fourth share vests in the trustees of the settlement, and, subject to the payment of costs of all parties, it will be transferred to the trustees of the settlement.

Solicitors: *Edward Jackson Barron; Nicholl, Manisty, Nicholl, and Fletcher; Walker, Martineau, and Co.*

Thursday, July 31.

(Before KAY, J.)

Re TANNER. (a)

*Infant—Advancement—Contingent legacy.*

A testator, who died in 1883, by his will, dated in 1881, bequeathed to his trustees 5000*l.* New Three per Cent. Annuities upon trust to pay to A. the dividends thereof, the same to be applied by him for the maintenance and education of his two eldest children (a son and daughter), and the survivor of them, during their respective minorities; and subject thereto the testator directed that such sum of annuities should remain in trust for the children equally to be divided between them, or for the survivor of them living at the testator's decease, if either should die in his lifetime, for their respective absolute use, the share of the son, or the whole as the case might be, to be an interest vested absolutely in him if and when he should attain twenty-one, and the share of the daughter, or the whole as the case might be, to be an interest vested absolutely in her, for her separate use, if and when she should attain that age or be married, with benefit of survivorship between them, as to each share, in case they should be both living at the testator's death, until vested absolutely; and the testator declared that in case both of the children should die without such sum of annuities having vested absolutely, the same should fall into his residuary estate.

The trustees paid to A. the dividends of the sum of annuities, and the whole thereof, in addition to moneys of his own, were applied by him in the education and maintenance of the children, who were respectively about twenty and eighteen years of age. A. had also expended, out of his own pocket, sums amounting to nearly 200*l.* in connection with the advancement in life of the son, and in the purchase of necessaries for him. A's sole source of income was a pension of about 200*l.* He had a family of seven children to be educated and maintained, who were in addition to and younger than the children referred to in the will. Under these circumstances, A. asked, by summons, that it might be declared that the estate and interest of the son in the sum of annuities stood charged with the payment of the sums expended by A. for the advancement in life and benefit of the son.

Held, that the application must be refused, the evidence being insufficient and unsatisfactory; and that the proper course would have been to have applied for an order as in *Re Arbuckle* (14 L. T. Rep. N. S. 538; 2 Set. 4th edit. 726).

TRENHAM OLD, who died on the 29th Jan. 1883, by his will, dated the 1st Feb. 1881, bequeathed to his trustees therein named 5000*l.* Three per Cent. Annuities upon trust to pay to Alfred Henry Tanner the dividends and income thereof, from time to time as and when the same should become due and payable, the same to be applied by him for the maintenance and education of his two eldest children, Trenham Montagu Tanner and Emily Dorothea Tanner, and the survivor of them, during their respective minorities; and subject thereto the testator directed that such sum of annuities should remain in trust for T. M. Tanner and E. D. Tanner equally to be divided between them, or for the survivor of them living at the

testator's decease, if either should die in his lifetime, for their respective absolute use, the share of T. M. Tanner, or the whole, as the case might be, to be an interest vested absolutely in him if and when he should attain the age of twenty-one, and the share of E. D. Tanner, or the whole, as the case might be, to be an interest vested absolutely in her for her separate use if and when she should attain that age or be married, with benefit of survivorship between them, as to each share, in case they should be both living at the testator's death, until vested absolutely; and the testator declared that in case both of the children should die without such sum of annuities having vested absolutely in him or her, the same should fall into and go with his residuary estate as part thereof.

The trustees paid to A. H. Tanner the dividends and income of the sum of annuities, and the whole thereof, in addition to moneys of his own, were properly applied by him in the education and maintenance of the children named in the will. T. M. Tanner and E. D. Tanner were respectively about twenty and eighteen years of age.

On the 19th May 1884 an originating summons was taken out by A. H. Tanner, asking that it might be declared that the estate and interest of T. M. Tanner in the 5000*l.* Annuities stood charged with the payment to A. H. Tanner of the sums of 127*l.*, 30*l.*, and 40*l.*, making the aggregate sum of 197*l.*, being moneys expended by A. H. Tanner, or for which he was liable, for the advancement in life and benefit of T. M. Tanner, with interest on the sum of 197*l.* from the date of the summons at 5 per cent. per annum, and the premium on a policy of assurance for 200*l.* effected on the life of T. M. Tanner, and costs.

Kay, J., sitting in chambers, refused this application, and it was now renewed by motion in court.

The evidence in support of the application consisted of the affidavit of A. H. Tanner, who was formerly of the War Department, but late a captain in the West Kent Light Infantry. He deposed that he had a family of seven children to be educated and maintained, in addition to (and all of whom were younger than) T. M. Tanner and E. D. Tanner; that his only source of income was a pension of 213*l.* 6*s.* 8*d.* a year from the War Office; that he was the owner of a freehold house at Margate, recently valued at 700*l.*, upon which there was a mortgage of 500*l.* at 5 per cent. interest, but the house had been vacant since Sept. 1883, and the interest upon the mortgage had to be paid out of his pension; that he had no other property or source of income; and that, having regard to the number of his other children, he was unable to afford, out of his small income, to contribute any sum towards the advancement of T. M. Tanner.

A. H. Tanner also deposed that T. M. Tanner had entered the Mercantile Marine Service as an apprentice, and had been appointed to the barque *City of Adelaide*, and to enable him to enter such service, and to hold such appointment, it was necessary to pay a premium of 52*l.* 10*s.*, and to purchase an outfit of a special character, and to provide him with money for the purchase of other necessaries; that for these purposes A. H. Tanner had paid, at the request of T. M. Tanner, and over and above moneys received in respect of the estate, the sum of 127*l.* in connection with the advancement of T. M. Tanner, in addition to other

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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moneys; that T. M. Tanner had recently sailed for Australia, and previous to his departure it was essential that he should be provided with a renewal of his outfit and with money and other necessaries incident to his profession and in connection with his appointment to the said ship, but that A. H. Tanner having already and considerably more than expended the dividends and income of the 5000*l.* Annuities upon the maintenance and education of T. M. Tanner and E. D. Tanner, he was unable, out of his pension, to meet all the requirements in this respect; that he was able, however, to procure an advance of 30*l.* for the purpose of such necessaries from Elizabeth Fowler, and as surety for T. M. Tanner, A. H. Tanner joined him in a promissory note of hand dated April 25, 1884, payable on demand, to secure the sum of 30*l.* with interest thereon; and that he was advised that T. M. Tanner was legally liable either on such note of hand, or, if not, for the amount of the 30*l.* as the costs of necessaries.

A. H. Tanner further deposed that, in addition to the sum of 30*l.* and interest, and the sum of 127*l.*, he had been compelled to expend, out of his own pension, or had made himself liable for, 40*l.* for necessaries in connection with the advancement of T. M. Tanner and in respect of his appointment in the ship.

*Cordery* in support of the motion.—The court has jurisdiction on summons to charge an infant's property for sums expended for past maintenance or advancement:

*Re Howarth* 28 L. T. Rep. N. S. 55; L. Rep. 8 Ch. App. 415.

In *Re Lane* (17 Jur. O. S. 219), on a similar application, Romilly, M.R. directed moneys which had been expended by the father for the infant's advancement to be raised and paid to the father out of the capital of the infant's property. [KAY, J.—The infant's interest here is only contingent.] That is immaterial, since I only ask for a charge corresponding to the interest, and if the interest fails the charge will fail too. The evidence shows that the moneys were advanced for the benefit of the infant, and that the father was quite unable to make the advancements out of his own means.

KAY, J.—In this case a gentleman comes to the court and says that at some time—he does not say at what time—he paid 127*l.* for the outfit of one of his sons who was going to sea. He says that that son recently—I do not know whether he gives the date—went away to sea again, and that he renewed his outfit. He asks now that there shall be a charge made for the sum of about 200*l.* which he says is the amount he has advanced for this son. The only property the son is entitled to is a contingent interest under a will in a sum of 5000*l.* Annuities, to one moiety of which he will become entitled if he lives to attain the age of twenty-one years. He will not be entitled to anything if he dies before that age, so that his interest is at present merely contingent. I am asked on this kind of evidence to give this father a charge now on this contingent interest of his son. When the matter was before me in chambers I thought it would be an extremely improper thing to do to give a charge on this contingent interest on the state of evidence before me. I continue of the same opinion. It does not seem to me that the applicant has made out a proper case in any

view of the matter; but, if such a charge were to be made, there is a proper mode of doing it which has been long settled and adopted, and is in continual use. That mode is by effecting a policy of assurance, or providing other security, in accordance with *Re Arbuckle* (14 L. T. Rep. N. S. 538; 2 Set. 4th edit. p. 726). There the order was, as appears from *Re Colgan* (46 L. T. Rep. N. S. 154; 19 Ch. Div. 309, note), as follows: [His Lordship read the order and continued:] I was asked in chambers, and I am asked again to-day, on this insufficient and unsatisfactory evidence, to make at once a charge in favour of this father on the contingent interest of his son. The general Act of Parliament (Conv. Act 1881, 44 & 45 Vict. c. 41, s. 43) has given the court special power to direct maintenance out of the income of property to which infants are contingently entitled, although there is no power of maintenance in the will or other instrument under which the interest arises; but no Act of Parliament gives the court power to make an advancement out of property to which the infant is contingently entitled, which is exactly what I am asked to do here. There is no doubt whatever that, where an infant has a vested interest in remainder, the court has power, where it is for the benefit of the infant, to sanction a charge on that interest. Except the cases which have been referred to I know of no case in which the court has thought itself at liberty to do that where the infant was only contingently entitled. But this is not the way in which such a charge ought to be made. If made at all, it should be, as I have said, in the form of the order in *Re Arbuckle* (*ubi sup.*). I refuse the application now as I refused it in chambers.

Solicitors: *Mear and Fowler.*

March 27 and April 8.

(Before CHITTY, J.)

HARVEY v. HARVEY. (a)

*Sheriff—Execution of writ of attachment—Contempt in non-compliance with order for delivery up of deeds—Breaking open outer door.*

*In a case where a writ of attachment was issued against a party to an action for contempt of court in refusing to comply with an order for the delivery over of certain deeds and documents, the sheriff refused to break into his house to arrest him, alleging he was not entitled to do so in a civil action.*

*Held, that attachment for contempt was not a civil process, though the action was in respect of private rights, and that the sheriff was bound, if necessary, to break open the outer door in order to execute a writ of attachment.*

*Burdett v. Abbott* (14 East, 1) and *Re Freston* (49 L. T. Rep. N. S. 290; 11 Q. B. Div. 545) discussed.

By an order of the court, dated the 13th July 1883, it was ordered that the defendant Henry Gordon Harvey should, within seven days after the service of the order, deliver over to the plaintiff Thomas Harvey, or his solicitors, certain deeds and documents of title in pursuance of the judgment in the action, as directed by an award

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.

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made by virtue of a compromise. The defendant, who was duly served with the order, did not comply with it, and thereupon a motion was made asking for leave for the plaintiff to issue an attachment against the defendant for his contempt in not having complied with the order of the 13th July 1883.

On this motion, notice of which was duly served on the defendant, the Vacation judge, on the 15th Aug. 1883, made an order on which an attachment subsequently issued.

That order recited the order of the 13th July 1883, and ordered that the plaintiff should be at liberty to issue a writ of attachment against the defendant "for his contempt in not having complied with the said order."

The writ of attachment was issued on the 27th Aug. and was in the form adapted to the case, commanding the sheriff to attach the defendant so as to have him before the court to answer touching his contempt. The writ was indorsed with a short statement showing the nature of the contempt.

The defendant, who was a clergyman, resided at what was apparently his own house in Dover, in the county of Kent.

The place of his residence was known to the sheriff of Kent, whose officers had watched the house with a view to the defendant's arrest. The defendant was aware that the officers were endeavouring to arrest him, and in order to prevent his arrest he had barred his house and refused to allow any one to enter it. He had written a letter to one of the public newspapers (the original of which was produced), from the statements in which it appeared that he pretended to mistake the officers for thieves and tramps, and, with the object of deterring the officers from entering the house, he had intimated that he was armed with a revolver.

Under these circumstances the sheriff failed to arrest the defendant, alleging that he was not entitled to break into the house for the purpose of his arrest.

The plaintiff now moved that the sheriff of Kent might be committed to prison for contempt of court in neglecting to arrest the defendant as directed by the court.

*Bomer, Q.C. and Jemmett* for the applicant.—The main question on this motion is whether the sheriff of Kent is entitled to break open the outer door of the defendant's house, in order to execute the writ of attachment. It may be admitted that in order to execute a mere civil process the sheriff is not entitled to break open an outer door, but an attachment for contempt of court is not a civil process, although the action may be in respect of private rights. This is a case of setting the authority of the reigning sovereign at defiance, and in such case the sheriff is entitled to break open the outer door. It has been decided that the sheriff may not break into any man's house to take execution except under the king's authority or for a contempt:

*Bemayne's case*, Cro. Eliz. 908.

In serving process of contempt of court the outer door may be broken open:

*Briggs' case* 1 Roll. Rep. 336;

*Burdett v. Abbott*, 14 East, 1, 157;

*Anonymous*, 11 Ves. 170;

*Stockdale v. Hansard*, 11 A. & E. 253;

*Morgan v. Copeland*, 1 Jones Ex. Rep. 248, n.;

*Moons v. Rose*, L. Rep. 4 Q. B. 486;

*Daniell's Chancery Practice*, 6th edit. p. 887;

1 *Chitty's Archbold*, 13th edit. pp. 529, 606;

1 *Smith's Leading Cases*, 6th edit. p. 115;

*Churchill's Law of Sheriff*, 2nd edit. pp. 212, 213, 421, 475.

The disobedience to an order to deliver up documents, even where a solicitor has set up "privilege from arrest," has been held to be wilful contempt, and even in such a case *Lindley, L.J.* has held there was no privilege:

*Re W. A. Freston*, 49 L. T. Rep. N. S. p. 290; 11 Q. B. Div. 545.

*Cock* for the respondent.—There is no power given to a sheriff's officer to break open the outer door to execute a writ of attachment in a civil action, such as this is. An execution at the suit of an individual may not be carried into effect by breaking open the outer door:

*Cook's case*, Cro. Car. 537;

*Daniell's Chancery Practice*, 6th edit. p. 887;

1 *Chitty's Archbold*, 13 edit. p. 529;

*Burdett v. Abbott*, 14 East, 155.

It is no doubt different where the action is one in which the reigning sovereign is interested, or where the matter is of a criminal or disciplinary nature. The facts in the case of *Re W. A. Freston* (*ubi sup.*) were different to those in the present case. There is no direct authority upon this point, which is now raised for the first time.

*Romer* in reply.

*CHITTY, J.*—This is a motion to commit the sheriff of Kent for breach of duty in not arresting the defendant *Harvey* for a writ of attachment. In the course of the argument an objection was taken for the sheriff that the motion was wrong in form, because a proper notice to return the writ had not been previously given to the sheriff, pursuant to Order LII., r. 11. But towards the close of the argument this point was abandoned by the sheriff's counsel, who stated that he was desirous of obtaining a decision of the court upon the merits. The question in substance is whether the sheriff may lawfully break open the outer door of the defendant's house, after due notice, in order to effect his arrest. The facts are not in dispute. [His Lordship stated the facts, as set out above, and proceeded:] The argument for the sheriff is founded on the maxim that a man's house is his castle, and that the defendant has the privilege, or right, of keeping it barred, so as to prevent the sheriff from breaking in for the purpose of executing this writ; and it was argued that this privilege extends to all cases where the process is a civil process at the suit of a subject, including an attachment for contempt. The defendant has been adjudged by the court to be guilty of a wilful contempt for disobedience to an order of the court. The order was not an order to pay a debt or sum of money, but for delivery of deeds. Under the 5th and 20th rules of Order XLII. of the Rules of 1875, an order requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment. The 7th and 24th rules of Order XLII., of the existing rules are to the same effect. The order for attachment in the case before me clearly falls within these rules. The question must be decided according to the authorities. The leading authority on the subject is that of *Burdett v. Abbott* (14 East, 1), decided in the year 1811, in which

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the prior decisions were reviewed. In that case the Serjeant-at-Arms of the House of Commons had broken open the house of Sir Francis Burdett in execution of a warrant issued by the Speaker for his arrest and committal to the Tower. The warrant was issued pursuant to an order of the House based upon a resolution that Sir Francis Burdett had been guilty of breach of privilege by the publication of a libel. The Court of King's Bench decided that the Serjeant-at-Arms was justified in breaking into the house, founding its judgment on the right of the sheriff to break into a house in the execution of a writ to arrest for contempt issued under the authority of a court of law. Lord Ellenborough, in giving judgment, said (at p. 154): "Nothing is more certain than that, in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer door in order to execute such process. The law values the private repose and security of every man in his own house, which it considers as his castle, beyond the civil satisfaction of a creditor. But I have already observed that the distinction taken in argument stands upon an extra-judicial opinion in the Year-book of the 13 Edw. 4, 9. It is there stated to have been held that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the common weal to take them. And likewise Choke said: 'Where the king has an interest, the writ is a *non omittas propter aliquam libertatem*, &c. So the liberty of the party's house shall not hold where, &c., but otherwise it is for debt or trespass; the sheriff or other cannot break open his house to take him; for this is only the particular interest of the party. And this is cited in Fitz. Abr. Barre, pl. 110. Therefore, even in that case, the interest in the king in the execution of process seems only to be put in contradistinction to the interest of an individual in process sued out for his own particular benefit, inasmuch as the process of the Crown respects the public justice and public interest of the realm; but it is not put in contradistinction to process for contempt, in which the public at large have as much interest as in other criminal process.' Then he also said: 'If it rested upon that alone, I should not have thought it an authority, especially when I find an older case in stat. 18 Edw. 2, which is in Fitz. Execution, pl. 152, where it is said, Note, that the minister of the king coming to levy execution of damages recovered may break open the house fastened if he cannot have the key; for it is not lawful for any to disturb the execution of the king's minister,' &c. It is not, however, clear that this might not relate to a levy by the king's minister, as he is called, for the king's debt, and not to a levy by the king's officer for the debt of an individual subject. But in the latter sense the point was certainly ruled otherwise (and according to the dictum in the Year-book, 13 Edw. 4, 9) in the Year-book, 18 Edw. 4, 4, pl. 19, referred to in Bro. Abr. Execution, pl. 100; for there all the justices agreed that trespass lay against the sheriff for breaking the house to execute *feri facias*, for by the *feri facias* he may take the goods, but may not break the house. What is said by the judges in that case is confirmed by a still more important authority, a decision in a case of life and death. This was the case of *Cook* (Cro. Car. 537), who was indicted for murder in volun-

tarily killing a sheriff's officer while attempting to break into the house for the purpose of executing civil process against him; and this was held to be manslaughter, and not murder. Upon the authority, therefore, of that case I should say that it stands perfectly clear, that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door; and therefore it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal. That it falls under the latter description cannot, I think, be doubted. And without going into the other books cited by the Attorney-General to show that the privilege of keeping the outer door shut against process is confined to process in civil suits, it is sufficient to refer to *Semayne's case*, as reported in Cro. Eliz. 918, where it is said, 'that afterwards, in Michaelmas term (2 Jac. 1), this cause was argued again; and that Williams agreed with the opinion of Yelverton and Fennel in *omnibus*, and that the sheriff might not break any man's house to take execution unless in the Queen's case, or for a contempt,' &c. We understand by this a contempt of any of His Majesty's courts of justice; but it cannot be contended that the Houses of Legislature are less strongly armed in point of protection and remedy against contempts towards them than the Courts of Justice are. There is also *Briggs' case*, cited by the Attorney-General, which came on before Coke, L.C.J. and it is to be found in Roll. Rep. 336. It appears from the search which has been made in that case, that the sheriff was ruled for not returning an attachment against Briggs; and there it was held clearly that on process of contempt the outer door might be broken open. Therefore, upon authorities the most unquestionable, this point also has been settled, that where an injury to the public has been committed in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it, and then he goes on to say that it had been made out, among other things, 'that the mode of executing that warrant in this case, by breaking the house, after due notification and demand of admittance without effect, is justifiable upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way for the public good.' Then Bayley, J. in his judgment says (14 East, 162): "Then as to the breaking of the outer door to execute the warrant, I think that whoever reads *Semayne's case* (Cro. Eliz. 908) will see that Lord Coke was making the distinction between those cases in which the king, standing forward as prosecutor on behalf of the subject on public grounds, was party, and other cases in which the subjects were parties only in respect of their private rights; but he was not meddling with cases of contempt. Process of contempt, however, has been held in other cases to warrant the breaking of the outer door for the purpose of executing it. It was so in *Semayne's case*, and in *Briggs' case* (1 Roll. Rep. 336), and there is another case (Willes, 459) in which an attachment for a contempt was treated, not as a civil, but as a criminal process; and therefore it was held it might be executed on a Sunday, and



the reason assigned is, that a contempt of the court is a breach of the peace. Now, in every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right; and in all such cases I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within." This case is a direct authority for the proposition that the sheriff can break open outer doors when he is directed to arrest for a contempt of court. Contempt is treated as in the nature of a criminal proceeding, and the attachment is regarded as a punishment for an offence. No distinction is drawn or attempted to be drawn with regard to the nature of the contempt. Such a distinction was, however, drawn in the case of *Re Freston* (49 L. T. Rep. N. S. 290; 11 Q. B. Div. 545) recently before the Court of Appeal. There the question raised was one not with reference to the privilege of a man's house, but with reference to the analogous privilege of his person from arrest in the case of a solicitor on his way to or from a court of justice. The solicitor, in his character of a solicitor, had been ordered to deliver up certain documents, and to pay a sum of money and costs. He subsequently delivered the documents, but did not pay the money or the costs, and the attachment was issued against him for nonpayment. Before the attachment was issued he paid the money, but not the costs, and he was subsequently arrested on the attachment on his way from a police-court. It was held that the police-court was a court of justice, and the question was whether the privilege extended to arrests on attachments for contempt of court. The Queen's Bench Division had apparently held that all attachments for contempt of court are now the same, and have the same incidents. The present Master of the Rolls declined to assent to that proposition. In the course of his judgment (p. 553) he cited with approval the following passage from Lord Redesdale's judgment in *McWilliams' case* (1 Sch. & Lef. 169, 174): "There can be no doubt that the thing to be considered is, not the form of the process, but the cause of issuing it. If the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as, for instance, disobedience of some order of the court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature;" and the Master of the Rolls added: "This passage seems to me to show the distinction between the two kinds of attachment." Lindley, L.J., in his judgment (p. 556), after referring to the passage above quoted from Lord Redesdale's judgment, and to the fact that he had pointed out that all contempts are not the same, said: "They are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions, or to orders to deliver up documents—in these cases there is no privilege from arrest." He there puts expressly the case of disobedience to an order to deliver up documents, and states that an attachment for such a contempt was something more than merely civil process, and that therefore there was no privilege. Fry, L.J., in his judgment (p. 557) drew a similar distinction. He

says: "It is plain that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist." And then he says: "Further, if the attachment were mere process, Freston could obtain his discharge *ex debito justitiae* on showing that he had performed what was required by the master's order. I do not think that he could have done so in the present case; the court would have had a jurisdiction to exercise its discretion, and to punish him further." The case before me falls within the precise words of Lindley, L.J.'s judgment, and within the principles enunciated by the other members of the Court of Appeal. In treating of the various kinds of contempt, which were dealt with as contempt by the Court of Chancery, it must be borne in mind that great alterations have taken place in the law and practice in these matters in recent times. Formerly that court acted *in personam*, and process of contempt was the ordinary method of compelling a defendant to appear, and of enforcing the decrees and orders of the court, including decrees and orders for payment of money. The process of contempt to compel an appearance (which was bailable) has been abolished. By the statute 1 & 2 Vict. c. 110, s. 18, decrees and orders of the Court of Chancery for payment of money to a person had the effect of judgments at common law, and were accordingly enforceable by the ordinary writs of execution, such as a *fiery facias* and an *elegit*. By the Debtors Act 1869 arrest and imprisonment for making default in payment of a sum of money were abolished, except in certain specified cases. The exceptions in the 4th section, according to the case of *Marris v. Ingram* (41 L. T. Rep. N. S. 613; 13 Ch. Div. 338), appear generally to be cases of misconduct. The power reserved by the 5th section to commit for a limited period for nonpayment of certain judgment debts is made exercisable by order, and such order is to be executed in the same manner as a writ of *capias ad satisfaciendum*. The result is to restrict the suitor's right to an attachment for nonpayment of money to the cases excepted by the 4th section, as is evident from rule 4 of Order XLII. of the rules now in force. The distinction as to contempt for nonpayment of money was recognised as long ago as the year 1797, when the case of *Es parte Parker* (3 Ves. 554), referred to in Cooke's Bankruptcy Law, edition of 1799, p. 115, and cited in *McWilliams' case* (1 Sch. & Lef. 169), was decided. In that case it was held that an attachment for nonpayment of money was to be considered only as process to enforce payment of a debt and analogous to an execution. The rules under the Judicature Acts introduced an important alteration in regard to attachments. Formerly an attachment issued as ordinary civil process, as of course on the application of a party, as appears from the case of *Abud v. Riches* (2 Ch. Div. 528); but now under Order XLIV., r. 2, an attachment issues only after an order of the court made on notice to the person sought to be attached. By the first rule of the same order a writ of attachment has the same effect as a writ of attachment out of the Chancery Division has heretofore had; but the orders are silent as to the manner of executing the writ, whereas Order XLIII., r. 1, says that writs of *fiery facias* and *elegit* shall be executed in the same manner as heretofore. By Order XLII., rr. 7 and 24, already cited, attach-



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ment and committal are apparently placed on the same footing, and in a case of *Sprunt v. Pugh* (7 Ch. Div. 567), on a motion against a receiver, in which I myself was counsel, Jessel, M.R. stated his opinion, though it does not appear in the report, that the distinction between committal for contempt and attachment for contempt was practically abolished. The difference between them seems mainly to be in the more summary process of the former, and in the degree of inconvenience and expense attending it. The distinction between an order for committal and an attachment for contempt was formerly considered to be that committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done. Committal for contempt never took place except by order of the court. Interference with a ward of court, interfering with the due administration of justice, as by intimidating witnesses, or ill-treating a process-server, and breaches of an injunction, were and still are all alike treated as in the nature of offences punishable by committal. After the decision in *Burdett v. Abbott* (*ubi sup.*) and in *Re Freston* (*ubi sup.*) it is scarcely necessary to deal with the statements in the text-books. In Daniell's Practice (6 edit. p. 887) it is stated that the sheriff cannot break open doors in the execution of a writ of attachment. But the author is there dealing only with the mesne process to enforce appearance. The only authority he cites is Chitty's Archbold, but the passage referred to relates merely to the execution of an ordinary writ of execution, and when the author deals with disobedience to decrees he does not repeat the passage. I may add that on a writ of sequestration, which issued formerly by order, but which, under Order XLII., r. 4, is now (as appears from the case of *Sprunt v. Pugh*) issuable without order, the sequestrators can break open outer doors, as appears from the case of *Lowten v. Mayor of Colchester* (2 Mer. 395). So the sheriff may break open outer doors on writs of *capias uilagatum* and *habere facias possessionem*, both of which contain a *non omittas* clause. The result appears to be that in a merely civil process at the suit of a subject (such as the execution of a writ of *feri facias*) the sheriff cannot break open outer doors, but he can do so on a writ of attachment for a contempt of court of such a nature as has been committed in this case.

Solicitors for the plaintiff, *Hasties*, agent for *Hasties*, East Grinstead.

Solicitors for the defendant, *Palmer and Bull*.

Saturday, July 26.

(Before CHITTY, J.)

STRUGNELL v. STRUGNELL. (a)

Practice—Trustees—Sale out of court—Partition Act 1868 (31 & 32 Vict. c. 40), s. 8.

In a partition action the question arose whether the court had jurisdiction under sect. 8 of the Partition Act 1868 to authorise certain trustees to sell out of court, where such trustees had no power of sale by virtue of the instrument appointing them, and where there were parties interested who were not *sui juris*.

(a) Reported by A. COYSEARNE SIM, Esq., Barrister-at-Law.

Held, that in a case like the present, where the court would not allow a plaintiff to sell out of court, the trustees would not be allowed to do so, inasmuch as to direct trustees to sell where there was a power of sale was not equivalent to giving a power of sale to trustees; and that there must be a sale in the usual way under the court, as the expense would not be much greater, and the parties not *sui juris* were entitled to the protection of the court.

*Baker v. Baker* (Hall, V.C., May 10, 1879, unreported) followed.

In a partition action, property, consisting of a freehold house, had been devised by a testator in trust for six persons, of whom four were infants, and the testator had not, by his will, given the trustees any power of sale. The plaintiffs were one of the adults and the four infants beneficially interested.

The defendants were the two trustees of the will, one of whom was beneficially entitled to the remaining sixth share. The court at the hearing was asked by the parties (the infants appearing by their next friend) to make an order for a sale, and that the trustees might be at liberty to conduct the sale out of court, and hold the proceeds upon the trusts of the will. The order was made in this form, but the registrar refused to draw it up, on the grounds that, as there were infants interested, and there was no power of sale in the will, the court had no jurisdiction to direct the sale to be conducted out of court.

*E. Ford* in support of the order.—An order similar to the one made by the court in the present case was made under similar circumstances by Malins, V.C.:

*Chubb v. Pettipher*, Seton on Decrees, 4th edit., p. 1009.

[The Registrar called the attention of Chitty, J. to a case, which had not appeared in the Law Reports, where Hall, V.C. declined to follow the decision in *Chubb v. Pettipher* (*ubi sup.*): (*Baker v. Baker*, unreported, May 10, 1879.) Hall, V.C. had also held that where some of the parties beneficially interested were infants the court had no jurisdiction to direct a sale under the Settled Estates Act 1877 (40 & 41 Vict. c. 18), to be conducted out of court: (*Re Harvey's Settled Estates*, 21 Ch. Div. 123.)]

*Arkecoll* for the defendants.

CHITTY, J.—It appears to me that Hall, V.C. was perfectly right in holding that the court had no jurisdiction to direct a sale to be conducted out of court where infants were interested. To permit a sale to be conducted out of court would be tantamount to giving the trustees a power of sale, although the testator had given no such power. If there were no trustees, would the plaintiffs be allowed to sell out of court? Certainly not; and the reasons for not allowing a plaintiff so to sell apply to trustees without a power of sale. It is to be observed that a sale under the court does not much increase the expense, and it has been often stated by Jessel, M.R. that any additional expense was more than compensated for, and that it was worth while selling under the court, as a better price was usually obtained. The infants are entitled to the protection of the court, and, having regard to

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*Baker v. Baker*, I am of opinion that I have no power to order a sale out of court. The order for a sale by the court in the usual way must be made, and the proceeds paid into court.

Solicitors for the parties, *Gosling, Ingleby, and Boak*.

### House of Lords.

April 1, 3, and 4.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

THE JUSTICES OF MIDDLESEX v. THE QUEEN. (a)  
ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Prisons Act 1877 (40 & 41 Vict. c. 21)—Superannuation—Compensation—Apportionment—Superannuation Act 1859 (22 Vict. c. 26)—Special minute.*

*At the time of the coming into operation of the Prisons Act 1877 (40 & 41 Vict. c. 21) C. was the governor of a prison which had been under the control of the justices of M. as the local authority, but by the Act it was transferred to the Secretary of State for the Home Department. Shortly afterwards C., who was not incapacitated in any way, resigned his appointment in order to facilitate some improvements in the organisation of the prison, and the Commissioners of the Treasury granted him an annuity pursuant to sect. 36 of the Act, and apportioned it, in accordance with paragraph 4 of that section, between the county rates of M. and moneys to be provided by Parliament. No special minute within the meaning of sect. 7 of the Superannuation Act 1859 (22 Vict. c. 26) was made or laid before Parliament with reference to C. or his office.*

*Held (affirming the judgment of the court below), that, upon the true construction of the Act, the commissioners had power to apportion the annuity as they had done, and that the provisions of the Act of 1859 as to a special minute were directory only, and not a condition precedent to the granting of an annuity such as that in question.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Bowen L.JJ.), reported in 11 Q. B. Div. 656 and 49 L. T. Rep. N. S. 614, affirming a judgment of the Divisional Court (Field and Stephen, JJ.), reported in 48 L. T. Rep. N. S. 480, upon a special case.

The special case is set out in the reports in the court below.

The question arose upon a rule calling upon the justices of Middlesex to show cause why a writ of *mandamus* should not issue commanding them to pay to Col. Colvill the proportion of the pension awarded to him as the late governor of the Cold-bath Fields Prison, which had been charged upon the county rates under sect. 36 of the Prisons Act 1877 (40 & 41 Vict. c. 21).

A special case was afterwards stated for the opinion of the court, who held that the justices were liable, and their decision was affirmed as above mentioned.

This appeal was then brought by the justices.

*R. S. Wright and Hannen* appeared for the appellants.

The *Attorney-General* (Sir H. James, Q.C.), the *Solicitor-General* (Sir F. Herschell, Q.C.), and *Danckwerts*, for the Crown.

The argument turned entirely upon the wording of the sections of the Act, and appears sufficiently from the judgment of their Lordships.

At the conclusion of the arguments, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: Perhaps it may be convenient that your Lordships' attention should first be directed to the last point which has been raised under sect. 7 of the Act of 1859, because, if that point were tenable, it would be entirely fatal both to the grant of this pension to the officer now immediately concerned, and, so far as I can judge, to all the grants which have been made to any officers of the same class—a most serious consequence. If your Lordships were obliged to arrive at that result nobody can tell how far-reaching it might be in its operation and effect as to other cases also; and it would be certainly most unwillingly that your Lordships would adopt that view, not only bearing in mind those consequences, but also bearing this in mind, that though the point does not seem to have been lost sight of either when the special case was settled, or when the argument took place before the Court of Appeal, yet it was one which the justices are obviously, and for reasons creditable to themselves, most unwilling to press, which they rather endeavoured to use as putting a kind of compulsion upon the court to yield to their views upon a totally different point, and therefore it was rather a subsidiary portion of their argument than the main fundamental ground of it, and yet it is evident that if the objection is tenable it is a fundamental objection. Now, after consideration, and hearing what has been said on both sides, your Lordships I think are agreed that you may safely hold what is said here about the necessity of a special minute to be directory, and not in the nature of a condition precedent on which the validity of the grant must essentially depend, and I may add I think directory for reasons which do not apply to anything which has been actually granted in the present case, or in any case exactly like it, but would apply to any excess beyond that which in the present case has been granted. I cannot but refer upon this subject to what appears in the documents which are part of the special case as to the practice of the Treasury. This particular grant was announced not alone, but with other grants under the Prison Act of 1877, by a Treasury letter addressed to the Secretary of State on 2nd Aug. 1878, in which the Under-Secretary, or the proper officer of the Treasury, writes: "I am directed by the Lords Commissioners of Her Majesty's Treasury to acquaint you, for the information of the Secretary of State, that my Lords have been pleased to award to the prison officers mentioned over leaf, the pensions set against their respective names, apportioned between the rates out of which their salaries were payable immediately before the 1st April 1878, and moneys voted by Parliament, and I am to state that my Lords have directed the Paymaster-General to pay the portions of the pensions payable out of voted moneys from the dates specified in each case." And, some correspondence having followed with the county officers,

(a) Reported by C. R. MALDEN, Esq., Barrister-at-Law.

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there is a subsequent letter on the 9th Jan. 1879, from the Treasury to the Secretary of State, in which this is said: "The letter announcing the pension is the only evidence of the action of the board in granting it which has ever been given, or, as my Lords believe, has ever been asked for since pensions began to be granted. The Comptroller and Auditor-General, an authority not open to the charge of being too easily satisfied, accepts these Treasury letters as sufficient vouchers for all pensions payable out of public moneys. It is not immaterial to notice that when pensions of a special character are to be granted, the Legislature has provided that copies of the minutes granting such pensions shall be laid before Parliament. Such an express provision, coupled with uniform practice from the time of this statute (22 Vict. c. 26), not to mention the earlier statute of 1834 which it partly embodies, sufficiently proves that the intention of the Legislature was to leave the Treasury to settle the routine of procedure in other cases. The Prison Act of 1877 contains no directions to the Treasury as to the process of awarding pensions, beyond such as may be gathered from the word 'award' in sect. 36 read in connection with the Superannuation Act of 1859, to which my Lords are referred for certain purposes in that same section. My Lords consider that it would be a very serious thing for a public department to depart from its procedure in the transaction of its business after so long a sanction by usage, nor can they consent to do so. In addressing their awards to the Home Office and not to the late prison authorities, my Lords have believed themselves to be complying with the view of the Secretary of State;" and so on. That I think seems to show that the view upon which the Treasury have acted, and all officers have acted, upon which pensions have actually been paid and the payment passed through the Audit Office, has been this, that except when an exceptional reason has required information to be given to Parliament, the ordinary procedure should be followed in all respects, and that this ordinary procedure amounts to a grant and an award of a pension, and I cannot but think that, when we bear that in mind, as we properly may in connection with the language of the clause, we can see our way to distinguish between that which operates as a grant to the pensioner and that which ought to be done by the granting authority for the purpose of giving information to Parliament in certain cases. The clause begins with the words, "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office," and so forth, "such special annual allowance by way of compensation" as they consider proper. I need not follow the terms of the clause at this moment. Now we must consider the question as between the Treasury and the grantee. It would be a most serious thing if he should suffer for any neglect of those things which are to be done in any particular case by the Commissioners of the Treasury, of which he has no knowledge, for which he has no responsibility, and over which he can have no control. The correspondence which I have read shows distinctly that as a general rule the uniform practice of all the Government Departments is to consider the grants or the awards of pensions as made in the

manner in which they have been made in this particular case, and I cannot but ask the question in those cases in which the Treasury ought to make a special minute for the purpose of being laid before Parliament, assuming, as I suppose we must assume, that the words "special minute" have some technical meaning, and that such letters as those which I have read do not come within it—I would ask, I say, the question, how is it possible that the title of an officer to his pension can be held to depend upon a thing resting with the Commissioners of the Treasury alone, upon minutes to be made by them in their own proper minute-books in their own department, to which the Acts of Parliament do not give the pensioner, as far as I can see, any right of access, and which they do not even require to be communicated to the pensioner, because they only require that they shall be laid before Parliament? With those preliminary considerations we have to approach the words which relate to this special minute: "If the compensation shall exceed" a certain sum, I need not enter into the details, "such allowance shall be granted by special minute stating the special grounds for granting such allowance, which minute shall be laid before Parliament." It seems to me that the object of that is to account for the excess, and to account for it by reasons to be communicated to Parliament, and that in the nature of the case it is not intended to affect the validity of the grant, at all events as far as relates to that which is not in excess, and which, if granted alone, would not require any special minute at all. But I do not shrink from going further than that, nor from saying that if that which is granted might properly be granted, and if the grant or the award is made, as far as the officer is concerned, in the usual manner, and communicated to him in the usual manner, I do not think that the neglect of the Treasury, or of their proper officer, to record in their proper books a special minute, or their neglect to lay that special minute before Parliament, need be construed as nullifying what otherwise would be a valid grant and award of a pension made and announced to the pensioner in a form which is sufficient in all other cases. Therefore I think that your Lordships, without doing any real violence either to the spirit or to the language of the Act of Parliament, may dispose of that argument in a manner which certainly would avoid consequences in the last degree inconvenient, and I may add unjust, which otherwise might possibly result. That argument being out of the way, it appears to me that the rest of the case may be disposed of without much difficulty. I will first refer to the arguments raised upon the clauses of the Act of 1877. Clause 36 of that Act in its first paragraph speaks of a case of superannuation after a certain length of service, or after a certain age has been attained, but it also applies that very term "superannuation allowance" to other cases which do not come within the natural and proper idea of the mere word "superannuation," namely, cases of incapacity from "sickness, age, or infirmity, or injury received in the actual execution of duty," all of which are contingencies independent of mere age, independent of mere length of service, and therefore to which the term "superannuation allowance" can only be applied in a secondary and not strictly etymological sense. That of itself seems to me to give a considerable

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way towards destroying the foundation of the main argument advanced at your Lordships' bar, which was this, that the term "superannuation" or "superannuation allowance" is used throughout this and other Acts in a technical sense inapplicable to the case in which an officer is retired and put upon a pension for the reason that his office is abolished, or that his retirement will facilitate improvements in the organisation of the department. I confess I can see no reason in the nature of things, or in the original meaning of the term, why what is granted upon compulsory retirement, or upon a retirement with the consent of the officer because it is desirable to abolish his office or to reorganise his department, should not be called a superannuation allowance, as much as in a case in which he retires not because he has attained a certain age or has served for a certain number of years, but because he has suffered accidental injury in the service, or has fallen into sickness or other infirmity. Then the next section of clause 36 is this, and this is the section which I think is applicable to the present case: "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs." That in effect means that such a case as that with which we are now dealing should be dealt with under sect. 7 of the Superannuation Act 1859. Paragraph 3 of clause 36 in the Act of 1877 deals with "prison service," which is there defined, and we then come to the particular words upon which so much argument was offered to your Lordships: "Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act, out of rates which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament." Now it was insisted, as I understood the argument, that because that portion of the clause begins with the words "any annuity by way of superannuation allowance or gratuity granted under this section," the apportionment provided for would only be applicable to a case in which the retirement is after a certain length of service or a certain age, or from incapacity by reason of sickness, age, infirmity, or injury received in the execution of the office, as to which it is indeed

true that in the first paragraph of the section there are the words "an annuity by way of superannuation allowance, or a gratuity," the same words which we have in this fourth paragraph. The argument was, that those words occurring in both those places mean the same thing in both, and therefore that they mean in the second place neither more nor less than they mean in the first, and are inapplicable to any of the cases mentioned in the second paragraph of the section, and therefore to the case now before your Lordships' House. Now I cannot but think that that argument sticks to the letter and loses sight entirely of the spirit and substance of the clause. I am not sure whether I should have been able to say so if there had been nothing in the context of the paragraph itself to make the matter clear, because then undoubtedly there would have been force in the observation that the words "any annuity by way of superannuation allowance or gratuity" are the very same words which occur in the first paragraph of the section, and do not occur in the section elsewhere. I confess that that is the only argument which would have had much weight with me, even if the context had not made, as it does to my mind make, the matter perfectly clear, because, although it may be very true that on account of the natural and original meaning of the word "superannuation" there may be particular clauses in some of the Acts upon this subject which give a more limited meaning to that word than others, on the other hand there are some clauses which appear to me to justify, and even to require, a larger meaning, and I cannot but say that the mere fact that the Act of Parliament which is expressly here referred to as the Act by which the grant of a pension in such a case as that now before your Lordships is to be regulated is called "The Superannuation Act of 1859," and is referred to here by title, goes a very long way to repel the narrow and technical interpretation which the argument of the appellants seems to put upon that word "superannuation." The Legislature thought that all the cases of pensions provided for by the Act came within the sense of the word "superannuation," as conveniently and popularly used, sufficiently to make that short title a good general description of all that was done by the Act. But I need not dwell upon that point, because it seems to me that upon the very face of this clause the Legislature has manifested in the most unequivocal manner possible an intention to include in these words "any annuity by way of superannuation allowance or gratuity" the particular case provided for by the second paragraph with which your Lordships have now to deal. The words "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department," are applicable to that case, and inapplicable to any other, and the fact that that is not to be taken into account shows plainly that but for that exclusion it might have been taken into account in the view of the Legislature, and therefore those are cases within the purview and intent of this particular paragraph. That argument of the appellants therefore appears to me entirely to fail. I now come to the remaining arguments. The argument upon sect. 53 was this: that this particular officer would not have been entitled to such an allowance as that which has been awarded

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him under the Prison Act 1865. The section is: "Nothing in this Act contained shall entitle any existing officer of a prison to any superannuation or other allowance, the conditions of whose office would not have entitled him to superannuation or other allowance under the Prison Act 1865." But the conditions of such an office as this would have entitled this officer to a superannuation or other allowance under the Prison Act 1865; that is to say, would have entitled him in the only sense in which anybody could have been entitled; it would have been in the power of the proper authorities to give it to him. And the section does not say that he shall not be entitled to any other or greater superannuation allowance than he could have obtained under the Prison Act 1865, but that unless he is an officer holding such an office as would have brought him within the superannuation provisions of the Act of 1865, he shall not be brought within those provisions of the Act. But Col. Colvill was an officer who would have been within those provisions, and being such an officer he gets the full benefit of the provisions of this Act. That argument, therefore, entirely fails. Then we come to the argument upon the Act of 1859. Now I do not think it advisable without necessity to enter into a question upon which possibly some of your Lordships may not take the same view as I do. I have certainly formed a pretty clear and decided opinion as to what is the meaning of the hypothesis in sect. 7 of the Act of 1859 upon which the necessity for a special warrant depends, and I certainly do think that contemplates this case, that there is an amount ascertained which it is proposed to award by way of compensation to the officer under that section, which would exceed the amount to which he would be entitled calculated upon the principles of sect. 2 with ten years added to his actual period of service, and it does not appear to me I confess, at present, though I do not think it at all necessary for your Lordships to decide the question, that that can be expanded into anything more than ten years by anything which is done, or by any right or title derived by the officer under sect. 4. But that point your Lordships, in my opinion, need not determine, because it is admitted here as a matter of fact that nothing has been apportioned against the justices of the annuity granted to Col. Colvill excepting the amount to which he would be entitled in respect of length of service computed upon the principles of sect. 2 of the Act of 1859, and the additions made, if properly made, under sect. 4 of the same Act; and the question is whether those are matters which, according to the true interpretation of the Act of 1877, can properly be chargeable upon the county by way of apportionment. No question arises as to the amount computed upon the actual length of service under sect. 2; it is admitted, upon the assumption of there being a valid grant of pension at all, that it was apportionable as it has been apportioned against the county. But the question arises under sect. 4. Now sect. 4 of the Act of 1859 provided this, that by a general order or warrant the Treasury might direct that when any person now holding an office coming within any of certain classes should retire from the public service, a number of years not exceeding twenty, to be specified in the order or warrant, should, in computing the amount of super-

annuation, be added to the number of years during which he might actually have served. It is manifest that, in the cases to which that provision applies, the additional number of years is not added in respect of abolition of office, or to aid in the reorganisation of the department, but it is added in respect of a totally different class of considerations, namely, the character of the office and the requirement of peculiar qualifications in the person holding that office. Well, that being so, the next question is whether Col. Colvill's comes within that provision at all or not. In the year 1860, the year which immediately followed the passing of that Act, a general order or warrant was duly made by the Commissioners of the Treasury specifying certain classes of officers who were to have the benefit of this 4th section to the extent there mentioned. The governors of prisons are put in, as I understand, so as to entitle them on retirement to have five years added to their period of service on account of special qualifications within the meaning of that 4th section being required of them. It is said, and truly said, that in 1860 Col. Colvill was not a governor of any public prison, and was not a public servant or a public civil servant in the sense of these Acts or of that order. But when in 1877 he was brought within that category, and when under the Act of 1877 the Superannuation Act of 1859 was made applicable to the case of pensions on the retirement of such an officer, I apprehend that the Act of 1859 was made applicable in all its provisions, and, as he had then become and was a public servant in the civil service of the Crown within one of those categories which had been mentioned in the order or warrant of 1860, it appears to me quite impossible to say that sect. 2 of the Act of 1859 is to be applied to this case, and not sect. 4. That being so, the addition of five years is properly made to his actual period of service, and that is in respect of the peculiar character of his office and the qualifications required for it. That being so, when we come back to sect. 36 of the Act of 1877 it seems quite impossible to treat those five years as to be excluded under the words "without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department," because those five years were not added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, but were added for a totally different purpose, and nothing has been added which can come within that category. Nothing has been apportioned against the county except that portion of this gentleman's pension which represents his actual period of service, and that additional portion which represents the allowance of so many years, in addition to the years of actual service, not added on account of the abolition of his office or for facilitating the organisation of the department, but because he was the governor of a prison in a particular category. I really cannot agree with the argument that there is the smallest difficulty in apportioning over the number of years' service the total amount of compensation, though five years are added to the actual service. It is as easy to apportion a hypothetical addition of five years as it is to apportion the actual period of service. The thing to be apportioned is "any

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annuity by way of superannuation allowance or gratuity granted under this section." The annuity granted under this section, excluding that which it is proper to exclude, is the annuity which represents the actual period of service and the five years added. The manner of apportionment is far from difficult, because it is to be between the period of service before the commencement of this Act, an ascertained period, and the period of service after the commencement of this Act, an ascertained period. The numerical ratio is ascertained by a comparison of the two periods. The thing to be apportioned is the annuity actually granted by way of superannuation allowance, excluding, as in this case has been excluded, any number of years added for abolition of office or for facilitating the organisation of the department. Therefore, the principal argument failing, namely, that there has been no valid grant of an allowance, the result is that the order appealed from is right and ought to be affirmed, and I move your Lordships accordingly.

**LORD BLACKBURN.**—My Lords: I am of the same opinion. I think it is most convenient to begin by referring to the Superannuation Act of 1859, and considering the question as if the justices of Middlesex had nothing to do with this case, as if it was Col. Colvill who was setting up a claim which had somehow come before us to have a pension calculated upon the number of years that have been allowed to him, and that he was seeking that pension under the Superannuation Act of 1859, I will consider that first. Now, supposing that to be so, sect. 7 is the one under which he would claim: "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service," upon grounds which apply to Col. Colvill's case, "such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said commissioners to be a reasonable and just compensation for the loss of office." Now, stopping there, it is plain enough that the Lords of the Treasury are to be the sole judges, or the persons who are to judge what they think a reasonable and just compensation for the loss of office, and that they are to grant that by way of an annual allowance. But what follows immediately afterwards gives an indication of how the Legislature supposed they would consider it. "If the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by this Act," is the idea which then comes in. From that it is plain enough that the Legislature thought that the annuity which would be granted would be considered thus: if instead of the man being turned out of his office he had retired as being superannuated, he would have had an annuity in such and such a proportion to his salary. In Col. Colvill's case it would have been an annuity proportioned to twenty-three years of service, he having come within the class which is mentioned in sect. 4 as being a peculiar class to be dealt with in a peculiar manner. On that ground Col. Colvill would have been entitled to that unless what follows is made a condition precedent to the granting by the commissioners of the retiring allowance to him. It says that if it exceeds what it would be if ten years were added to the number

of years he had actually served, "such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament." I do not inquire into the question whether or no the particular case is brought within that class for which a special minute is required, whether ten years being added under this section, and five years being added under sect. 4, brings it within the term requiring a special minute. I do not inquire into that. I will assume for the purposes of the argument that it does require a special minute, though I am not prepared exactly to express an opinion either one way or the other upon the question, and that the Lords of the Treasury neglected their duty in not making a special minute stating the special grounds, and laying that minute before Parliament. I think that is not intended to be a condition precedent to the grant in favour of the officer of his retiring allowance, but as what is commonly called directory only. It is an enactment put in, if I may use plain English about it, in case there should be "jobs;" the Lords of the Treasury, when they do this unusual thing, shall state in a minute their special reasons for it, and shall lay that minute before Parliament, and have them criticised. There are many cases (I was not aware that this point was to be raised, and I have not looked into them, and I cannot refer to them), but there is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory, in the sense that they were not meant to be a condition precedent to a grant, or whatever it may be, but a condition subsequent, a condition as to which the responsible persons may be blameable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that. Therefore if this case had arisen under the Superannuation Act of 1859, and that Act alone, I think that Col. Colvill would have been entitled to a superannuation allowance which he has received, calculated upon a number of years including both the years of his service and also the ten years which have been added on account of the abolition of his office. Now let us see what the Legislature said in another Act of Parliament. Inasmuch as this was a prison office which had been transferred to the Government, and Col. Colvill retired from it after he had become a civil servant of the Government under the Prisons Act, we are referred to sect. 36 of the Act 40 & 41 Vict. c. 21. That section provides, first, that if any officer retires on account of ill-health, or for various other reasons which do not apply to the present case, a superannuation allowance shall be granted. Then, secondly, it says that "If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act 1859 with respect to a person retiring or removed from the public service in consequence of the abolition of his office," and so on. That brings us to this, that Col. Colvill having now retired, his case is to be dealt with according to the Act of 1859, sect. 7, to which I have already alluded, and that says he is to have such annual allowance as



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the Lords of the Treasury, considering all the circumstances, think it just to appoint to him. Then comes the provision on which the present question arises: "Any annuity by way of superannuation allowance or gratuity granted under this section" (that is sect. 36), which includes, I should have thought if there had been nothing else to the contrary, not only a superannuation allowance properly so called, but an allowance granted under the clause which has preceded it beginning with the words, "If any office in any prison is abolished." I should have thought that it would have come under that if it had stood alone, but that would have been a matter of some doubt and difficulty. It "shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity and allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid." In the present case the amount of salary was not altered, but owing to Col. Colvill having become a civil servant the amount of his superannuation allowance on which he would retire was altered, but that, I think, does not affect the present case. "But without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority." That is really where the question comes in. It was argued that in the previous Acts (and owing to the very clumsy mode in which the Act is drawn referring to a whole number of previous Acts, I suppose we ought to look at them all) "superannuation allowance" has acquired a technical meaning, or rather it was not said it had acquired a technical meaning, but that it had often been used in one sense, whereas "allowance by compensation" had been used in another, and therefore we ought to construe the earlier part of the section as confined to those which were strictly superannuation allowances. That argument would hardly, I think, have prevailed with me (although I see Lindley, L.J., if I understand him rightly, says in his judgment that it would have prevailed with him) if this subsequent part of the section had not come in, but when I find these words added, "But without taking into account any number of years added to the officer's service on account of abolition of office," it becomes quite clear to my mind that the Legislature meant to include in it not only the superannuation allowance which was mentioned in the first part of the paragraph, but also the allowance which by the wording of the second paragraph in sect. 36 is ordered to be given, dealing with him in the same way as he would have been dealt with under the Act of 1859 if he had been a civil servant under the Act of 1859, and in that case he is to have such annual allowance as the Lords of the Treasury have thought to be reasonable and just compensation, but if such annual allowance exceeds the amount which he would have been entitled to as superannuation, then, says the Act, that portion of the amount which is measured by the additional years granted on account of abolition of office shall be struck off, and the justices—or the people who pay the rates—shall not be called upon to pay that, but it shall be paid out of moneys voted by Parliament. Why should not that be just and

proper? I cannot see. It seems to me very reasonable and proper. If once you say the retirement is to be compensation for having served for a time under the ratepayers, and then after a time having served under the Crown and now being turned out, it seems to me most reasonable that the amount of compensation which is given should, as far as regards the service before, fall upon the ratepayers, and that the amount as far as regards the service since should fall upon the Crown who have enjoyed it since; and so far as regards that portion which is added in consequence of the abolition of the office subsequently to his becoming a servant of the Crown, that should fall on the Crown. That seems to me perfectly reasonable and just, and that is, I think, what the Legislature has said. There is one other point that was made. It was said that under sect. 4 of the Superannuation Act the amount which he was to have when he was retiring under superannuation was to depend on the number of years service, and if he was in a particular class within which the governors of prisons (the office which Col. Colvill held) were brought, he was not only to have that amount of superannuation which was allowed him for the years of service, but also five years more just as if he had served five years more. Such is the enactment there. That is an addition to his superannuation allowance, if it had come to be a superannuation allowance by adding years, but it is not an addition by adding years owing to the abolition of the office. It is the amount of the superannuation which he would have been entitled to upon his past service, he being in a particular class in which in that particular way the amount of superannuation has been increased, and therefore it seems to me to be clear enough, looking at it quite independently of the other question, that the five years added under sect. 4 is just like the twenty-three years actually served, not an addition on account of the abolition of the office, but an addition on account of qualification, and consequently it is not taken out of the 36th section, and it is not prevented from being part of what would fall on the justices or ratepayers of Middlesex. There were one or two smaller points about the nature of the appointments of Col. Colvill, some at earlier times, and some later, but I do not think they were much pressed, and certainly they seem to me to have been completely disposed of; therefore I will not waste time by going into them, I therefore quite agree that the decision below is correct, and that it should be affirmed.

LORD WATSON.—My Lords: I am of the same opinion in this case with that which has been already expressed by my noble and learned friends. I cannot say that the 36th section of the Prisons Act of 1877 appears to my mind to be of so extremely doubtful interpretation as it was regarded by the learned judges of the Court of Appeal. No doubt, if you look at the provisions of that Act, and also the provisions of the various Superannuation Acts that have been passed from time to time, there is a great deal of looseness in the way in which the terms "superannuation allowance" and "annuity by way of superannuation allowance" have been used. The expression, it may be said, as used has not in all cases been very accurate or very appropriate, but I do not think there can be any reasonable doubt



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as to what its signification is in the 4th paragraph of the 36th section of the Act of 1877. Turning to the provisions of the Superannuation Act of 1859, I think Mr. Wright's criticisms upon that term were so far justified. I think the term "superannuation allowance" is used to denote an allowance made in respect of service and calculated according to the period of service upon a higher and lower scale according as the case dealt with by the Commissioners of the Treasury is or is not within sect. 4 as well as within sect. 2 of the Act. On the other hand, where an office has been abolished, or an officer entitled to superannuation allowance has been retired in order to make way for the reorganisation of the public department to which he belongs, the consideration given to him in respect of his removal or retirement is termed in the statute an "allowance," and in other parts of it is dealt with as compensation. But whatever may be the meaning of the words as used in the Act of 1859, we are not, in this question between the Treasury and the justices, dealing with the provisions of that statute at all; we are under the 36th section of the Prisons Act. Now at the outset of that the words "an annuity by way of superannuation allowance" are undoubtedly applied to the ordinary case of the retirement of an officer, but including retirement not necessarily from age, but possibly from injuries received in the actual execution of his duty, or from sickness and so on. Then follows the provision in the 2nd paragraph of that section with regard to the case of retirement or removal such as is dealt with by the 7th section of the Act of 1859, and the provision made in the statute of 1877 is that cases of prison officers coming within that shall be dealt with in manner provided by the Superannuation Act of 1859; and if the enactment had ended there, there would have been some room for applying the argument which was addressed to us on behalf of the appellants, but when you come to the 4th section, which is really the material part of the clause in the present case, it is perfectly clear that the Legislature by the words "annuity by way of superannuation allowance or gratuity" intended to include not only allowances made in respect of service, and calculated by duration of service, but also allowances made in respect of abolition of office, and enforced retirement in order to make way for improvements in the organisation of officer's department, because it provides that such annuity when apportioned shall not be apportioned as a whole, but that, in separating the amounts that are to be severally borne by the Treasury on the one hand and the old prison authority on the other, you are to lay out of the account altogether that part of the allowance which has been added by reason of the abolition of office, or the compulsory retirement of the officer. Now that section not only points to the very wide meaning which the Legislature obviously intended to give to the words "annuity by way of compensation allowance," but to my mind it goes a step further. It indicates that it is to be the duty of the Treasury, in giving an allowance to one who has been an officer of the old prison authority, to give him the total sum upon different considerations; to give him first an allowance in respect of the term of service, if any, to which he is entitled, and then to add to it a special allowance under sect. 7, irrespective

of service, and on account solely of abolition of office, or compulsory retirement. If that were not given effect to by the Treasury it would be impossible, so far as I can see, to arrive at the just sum which is to be apportioned as between the Treasury and the justices. Now the provision of that 4th clause is, that the justices are to bear their due proportion according to the term of years for which he has served under them of so much of the annuity or allowance as is payable in respect of service before the commencement of this Act. That clearly refers to the allowance to which the officer might be entitled under sect. 2 of the Superannuation Act, because that in terms of sect. 2 is an allowance granted to a person who has served in an established capacity in the permanent civil service of the State. But what is added to that under sect. 4 of the Act of 1859 is quite as much an allowance in respect of service as the allowance given him under sect. 2. As I read it sect. 4 is not a separate and independent enactment giving a distinct allowance for distinct considerations, but an enactment intimately connected with sect. 2, giving an allowance upon an increased scale to officers in whose cases for the due performance of the duties of their office higher qualifications are required than in ordinary circumstances. The provision of sect. 4 is not that an addition shall be made, or a separate allowance given, but that, in computing the amount of superannuation allowance which may be granted to him under the foregoing section of the Act, there shall be added a certain number of years. The provision is made not for the purpose of giving a separate allowance, but for the purpose of giving an additional item leading to an increased total sum in computing the provision under sect. 2 of the statute. Well, that being so, I think it perfectly clear upon these considerations that sect. 36 of the Act makes it incumbent on the justices to bear that proportion of the retiring allowance of Col. Colvill which the judgment of the Court of Appeal lays upon them. But then a very ingenious argument was raised, and more firmly insisted upon at your Lordships' bar than it seems to have been before the Court of Appeal, to this effect, that under sect. 7 it is incumbent on the Treasury, when they give an allowance to an officer who has been removed or compulsorily retired for the purposes in that section stated, to proceed by means of a special minute, and that special minute must be laid before Parliament. I do not think it necessary for the purposes of this case to state what my own views are of the just construction of that section. That is a question which it does not appear to me that the justices, the appellants, are entitled or have any right to raise in the present case. The enactments with regard to a special minute appear to me to be plainly directory. I do not think it was intended that it should be a condition precedent of an arrangement made by the Treasury with respect to a retirement of a prison officer or any other civil servant whose case falls within the 7th section of the statute, that he should have the implied assent of Parliament from the presentation of such a minute, and, I suppose, its lying unchallenged on the table of either House of Parliament for a certain period. That was not the intention of the provision. It was

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not intended to take away from the Commissioners of the Treasury the power of making these arrangements. The provision is, that for the information of Parliament a minute containing the special reasons for granting a large allowance to a civil servant in such circumstances shall be laid upon the table, it being of course within the power of one of the Houses of Parliament to deal as they choose in committee of supply with the allowances that are made by the Treasury. Therefore, my Lords, it appears to me that we must here assume, and I do assume, that everything was rightly done, and certainly that it is not within the competency of the appellants to challenge what was done by the Treasury in making an addition, as I think the Act of 1877 directs them to do, to the salary of Col. Colvill in respect of his having been removed in order to provide for the better organisation of the department over which he so long presided. I therefore agree with your Lordships that the judgment under appeal ought to be affirmed.

Lord FITZGERALD.—My Lords: There was a real and substantial question in the case very much discussed in the court below, and at your Lordships' bar. That was whether the justices were liable to any portion whatsoever of this grant of an annuity to Col. Colvill under the terms of sect. 36 upon the true construction of them. But the argument of Mr. Wright, I think, was met very firmly in the Queen's Bench Division by Stephen, J., and also in the Court of Appeal, with some little shade of hesitation, by Lindley, L.J. Your Lordships have adopted the views of both the Divisional Court and the Court of Appeal, and in your Lordships' views I entirely concur. Now it is very agreeable, in also adopting your Lordships' solution of the various difficulties that the ingenuity of Mr. Wright has raised in his argument here, to be able to come to the conclusion that, assuming the construction of sect. 36 as adopted by your Lordships to be the true one, the justices are only called upon to pay exactly what they ought to pay, and not one farthing more. It is true that Col. Colvill did go through a short service after the Prison Act had come into operation, but no allowance whatever was made in respect of that. I think it was four months. They took the twenty-three years of actual service before the Act, and superadding the five years under sect. 4, that made the twenty-eight sixtieths which they allowed him for the service before the Act, and nothing more, and in the allocation of the entire annuity that is exactly what the justices are required to pay. Then the remaining portion as to which it is said the special minute required by sect. 7 ought to have been granted, the ten-sixtieths, does not fall upon the justices, they are not injured by it. They are not affected by that ten-sixtieths, and in my opinion they have no right whatever to inquire whether that ten-sixtieths was or was not justified by a special minute under sect. 7. On these grounds I entirely agree with your Lordships that the appeal should be dismissed.

*Order affirmed, and appeal dismissed. (a)*

Solicitors: for the appellants, *R. Nicholson*; for the respondent, *The Solicitor to the Treasury.*

(a) The attention of the House was called to the fact that in cases of this nature the Crown neither pays nor asks for costs.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Friday, June 20.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte BATH; Re PHILLIPS. (a)*

*Bankruptcy—Building society—Mortgage—Principal, premium, and interest payable by instalments—Claim to prove for premiums after date of bankruptcy.*

By certain indentures of mortgage the debtor, in consideration of advances made by a building society, covenanted to repay the amounts with a premium in each case, and interest, by a certain number of monthly instalments extending over a term of twelve years. Each mortgage contained a provision that every monthly payment should, when made, be applied, first, in or towards satisfaction of so much interest as should be due at the time of such repayment; secondly, in or towards payment of the premium; and lastly, towards payment of the principal. In case of three months' default the whole of the instalments immediately became payable. The debtor having made default and filed a petition for liquidation:

Held (affirming the decision of Bacon, C.J.), that the premiums were not in the nature of interest, and might all be proved for in the liquidation.

By an indenture of mortgage dated the 29th March 1879, and made between H. J. Phillips described as a member of the Liberator Permanent Benefit Building Society, of the one part, and the society of the other part; after reciting that the mortgagor, being the holder of forty shares in the society, had applied for the advance of 1200*l.* and had agreed and did thereby agree with the society "to pay a sum of 144*l.* as and by way of premium or commission for such advance, and to pay such sums of 1200*l.* and 144*l.* (making together the aggregate sum of 1344*l.*)," together with interest from the date of the deed "in respect thereof" at the rate of 5 per cent. per annum, on so much of the said sum of 1344*l.* as should from time to time remain unpaid, by monthly repayments of 12*l.* 12*s.* in each month throughout the term of twelve years, and further, that every monthly repayment should when made be applied as follows, viz., first, in or towards satisfaction of so much interest as should be due at the time of such repayment being made; secondly, in or towards payment of the premium of 144*l.* until the whole thereof should be discharged; and lastly, towards payment of the principal sum of 1200*l.* agreed to be advanced; and in case default should be made in any monthly payment, also a fine of 4*l.* per month per share for every month during which or during any part of which any such monthly repayment, or the fines accrued in respect of any default, should remain unpaid, such repayments and fines to be secured in manner thereafter appearing: It was witnessed that, in consideration of the sum of 1200*l.* to the mortgagor paid by the society, the mortgagor covenanted with the society that he would pay to the society on the first Monday in the month of April then next, and on every first Monday (except when such

(a) Reported by FRANK EVANS, Esq., Barrister at-Law.

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Monday should happen to be a statute holiday, and then on the following day) in each successive month during the said term of twelve years, the sum of 12*l.* 12*s.*, "being the monthly repayment agreed upon as aforesaid in respect of the said advance of 1200*l.* and the said premium of 144*l.* and interest as aforesaid; and also, in case default shall be made in any such monthly payment at the time and place aforesaid, then a fine of 4*d.* per share (in respect of each of the said forty shares) for every month during which or during any part of which any such monthly payment, or the fine or fines thereon, shall remain unpaid, and will also duly and punctually pay to the said society all subscriptions and other moneys which, according to the rules for the time being of the said society, shall from time to time become payable in respect of the said forty shares;" and also would duly observe and perform all the rules for the time being of the society which ought on the part of the mortgagor to be observed and performed. The deed also contained a proviso in the following words:

But it is hereby agreed and declared that in case the mortgagor, his executors, administrators, or assigns, shall at any time fail for three calendar months duly and punctually to pay all such repayments, subscriptions, and other moneys (if any) as shall by virtue of these presents be payable, or shall at any time fail in other respects to observe and perform the regulations of the said society or any covenants by the mortgagor, or provisions herein contained, and which respectively ought to be observed and performed by the mortgagor, his executors, administrators, or assigns, then and in any or either of such cases the whole of the repayments or other payments (if any) intended to be hereby secured shall immediately thereupon become due and payable.

The mortgage also contained powers for the society to enter upon, lease, or sell the mortgaged property on default in payment for three months, or on Phillips becoming bankrupt or compounding with his creditors, and a proviso that upon any exercise of such powers it should be lawful for the society to treat the whole of the repayments thereafter to become due as actually due and payable at the time of the exercise of such powers. And it was thereby further witnessed that, for the consideration aforesaid, the mortgagor demised unto the society certain hereditaments, to hold for the residue of a term of ninety-nine years (except the last three days thereof), subject to a proviso for vacating the deed if the mortgagor should pay to the society all the repayments, subscriptions, and other moneys (if any) which, according to the rules for the time being of the society, should from time to time become payable in respect of the forty shares, and should observe and perform all the same rules and the mortgagor's covenants, and the provisions in the deed contained.

There were two other mortgages in similar form between the same parties; one being dated the 8th Feb. 1879, and made to secure 700*l.*, with a premium of 84*l.* and interest at 5 per cent. per annum on so much of the said 784*l.* as should for the time being be unpaid, by monthly repayments of 7*l.* 7*s.* throughout the term of twelve years; and the other being dated the 8th March 1880, and made to secure 2100*l.* and a premium of 315*l.* with interest at 5 per cent. per annum by monthly repayments of 19*l.* 8*s.* for fifteen years. Phillips made default for more than three months, and afterwards filed a petition for liquidation. Reso-

lutions for liquidation were passed, and a trustee was appointed on the 16th Feb. 1881.

On the 30th May 1881 the society tendered a proof for 6367*l.* 16*s.* 9*d.* made up of 5891*l.* 19*s.* 7*d.* due from Phillips to the society for arrears of repayments and fines under covenants contained in the above-mentioned mortgages, and other sums.

The affidavit stated that the society estimated the value of their security at the sum of 4422*l.* 7*s.* 4*d.*, and that they were ready and willing to give up the security for the benefit of the creditors of Phillips on payment to them of that sum.

On the 23rd Nov. 1882 the Court of Appeal decided that the proof, as to so much of the sum claimed as represented interest payable subsequently to the filing of the liquidation petition, must be rejected: (48 L. T. Rep. N. S. 293; 22 Ch. Div. 450.) The society then claimed to prove for an amount made up of the principal sums, the total amount of the premiums, interest up to the date of the filing of the petition, and some other sums, and estimated the value of the security at the same amount as before.

The Registrar of the Edmonton County Court (in which the proceedings were pending) by his report only allowed 53*l.* 1*s.* as being provable in respect of premiums, instead of 543*l.* the total amount of premiums referred to in the deeds and claimed to be owing. He also found that 487*l.* 10*s.* 5*d.* had been paid to the society by the debtor, and that there had been an overpayment of interest to the amount of 10*l.* These sums with 4422*l.* 7*s.* 4*d.* the estimated value of the security amount to 4919*l.* 17*s.* 9*d.*, which the registrar considered as representing what the society had got out of the security. He also found the amount of their debt to be 4782*l.* 6*s.* 2*d.* only, and deducting this from the larger amount, reported that the society were indebted to the trustee in the sum of 137*l.* 11*s.* 7*d.*

This report was confirmed by the judge of the Edmonton County Court on the 10th Aug. 1883.

The society then appealed to Bacon, C.J., who on the 19th Nov. 1883 reversed the decision of the County Court judge, and held that the appellants were entitled, as against the trustee, to prove both for the principal sums and the total amount of the premiums, and also for interest on the aggregate sum of principal and premiums up to the filing of the petition.

The trustee appealed.

*Francis Turner* for the appellant.—This point was not discussed on the former appeal to this court, and is still open. The sums claimed to be provable as premiums are not in reality premiums but payments in the nature of interest. The society cannot deprive them of the character of interest by calling them premiums. The judge of the County Court found that the society had received in money or its value 137*l.* 11*s.* 7*d.* more than they ought to have received, and ordered them to pay that amount into court. The premium is an annual sum calculated at the rate of 6*s.* per share per 100*l.* He referred to

*Ex parte Bath; Re Phillips*, 48 L. T. Rep. N. S. 293; 22 Ch. Div. 450;

*Ex parte Robinson; Re Nicholson*, 6 L. T. Rep. N. S. 143; 31 L. J. 12, Bank.

*J. Chester* and *H. Reed* for the society.—The question as to interest was in effect decided by

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this court on the former appeal. The election made by the society was only for the purpose of proof. The sum which the registrar has reported as being owing from the society to the trustee could only be payable by the society in a redemption suit or some analogous proceeding, and in such a case all the interest would be payable to the society. But this is not interest, but a sum of principal payable as premium. A building society is a convenience for obtaining a loan repayable by periodical instalments. An ordinary mortgagee cannot be made to take his money in dribbles. A building society agrees to do so, but indemnifies itself by charging these premiums. The trustee rejected the proof simply on the ground of interest being payable. They cited

*Harvey v. Municipal Permanent Investment Society*, 51 L. T. Rep. N. S. 408; 26 Ch. Div. 273;  
*Wallingford v. Mutual Society*, 43 L. T. Rep. N. S. 258; 5 App. Cas. 685.

*Turner*, in reply, cited

*Ex parte Williams; Re Thompson*, 37 L. T. Rep. N. S. 764; 7 Ch. Div. 138.

BAGGALLAY, L.J.—Mr. Phillips, in the month of March 1879, was a member of the Liberator Building Society, and as such borrowed a sum of 1200*l.* from the society. The consideration for the loan so made to him was that he should make himself liable for a premium of 144*l.* in addition to the sum of 1200*l.* which he actually received; and he further agreed that he would pay 5 per cent. on the aggregate sum composed of the 1200*l.* advanced and the 144*l.* bonus, or commission or premium for the payment of the sum of money which he borrowed. Mr. Phillips having become bankrupt, a question arises on the society's proofs against his estate. The building society claim a certain sum for principal, for premium and interest. The matter came under the consideration of this court in 1882, on appeal from the decision of the Chief Judge, who had then reversed the decision of the County Court judge on this point. The trustee had rejected so much of the proof as comprised interest subsequent to the time of the presentation of the petition for liquidation, and the judge of the County Court took that view, and ordered an inquiry as to the amount due to the society for principal, premium, and interest, at 5 per cent. per annum on the three mortgages up to the date of filing the liquidation petition. As I said before, the Chief Judge reversed that decision of the County Court judge, and the matter then came before this court by way of appeal. What this court held was that, as to so much of the sum claimed as represented interest payable subsequently to the filing of the petition for liquidation, the proof must be rejected. The attention of the court was in no way directed to any possible distinction between principal and premium on the one hand, and interest and premium on the other hand. The simple question argued before the court, and decided by the court, was that there should be no proof in respect of so much of the claim for interest as arose in respect of the period subsequent to the time of the filing of the petition. Then the direction of the County Court judge was set up by virtue of which the accounts were to be taken. Those accounts have been taken, and now the question is raised whether, as regards so much of the money as is due to the society in respect of premium, it is in the nature of interest and not

in the nature of principal, and whether there ought to be a disallowance in respect of it similar to the general disallowance in respect of interest. That I take it is the sole question we have now to consider. It has been suggested that the decision of the court on the former occasion disposed of the question, inasmuch as it directed the computation of interest up to the time of the filing of the petition; but, without saying that the case decided that, it may be said it was not intended so to limit it, and the question has been opened and argued before us now. I think that, having regard to the terms of the mortgage deed, the premium was clearly made a portion of the principal money, and was not in any way to be regarded as a debt in respect of interest. It has been suggested by Mr. Turner that a proceeding of this kind is in the nature of a fraud on the Bankruptcy Act. I think, in answer to that, I may say that on the former occasion when it was before the Court of Appeal that court distinctly recognised three portions of which the claim of the building society was made up: that it was made up partly of the original principal, partly of what is called premium, and partly in respect of interest. If the court had thought that the charge in respect of premium was one which ought not to have been allowed, considering the case was in bankruptcy, the court would have taken cognisance of it then, and it would not have sent back the account to the County Court as it did. My opinion is, therefore, that the view of the applicant in this case is not well founded: but that, in point of form, the premium is in the nature of principal, and not in the nature of interest. It appears to me that the appeal altogether fails, and must be dismissed with costs. I also desire to add that I think it was a very unfortunate thing that the trustee did not direct attention to this matter when the case was before the court on the former occasion. If that had been done much expense might have been saved.

COTTON, L.J.—I am of the same opinion. This point was certainly not decided in favour of the appellant, and I am in some doubt whether it was not decided against him by the decision of this court on the previous occasion, because the order of this court on that occasion directed an account to be taken of what was due for principal and premium, without any limit, and interest at 5 per cent. down to the date of the petition. Now, although in proper circumstances, of course, the court would not hold creditors bound by that, there was certainly nothing in the previous decision in any way in favour of the appeal except on the principle, which is undoubted, that, as interest is not allowed, you cannot claim interest after the bankruptcy in computing what the amount of the debt is. The case which was cited lays down, though it was not necessary to decide it, that, under whatever guise arrear of interest is attempted to be made payable, the court, if it finds the real intention was to give interest in another form, will not allow a proof in respect of that interest beyond the limit assigned by the law of bankruptcy. Now, looking at this premium, entirely apart from the previous decision, can it be said to be interest? In my opinion it cannot. The debtor, who was a member of the society, applied for an advance of 1200*l.* which the society agreed to give him, and he agreed to pay 144*l.* as and by

way of commission for this advance. These societies lend money on very special terms, and they have a perfect right, and they always do, according to their rules, being guided by the circumstances as to the amount, require premiums for the advances they make. What is here done with that premium? It is added to the 1200*l.*, and the borrower agrees to pay the two sums of 1200*l.* and 144*l.*, making together the aggregate sum of 1344*l.*, together with interest from the date of the deed, in respect thereof; that is, on both sums he pays interest at the rate of 5 per cent. Then payment of the principal, interest, and premium is made by monthly repayments of 12*l.* 12*s.* When we look at the deed we find that 12*l.* 12*s.* was first for the interest, then to be in repayment by instalments of the premium, and then to go towards the principal money advanced. But there is nothing at all there showing that this is really interest under another guise. It is true the society agreed not to call in the loan except in the way provided for by their rules and by the deed, but of course the value of the advance of the sum which was to be advanced on mortgage depends, to the person applying, upon the time for which the society bind themselves not to require its repayment. Here a certain sum is covenanted to be repaid and becomes a debt at once, although the society agree not to require the repayment of it, as they agree not to require repayment of the money actually advanced except by certain instalments. But it was said that, if the mortgagor redeemed, there was a rule which held out a prospect that a certain rebate would be made of the premium. That is true, but it is a rebate which that very rule says is entirely within the discretion of those who are managing the society at the time, and not that which the member getting the advance could in any way require to be made, independently of their discretion. The society must decide what it is. What I have referred to shows, to my mind, that this is not a mere mass of interest under another form, but that it is something which was agreed to be paid as a principal sum due, by the person applying for a loan, to the society, as that which the advance was worth to him over and above any interest the society might require. In my opinion, therefore, the Chief Judge was right, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. On looking at the deed, and considering the working of these societies, I am quite satisfied that this sum for premium has nothing whatever to do with interest. It is a sum which is not altogether arbitrary, because it is calculated with reference to the duration of the loan, and so on. In this particular society it seems to be calculated at the rate of 6*s.* per share per annum—there is a method and a principle in it. The object of it is to fix a sum which it will be worth the while of the borrower to pay for the accommodation granted to him by the society, that accommodation being the payment off of the principal and interest by instalments. That is the substance of the thing. It is not a cloak for getting compound interest or anything of that kind; it is a charge made for the convenience afforded to the borrower. There is nothing illegal in it, nothing uncommon in it, nothing oppressive in it, and it appears to me it would be an entire mistake to call it interest in any sense or shape. If you look

at the deed, it is quite plain that it is not treated as interest, because the deed draws a distinction between the actual sum advanced of 1200*l.* and the premium and the interest. These it capitalises first, and charges interest on the aggregate sum, and then there is that clause about the application of the money which Mr. Turner has remarked upon; but we must look at the substance of the thing, and I am satisfied it is not interest at all. I think the Chief Judge was quite right.

*Appeal dismissed with costs.*

Solicitor for the appellant, H. Rumney.

Solicitor for the society, H. G. Wright.

July 21, 24, and 25.

(Before BAGGALLAY, COTTON, and LINDLEY, L.J.)

Re ILLIDGE; DAVIDSON v. ILLIDGE. (a)

*Administration — Judgment — Registration — Priority*—4 & 5 Will. & M. c. 20, s. 3—23 & 24 Vict. c. 38, s. 3—*Real estate—Assets—Simple contract debt—Heir-at-law—Retainer*—3 & 4 Will. 4, c. 104—32 & 33 Vict. c. 46.

*By sect. 3 of 4 & 5 Will. & M. c. 20, no judgment not duly docketed shall "affect any lands as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates."*

*Sect. 3 of 23 & 24 Vict. c. 38, after reciting the above section, and that by several later Acts judgments not registered shall not affect lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, and that the later Acts "do not expressly enact that judgments not docketed as thereby required shall not have preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates," in consequence whereof such heirs, &c., had lost the protection which they enjoyed under the first recited Act, it was enacted that no judgment not docketed under the Acts in force so as to bind "lands, &c., as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates."*

*Held, by Chitty, J. and the Court of Appeal (following the decision of Fry, J. in Van Ghelue v. Nerinckx, 47 L. T. Rep. N. S. 46; 21 Ch. Div. 189), that the effect of the section is not only to protect heirs, executors, or administrators from an action by a judgment creditor for a devastavit, in case they should pay simple contracts in priority to the judgment debt, but also to regulate the order of administration, and therefore that an unregistered judgment debt has no priority over a simple contract debt.*

*Held, also, by Chitty J. and the Court of Appeal, that the heir-at-law or devisee of real estate sold by the court under 3 & 4 Will. 4, c. 104, has no right of retainer, out of the proceeds of sale, or any rents in his hands, for a debt due to him on simple contract.*

*Semble, that the heir-at-law has a right of retainer in respect of debts by specialty, in which the heirs are bound, notwithstanding Hinde Palmer's Act (32 & 33 Vict. c. 46).*

(a) Reported by FRANK EVANS Esq., Barrister-at-Law.

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T. BAILEY ILLIDGE, by his will, dated in 1853, bequeathed all his real and personal estate to his mother, the defendant Mary Ann Illidge, and appointed her his executrix.

The testator died a bachelor on the 29th Dec. 1875, leaving his brother, the defendant John Betts Illidge, his heir-at-law.

Mary Ann Illidge proved the will, but disclaimed the devise of real estate, by a deed-poll dated the 26th June 1876, and thereupon the real estate devolved on J. B. Illidge as heir-at-law.

The plaintiffs, who were unpaid judgment creditors of the testator, commenced this action, on behalf of themselves and all other creditors, against the executrix and heir-at-law for the administration of the real and personal estate of the testator.

Judgment for administration was given on the 13th Jan. 1877, the real estate being ordered to be sold.

Mary Ann Illidge afterwards died, and administration *de bonis non* was granted to J. B. Illidge.

The whole of the testator's real estate was sold under the administration judgment, and the proceeds were paid into court to the credit of the action.

The estate was insufficient to pay all the creditors in full.

The testator, at the time of his death, was indebted to Mr. Henry Staples in the sum of 3423l. 18s., and further sums for interest and costs, under a judgment of the Court of Queen's Bench, dated the 15th Feb. 1871.

This judgment had been registered on the 19th July 1870, but was not re-registered till the 10th April 1883.

Staples claimed that the amount due in respect of his judgment should be paid in priority to other debts of the testator, and the question was reserved for the court on the further consideration of the action.

It appeared that J. B. Illidge had in the testator's lifetime paid out of his own moneys various sums on behalf of the testator, and he proved as a simple contract creditor against the estate for the sums so paid, with interest.

A considerable balance was found due from J. B. Illidge for rents received by him as the testator's heir-at-law, and he claimed to retain the balance against the testator's general indebtedness to him.

He also claimed a right of retainer, in respect of his simple contract debt, out of the proceeds of the real estate sold.

The further consideration of the action came on before Chitty, J. on the 9th and 16th July 1883.

*F. Cutler* for Staples.—This debt is entitled to priority over other debts of the testator. The question depends on the construction of sect. 3 of 23 & 24 Vict. c. 38, which is as follows: "And whereas by an Act passed in the 4th and 5th years of their late Majesties King William and Queen Mary, intituled 'An Act for the better discovery of judgments in the Courts of King's Bench, Common Pleas, and Exchequer in Westminster,' it is enacted that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors', tes-

tators', or intestates' estates; and whereas by several later Acts judgments are required to be registered with more particulars than were required by the said recited Acts; and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same Acts contained the dockets existing under the said first recited Act have been finally closed; and whereas the said several later Acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first recited Act, and it is expedient that the same should be restored; be it therefore declared and enacted that no judgment which has not already been, or which shall not hereafter be entered or docketed under the several Acts now in force, and which passed subsequently to the said Act of the 4th and 5th years of King William and Queen Mary, so as to bind lands, tenements, or hereditaments, as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates." The judgment was not registered at the date of the administration judgment, but the solicitor who represented the testator in the action by Staples now represents the executors. The statute was passed to relieve executors from the hardship which they were exposed to by being liable to a *devastavit* in case they paid simple contract creditors before judgment creditors, even where the judgments were unregistered. The question is whether the law has taken away from a judgment only registered after the death a priority which was incident to it by the common law, whether the judgment was registered or not. [*Crossley, Q.C.*, for the executors, referred to *Van Gheluwe v. Nerinckx* (47 L. T. Rep. N. S. 46; 21 Ch. Div. 189). CHITTY, J.—The statute is absolute, that no judgment not docketed shall have any preference against the administrator.] There is apparently no authority on the Act of William and Mary. The statute 1 & 2 Vict. c. 110, by an oversight, did not affect the case of an executor, but only affected the priority of a judgment as regarded the purchaser and mortgagee. That was supposed to be a slip, and in that state of the Statute-book it was held that the docket being closed by the statute 2 & 3 Vict. c. 11, the old law giving priority to a docketed judgment was inapplicable, and that the administrator was liable for a *devastavit* by paying a simple contract creditor before a judgment creditor, though without notice of the judgment:

*Fuller v. Redman*, 33 L. T. Rep. O. S. 313; 36 Beav. 600.

In consequence of that decision sect. 3 of 23 & 24 Vict. c. 38 was passed to remedy the grievance; but the section, although it says that no unregistered judgment shall have any preference against an executor, does not say that it shall have no



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preference as against a simple contract creditor, and words taking away that preference ought not to be interpolated. *Van Gheluwe v. Nerinckx* is not binding on another judge. [CHITTY, J.—Fry, J. seems to have followed *Re Turner; Turner v. Waller*, 9 L. T. Rep. N. S. 750.] His Lordship misread the section, and gave it an extended meaning which the words will not bear.

*Crossley, Q.C.* and *Northmore Lawrence*, for the plaintiffs, were not called upon.

CHITTY, J.—This point has been decided by Fry, J. in a carefully considered judgment in the recent case of *Van Gheluwe v. Nerinckx*. I am not sitting here to overrule Fry, J., and I shall simply follow his decision. But I see no reason for doubting the accuracy of that decision, and before the judgment of Fry, J. was read to me I was arriving at the same conclusion. I must therefore refuse this application.

*Romer, Q.C.* and *E. Cutler* in support of the claim of J. B. Illidge.—By the sale of the real estate under 3 & 4 Will. 4, c. 104, the real estate has become assets for payment of the testator's debts. The defendant, as heir-at-law, has therefore the right to retain his debt out of the proceeds. An heir-at-law ought to stand in the same position as a devisee or trustee. The trustee of real estate sold for payment of the debts of his testator is entitled to retain his own debts, although the money has been paid into court:

*Hall v. Macdonald*, 14 Sim. 1.

In one case the heir's right was recognised, though he apparently lost it by waiver:

*Player v. Foxhall*, 1 Russ. 538.

A devisee had the right of retainer out of the proceeds of both real and personal estate:

*Ferguson v. Gibson*, L. Rep. 14 Eq. 379.

This right of the devisee was held by him by analogy to the right of an executor:

*Loomes v. Stothard*, 1 S. & S. 458.

As the Act makes the heir liable to the executors for the proceeds, he is placed in the same position, as regards realty, as the executor is in with regard to personalty, and ought, therefore, to have the same right of retainer as the executor, and as he has under the statute 11 Geo. 4 & 1 Will. 4, c. 47, s. 6, by which the heir is liable for his ancestor's debts to the extent of the value of the descended real estate, though such real estate may have been sold before the action is brought.

*Crossley, Q.C.* and *Northmore Lawrence* for the plaintiffs.—The heir has no right of retainer. The effect of 3 & 4 Will. 4, c. 104, is the same as a devise of real estate for payment of debts, in which case it has been held that the devisee in trust has no right of retainer, whether he is executor or not:

*Bain v. Sadler*, 25 L. T. Rep. N. S. 202; L. Rep. 12 Eq. 570.

There Wickens, V.C. disapproved the decision, as reported, of Shadwell, V.C. in *Hall v. Macdonald*, and said: "The rule laid down by the statute 3 & 4 Will. 4, c. 104, is anomalous. I believe that it cannot be reconciled with the principles of equity; but it must be rested entirely upon decision and upon the words of the statute. The trustee of an estate devised for sale, and who is not an executor, has no right whatever analogous to that of an executor who is a creditor." The statute gives in words no right of retainer to the

heir or devisee, and it has never been decided that the heir, *quid* heir, has such a right. *Player v. Foxhall* was the case of an executor. *Ferguson v. Gibson* was the case of a specialty creditor. The statute makes the real estate assets in equity, and according to the rules of administration adopted by courts of equity. The executor's right of retainer was recognised by courts of equity because at common law he could not sue himself. The heir stands on a different footing. The heir can only come into equity to get the proceeds, and, as equity delights in equality, he is entitled to no priority in respect of the debts due to him.

*Romer* in reply.—Before the Act 32 & 33 Vict. c. 46 abolished the priority of specialty over simple contract debts of persons dying after the 1st Jan. 1870, the heir's right of retainer for his specialty debt was clear, and 3 & 4 Will. 4, c. 104, gave the heir the same right of retainer as regards simple contract debts as he had before in respect of specialty debts. The Act 32 & 33 Vict. c. 46, did not affect the right of retainer:

*Crowder v. Stewart*, 16 Ch. Div. 368.

It only equalised specialty and simple contract debts by repealing the proviso at the end of 3 & 4 Will. 4, c. 104.

CHITTY, J.—The real estate in this case has been sold under the jurisdiction conferred upon the court by the Act 3 & 4 Will. 4, c. 104, and the question is, whether the heir is entitled to retain a simple contract debt out of the proceeds of the sale. The Act, which is one of a series rendering real estates liable for the payment of debts of a deceased person, enacts in substance that where the real estate has not been charged or devised subject to the payment of debts, "the same"—that is the real estate—"shall be assets to be administered in courts of equity for the payment of just debts of such persons, as well debts due on simple contract as on specialty." That is the cardinal enactment in this statute, that the real estate shall be assets administered in courts of equity according to the principles adopted by courts of equity in the administration of assets. Now it is an acknowledged principle of equity that where there are equitable assets, all creditors are to be paid *pari passu* out of such assets without any recourse to legal priority whatever. The statute has not conferred any right of retainer upon the heir or devisee in express terms. The question is now raised whether, by implication or otherwise, the heir or devisee has not such a right of retainer. I should say that there is no distinction made, and none could be made, between the case of an heir and that of a devisee of the real estate. The right of retainer was a legal right—a right not conferred by courts of equity, but acknowledged by courts of equity, in the administration of dead men's estates where that right existed at common law. The grounds upon which the right originated at common law are obvious. I will take the case of an executor first. A creditor suing an executor sued only on his own behalf. The judgment at common law was of the simplest kind. If there were assets, the creditor recovered his own debt, and his own debt only; that was one ground. Another ground was, that the executor had a right, among creditors of an equal degree, to prefer one to another. The third ground was (and it was an obvious principle of law), that the executor could



not sue himself. It was obvious that, unless the executor could retain, the executor would at common law have lost his debt, and would have been compelled to pay a creditor of equal degree before himself, notwithstanding the right he had at common law. Those, I say, are the principles upon which the right of retainer in favour of the executor was established; and in the analogous case, where the heir was sued, or, after the Statute of Fraudulent Devises, of William and Mary, the devisee was sued, the same principles applied. The heir or devisee could only be sued on those contracts under seal where the heirs were bound; and, for the very same reasons I have mentioned, it was obvious that the right of retainer must have had effect given to it. But, in a court of equity, the right has only been acknowledged and not conferred, because decrees of courts of equity, in the administration of assets, were decrees not obtained solely for the benefit of the creditor suing for the benefit of all creditors. It appears to me that, on the true construction of the statute, when the Legislature enacted that real estate should be assets to be administered in courts of equity—thus creating a new liability on the part of the real estate with regard to simple contract debts—if it had been intended that any right of retainer should be conferred on the heir or devisee, such a right would have been expressed. But, subject to what I am about to mention, I find no such expression in the Act. I hold, therefore, on the principle that assets which are to be administered in courts of equity are to be administered in accordance with the doctrines of those courts, that there is no right of retainer out of real estate which is made assets by the statute. In the analogous case, where lands were charged by will with payment of debts, if the legal estate descended, the heir had no right of retainer; and, if the estate was devised subject to a charge of debts, the devisee had no right of retainer. As was pointed out by Wickens, V.C. in *Bain v. Sadler*, a trustee of an estate devised upon trust for sale, who is not an executor, has no right analogous to that of an executor. At the end of the Act 3 & 4 Will. 4, c. 104, there is a proviso "that in the administration of assets by courts of equity under and by virtue of this Act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." Since that Act came into operation (which is now about fifty years ago), I have never heard of the question having been raised as to the right of the heir or devisee to retain, except in the case of *Ferguson v. Gibson*, where it does appear that Wickens, V.C. allowed a retainer on the part of the devisee in respect of a specialty debt. It appears to me that that decision may be supported entirely by, and ought to be attributed solely to, the proviso at the end of the section which I have read, because that proviso retained the priority which creditors by specialty, in which the heirs were bound, had. It appears to me that the Vice-Chancellor was warranted in saying that the right of retainer in respect of a specialty debt in which the heirs were bound was preserved as being part of the law which admitted the preference or priority of specialty debts of that

nature. That proviso is now repealed by the Act which came into operation in 1870. It appears to me that, with the repeal of the proviso, there has also fallen to the ground the right which, to my mind, was preserved by the proviso, and that that right is gone. The claim of the heir in this case is not in respect of a specialty debt, but merely of a simple contract debt. With the exception of *Ferguson v. Gibson*, as I have said, though more than forty years have elapsed, this point has never been raised in any case which has been reported. It has never been raised because, I believe, there has been a common consent on the part of the profession that such a right did not exist. However that may be, I hold that, upon the true construction of this statute, neither the heir nor the devisee has any right to priority or any right of retainer in respect of a simple contract debt, or indeed, at the present time, of a specialty debt. I have nothing to do with a judgment debt. Mr. Romer has argued another point, that, if the heir was not entitled to a right of retainer as against the proceeds of sale of the real estate, at any rate he was entitled to a right of retainer as against the rents; but, as I have already pointed out, the statute makes real estate assets to be administered in courts of equity for payment of debts as from the death of the testator, and the rents are but part of the real estate. The statute does not enact that merely the proceeds of sale of real estate, but that the whole of the real estate, shall be assets. I hold, therefore, in this case, that the heir has no right of retainer in respect of his simple contract debt, either out of the proceeds of the real estate or out of the rents.

Staples and J. B. Illidge appealed.

*Romer, Q.C. and E. Cutler for Staples.*—Sect. 3 of 23 & 24 Vict. c. 38 was only intended to give protection to heirs, executors, or administrators in administering estates. It does not purport to enact that unregistered judgment debts are to be deprived of any priority which they formerly had. The authorities which were binding on Chitty, J. are not binding on this court. They referred to

*Van Gheluve v. Nerinckx*, 47 L. T. Rep. N. S. 46; 21 Ch. Div. 189;  
*Steel v. Borker*, 1 B. & P. 309;  
*Landon v. Ferguson*, 3 Russ. 349;  
*Fuller v. Redman*, 33 L. T. Rep. O. S. 313; 26 Beav. 600;  
*Re Turner*; *Turner v. Waller*, 9 L. T. Rep. N. S. 750;  
*Kemp v. Waddingham*, 13 L. T. Rep. N. S. 709; L. Rep. 1 Q. B. 355.

*Crossley, Q.C. and Northmore Lawrence*, for the plaintiffs, were not called on.

BAGGALLAY, L.J.—We are asked to put a particular construction upon an Act of Parliament passed upwards of twenty years ago, which has apparently received both in courts of equity and courts of common law one uniform construction. No doubt that construction has been applied to a variety of cases, but I adopt the language of Fry, L.J. in the case of *Van Gheluve v. Nerinckx*, where, after quoting the words of the Act, he says: "Those words, to my mind, convey a very simple meaning, viz., that the person who has the undocketed judgment shall come in *pari passu* with the simple contract creditors, and shall not have any priority or preference in the administra-

tion of the estate, shall not have a better right than the ordinary simple contract creditors." That is the construction which has been all along put upon the section, and I see no reason for departing from it.

COTTON, L.J.—I think that that is the true construction of the Act, and there has been one uniformity of decision to that effect, which one would be slow to depart from even if one doubted it. The whole gist of the argument is as to its not being intended to apply to judgment creditors who have not complied with certain regulations of the law. It does deprive them of some rights, because it says they shall have no preference as against purchasers, or mortgagees, or creditors, and it also says, "so as not to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors." Then it goes on to say that in the administration of the estate they shall not have any preference. It is true it is said against heirs, or executors, or administrators. But how? In their administration, I understand: when the heir is administering the real estate; or the executors or administrators are administering that which is vested in them—the personal estate, then those persons who do not comply with the law are not to have a preference.

LINDLEY, L.J.—I am of the same opinion. These words have been construed in the same way ever since the Act of the 4 & 5 Will. & M. c. 20, and down to the time of *Van Gheluwe v. Nerinckx* the decisions upon it have not altered.

Romer, Q.C. and E. Cutler, for the appellant J. B. Illidge, repeated the arguments in the court below.

Crossley, Q.C. and Northmore Lawrence, for the plaintiffs, were stopped.

COTTON, L.J.—This is an appeal from the decision of Chitty, J. against the claim of the heir-at-law, who was a simple contract creditor of the deceased, to retain his debt out of the proceeds of the real estate which he took as heir-at-law, as against the other creditors. Now, the question really is, What is the effect of the Act 3 & 4 Will. 4, c. 104? Previously to that Act a specialty creditor, when the heirs were bound by the deed, had a right of action as against the heir and as against the legatee, but the right of action as against the devisee, as to the assets, then extended no further. Then, when the real estate was devised in trust to pay debts, it became equitable assets to be distributed rateably amongst all the creditors; and what we have to consider is the real meaning of the Act which I have referred to, which is as follows: "Whereas it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this Act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of

such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity, under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands." Now, Chitty, J. has held that that excludes the claim to retainer, and one must really consider on what the claim was based. It was a right as against legal assets, and for this reason: When the creditor was also executor he could not sue himself. Any other creditor, by suing the executor, might get priority by judgment obtained, and the executor, not being able to sue himself, was allowed, as against other creditors, to retain. But now, in the case which we have before us, what is the position of the simple contract creditor? A simple contract creditor, except under this statute, can have no right at all to an action as against the heir, or as against the devisee. That, I must observe, is a simple contract creditor simply under the statute, and, though this statute does say that the simple contract creditor shall have the same right of action as against the heir or devisee as the creditors by specialty would have had, yet there is the saving that the real estate is then part of the assets administered by the court of equity, and being administered in courts of equity it is to be administered as equitable assets. By having a judgment or decree under this statute the simple contract creditor would not get a judgment which would give him a priority; he would get a judgment, for the benefit of all the creditors, for the administration, as equitable assets, of real estate, by virtue of the action which he could bring under the statute. That being so, the very ground upon which retainer is allowed is gone as regards the simple contract creditor. He cannot get a judgment giving him priority; he can only get a judgment as against the heir-at-law, which will put the court in a position for administering the real estate which is in the heir-at-law, for the benefit of all the creditors equally, and, that being so, the very foundation of the right of retainer of the heir-at-law when he was a specialty creditor, or the ground of allowing retainer to an executor out of the personal estate, is gone. That retainer was given in order that he might not be under a disadvantage by not being able to sue himself, since, if he could not retain, other creditors might have obtained priority by suing him. Now, as I understand the contention on one side, it has been considered that Mr. Hinde Palmer's Act made a difference. In my opinion, that Act makes no difference. It merely says that simple contract creditors and specialty creditors are to be paid rateably; but, in my opinion (it is not necessary to decide it here, and therefore one does not express a final opinion upon it), there is nothing in this Act which will

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prevent a creditor by specialty, where the heirs are bound, if he be the heir-at-law, from retaining. The right of action given to a specialty creditor, when the heir is bound, is not taken away, and, although, as regards the simple contract creditor, he has no right at all as against the real estate except that which the statute gives him, although it is not necessary to express an opinion upon it at present, in my opinion there is nothing here which would prevent the heir-at-law, if a creditor by specialty in which the heirs were bound, from retaining, notwithstanding this Act of Parliament. That question really does not arise at the present moment. Now the case which I felt some little difficulty about upon that point was the case of *Ferguson v. Gibson* before Wickens, V.C. which has been referred to in argument. But, in my opinion, that decision was quite right. There an estate was devised to a mother for life and to the daughter after her death, and the Vice-Chancellor, on the case before him, undoubtedly considered that the right of retainer existed as regarded both the real and the personal estate, and he determined that the widow, who was a simple contract creditor only, not having paid off the debt for which she was bound, which was a debt she was bound as surety for—if she paid it off she would have had a right to the benefit of the specialty in which the heirs were bound—could only be treated as a simple contract creditor. The Vice-Chancellor decided that there was no right of retainer in her case, but he decided that her daughter, who was entitled as devisee in remainder (not a devisee in trust for sale, but a devisee for her own benefit), and was a creditor by specialty in which the heirs were bound, was entitled to retain her debt. That, in my opinion, was quite right upon the ground I have mentioned, that in the case of a specialty creditor where the heirs are bound, the common law right of action against the heir, by which priority is gained, is not taken away if the creditor likes to enforce it, whereas the judgment which the simple contract creditor can recover is not for his own benefit as against the real estate, but for the benefit of himself and all other creditors, treating it as equitable assets. Mr. Hinde Palmer's Act takes away the priority of creditors by specialty, but I do not see anything in it to take away the right which creditors by specialty in which the heirs were bound had to bring a common law action against the heir, nor to take away the consequent right of retainer by the heir-at-law. But I agree with Chitty, J., that an heir-at-law who is only a simple contract creditor has no right of retainer against the proceeds of real estate.

BAGGALLAY, L.J.—I agree entirely with the opinion expressed by Cotton, L.J. in this case. The case is perfectly clear. The only doubt thrown upon it is from the report of the case of *Ferguson v. Gibson*. That has been fully explained by Cotton, L.J., and I think the remarks he has made show that that decision in no way interferes with the decision in the present case.

LINDLEY, L.J.—I also agree in the opinion that has been expressed. It is only necessary for me to say a few words. The question in this case really turns upon the true meaning of the expression in the statute 3 & 4 Will. 4, c. 104, "the same shall be assets to be administered in courts of

equity." In order to ascertain what that means we must look a little at the law as it stood at the time of the passing of the Act. The heir could be sued for debts by specialty in which the heir was bound, and was liable to the extent of the assets. His liability would be the legal liability, and to the extent I have mentioned the assets are legal assets. The devisee under the Act 3 & 4 Will. & M. c. 14, and ultimately under the statute which repealed it, the 11 Geo. 4 & 1 Will. 4, c. 47, stood precisely in the same position. The specialty creditor could bring an action at law, under the statute, against the devisee, and recover up to the value of the assets, and those assets were called legal assets because they could be got at by an action at law. Now the real estate was not assets at law in any sense for the purpose of paying the simple contract creditor. This statute, if you look at it, will be found to be a mere repetition in words of the 9th section of the Act 11 Geo. 4 & 1 Will. 4, c. 47, which was confined to traders, but the Act 3 & 4 Will. 4, c. 104, is the re-enactment of the same section omitting the word "traders." How was the real estate to be got at by the simple contract creditor? There is no question about its being legal assets. But the simple contract creditor could not get it at law before the statute, neither could he bring an action at law under the statute. It was not made legal assets in the sense in which that expression is always used, by an action at law as distinguished from simple equity; it was made assets to be dealt with in a court of equity. Does that mean anything else than what is popularly called "equitable assets?" What are equitable assets as distinguished from legal assets, except assets which you could not get in a court of law? The meaning of it is, that it is an equitable asset in the popular sense of the expression, an asset to be administered in courts of equity. I will only say this in addition, that the case of *Hall v. Macdonald* is not to be relied upon as being any guide. I do not say that the decision was wrong, I do not understand it. There is no reference there to this Act of Parliament; we are not told whether it was a devise in trust for sale, or what the circumstances were. The decision in that case may have been right enough. In the other case referred to, *Ferguson v. Gibson*, the right of a specialty creditor to retain out of the proceeds of real estate was allowed, but it was decided that a simple contract creditor had no such right. In my opinion the appeal in this case should be dismissed.

COTTON, L.J.—In giving my judgment I have not mentioned the question of the rents, but they stand exactly in the same position. The rents, of course, descended to the heir.

BAGGALLAY and LINDLEY, L.JJ. concurred.

*Appeals dismissed with costs.*

Solicitors for Staples, J. and B. Gole.

Solicitors for J. B. Illidge, Tatham, Oblein, and Nash.

Solicitors for the plaintiffs, Davidson and Morris.

Feb. 12 and July 12.

(Before Lord COLERIDGE, C.J., BRETT, M.R., and BOWEN, L.J.)

BRUNSDEN v. HUMPHREY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Judgment recovered—Action for negligence—Injury to vehicle—Personal injury caused by same negligence—Distinct cause of action.**Plaintiff sued defendant in the County Court to recover damages for injury done to plaintiff's cab in a collision caused by the negligence of defendant's servant, and obtained judgment.**Afterwards plaintiff sued defendant in the High Court to recover damages for personal injury which he had suffered in the same collision.**Held, by Brett, M.R. and Bowen, L.J. (Lord Coleridge, C.J. dissenting), that the damage to the cab and the personal injury constituted two distinct causes of action, and therefore the judgment recovered in the County Court was no bar to the subsequent action in the High Court, and plaintiff was entitled to recover.**Judgment of Pollock, B. and Lopes, J. reversed.*

THE plaintiff was a cab driver, and while he was driving his cab a two-horse van driven by the defendant's servant came into collision with the cab, and the plaintiff was thrown from the box.

THE plaintiff sued the defendant in the White-chapel County Court to recover the amount of the damage done to the cab.

THE particulars were as follows :

For carelessly driving a van into a cab 4*l.* 3*s.* 0*d.*

	<i>£</i>	<i>s.</i>	<i>d.</i>
Repairing woodwork .....	1	8	0
Painting .....	1	5	0
Three weeks' hire of cab .....	1	10	0

24 3 0

THE defendant paid the amount claimed, and costs, into court.

AFTERWARDS the plaintiff discovered that he had sustained more serious personal injury owing to the collision than he had at first been aware of, and he wrote to the defendant asking for compensation ; his request was refused, and he thereupon commenced the present action in the High Court to recover damages for the personal injury which he had suffered by being thrown from the box of the cab in the collision.

AT the trial before Grove, J. the jury found a verdict for the plaintiff for 35*0*l.** damages.

A rule was afterwards obtained calling on the plaintiff to show cause why there should not be a new trial or judgment entered for the defendant, on the ground of misdirection in not holding that the proceedings in the County Court were a bar to the present action.

ON the 5th July 1883 the Divisional Court (Pollock, B. and Lopes, J.) made the rule absolute to enter judgment for the defendant, and from this decision the plaintiff now appealed.

Waddy, Q.C. and Crispe for the plaintiff.—The fact that the plaintiff had recovered in the County Court is no bar to his subsequently recovering in the High Court, for the two causes of action are separate and distinct. At the time when the plaintiff recovered for damage to the cab the cause of action on which he now relies was incomplete, for he had not then suffered the

injuries which afterwards resulted from the collision, and negligence alone, without injury, gives no cause of action. They referred to

*Fetter v. Beal*, 1 Lord Raymond, 339 ;

*Greathead v. Bromley*, 7 T. R. 455 ;

*Earl of Bandon v. Becher*, 3 Cl. & F. 479 ;

*Kitchen v. Campbell*, 3 Wils. 304 ;

*Markham v. Middleton*, 2 Stra. 1259 ;

*Boncmi v. Backhouse*, in the Exchequer Chamber, E. B. & E. 646 ; 28 L. J. 378, Q. B. ; and in the House of Lords, 34 L. J. 181, Q. B. ; 9 H. L. C. 503 ;

*Lee v. The Lancashire and Yorkshire Railway Company*, 25 L. T. Rep. N. S. 77 ; L. Rep. 6 Ch. 527 ;

*Seddon v. Tutop*, 6 T. R. 607 ;

*Read v. The Great Eastern Railway Company*, 18 L. T. Rep. N. S. 822 ; L. Rep. 3 Q. B. 555 ;

*Nicklin v. Williams*, 10 Ex. 259 ; 28 L. J. 335, Ex.

MURPHY, Q.C. and HANNEN for the defendant.—The plaintiff is seeking to recover twice over for the same cause of action. The test is whether he could have recovered for personal injury in the County Court, and it is clear that he could. They referred to

*Lamb v. Walker*, 38 L. T. Rep. N. S. 643 ; 3 Q. B. Div. 389 ;

*Barnett v. Lucas*, Irish Rep. 6 Com. Law, 247 ;

*Wright v. The London General Omnibus Company*, 36 L. T. Rep. N. S. 590 ; 2 Q. B. Div. 271.

Waddy, Q.C. replied.

Cur. adv. vult.

JULY 12. — The following judgments were delivered :—

BRETT, M.R.—It was urged on behalf of the defendant that the plaintiff could not succeed in the second action because he had already recovered damages in respect of the collision, and no person can sue twice for the same cause of action. Upon the other side it was said that the two injuries, although one part of the cause of action was common to both, were in reality two different causes of action, and no rule exists against bringing separate actions for two separate and distinct causes of action. It was admitted that it may be oppressive to bring several actions, but it was said that if they were brought oppressively the court would have power to stop them, but that in this case, where there was an undeveloped injury, an action is brought *bond fide* and is not oppressive. Therefore the question is whether the causes of action are the same, because the law is that a person cannot in different actions recover successive amounts of damages for the same cause of action, but he must when he first brings the action recover all the damages to which he is entitled in respect of that cause of action. When this rule is applied to damages which are or must be known to the plaintiff at the time of the first action, I have always thought it a good rule ; but when applied to cases where the damage is not known at the time of the first action, but develops itself afterwards, and when the claim is made *bond fide* for ulterior damages, and could not in fact have been made at the time of the first action, because the further damage was not known, I have always been of opinion that it is a harsh rule, and if it were to be established now for the first time it could not have my concurrence. It is based upon the maxim that it is for the benefit of the State that the litigation of individuals should come to an end. To my mind that is one of those maxims which appear to be the less true the more one looks into them. It cannot matter to the State, and the

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

maxim is never vouched except in cases where the subsequent litigation would be just if it were not for the maxim. In these cases of undeveloped injury the maxim is not only untrue, but also unjust as between individuals. However, the rule exists, and I have not the smallest intention of cavilling at it. It must remain, although the subsequent injuries are unknown and cannot be known. Nevertheless, in cases where there has already been a trial, one is to suppose that which is not the truth, viz., that the first jury tried the case, when the subsequent damage or injury could not be known to them, and that they have in contemplation of law given damages for the prospective injury. The question is whether the cause of action in this case is the same as that in the former action. The cause of action alleged is an injury to the plaintiff's person by reason of the negligent driving of the defendant's servant. The existence of that negligence and the collision alone do not give any cause of action. Supposing that by negligent driving the wheel of a cart is run against a carriage and there is no injury caused, the owner of the carriage could not succeed in an action for nominal damages; such an action would not lie. The cause of action in such a case is the negligence which causes appreciable injury to the vehicle. There must be both the negligence and the appreciable injury. Therefore, in the first action the cause of action was the negligent driving and the appreciable injury to the plaintiff's cab. Suppose that in the days of strict pleading he had relied upon that cause of action, and had pleaded it, he could not have given evidence of the personal injury. The cause of action in such a case is injury to property. That is the cause of action, and is in respect of a right of property. Now, the plaintiff brings an action in which he says that he has been injured in his person. That is a different right. He has a perfect right by law to have his person unmolested by the negligence of another man's servant. The mere fact of the defendant's vehicle having touched or shaken the person of the plaintiff would give no cause of action if no appreciable damage had been caused. Therefore it is clear that the cause of action is the negligent driving and the injury to the plaintiff's person; that is, the injury to the right to have his person unmolested. That is a distinct cause of action, and therefore the plaintiff is entitled to maintain the second action. That in itself seems to me to be sufficient reasoning upon which to found a decision that the two causes of action are different. But different tests have been applied by judges at different times. They are not grounds of judgments, but tests by which to determine sometimes, but not always, whether the causes of action are the same or different. A very good, though not always a very accurate, test is to see whether the same sort of evidence would prove both cases. It is plain that, where damage to a vehicle is in question, persons who know about vehicles should be called to show what the injury was, but in the case of injury to the person doctors are called to show what was the external or internal damage to the person. The cases would be tried with two different sets of witnesses. In my opinion that is only a test, and not always an accurate one, but here it is sufficient to show that the causes of action are different. Therefore, in my opinion, we are not called upon in this case to apply the maxim I have mentioned, which for

my part I think the law ought never to apply except in cases where it has already been determined that it must apply. It ought not to be stretched, and it is not applicable in this case. Therefore I am of opinion that the plaintiff is entitled to recover the sum awarded to him by the jury. Two different actions may be brought for different causes of action, but not to recover damages for the same cause of action. It follows that the judgment of the Divisional Court cannot be supported, and this appeal ought to be allowed.

BOWEN, L.J.—The plaintiff in this case has recovered a verdict and 350*l.* damages for personal injuries sustained by him through the negligence of the defendant's servants in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box, and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the County Court for damages done to his cab in the collision, and the particulars delivered under this plaint had been confined to the damages which the cab had sustained. The defendant in the County Court action paid 4*l.* 3*s.* into court, together with 6*s.* costs, upon which the plaintiff had discontinued the County Court plaint. The present action was now brought in the High Court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant at the time of the County Court proceedings. On a motion for a new trial the court below have entered a verdict for the defendant, on the ground that the recovery in the County Court of damages in respect of the cab is a bar to any further action for injury to the plaintiff's person. The rule of the ancient common law is, that where one is barred in any action real or personal by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing for ever. "It has been well said," says Lord Coke, in a note to *Ferrer's case* (6 Coke, 9 a), "Interest reipublice ut sit finis litium, otherwise," says Lord Coke, "great oppression might be done under colour and pretence of law:" (see also *Sperry's case*, 5 Coke, 61; *Higgen's case*, 6 Coke, 44 b, Year-book, 12 Ewd. 4, p. 13, 9.) Accordingly in *Hudson v. Lee* (4 Co. p. 43) it was held to be a good plea in bar to an appeal of malice that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird v. Randall* (3 Burr. 1346) it was decided to be an answer to an action for seducing a man's servant from his service that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips v. Berryman* (3 Doug. 286) a recovery in replevin was held to be a good bar to an action on the Statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb: *Nemo debet bis vexari pro eadem causa*. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule. How far is the cause which is being litigated afresh the same cause in substance with that

which has been the subject of the previous suit? "The principal consideration," says De Grey, C.J. in *Hitchin v. Campbell* (2 Wm. Bl. 827), "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case; and one great criterion," he adds, "of this identity is that the same evidence will maintain both actions:" (see per Lord Eldon in *Martin v. Kennedy*, 2 Bos. & Pull. 71.) "The question," says Grose, J. in *Seddon v. Tutop* (6 Term Rep. 607), "is not whether the sum demanded might have been recovered in the former action; the only inquiry is whether the same cause of action has been litigated and considered in the former action." Accordingly, though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet, if no attempt was made to give evidence upon some of the claims, they might be recovered in another action: (*Thorpe v. Cooper*, 5 Bing. 129.) It is evident, therefore, that the application of the rule depends not upon any technical considerations of identity of cause of action, but upon matters of substance. I have now to consider the application of the above doctrine to the present action; and the question to be decided is, whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff's person. Nobody can doubt that, if the plaintiff had recovered any damages for injuries to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently: (see *Fetter v. Beal*, 1 Lord Raymond, 339.) "The jury," says the court in that case, "have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff." This authority, however, leaves still open the point we now have to determine, whether the cause of action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question, let me assume for the sake of argument that the damage had been caused by some act of the defendant himself, and not merely an act of his servant. According to the old distinctions of forms of actions, which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury—trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Everyone in this country has an absolute right to security for his person. Everybody has, further, an absolute right to have the enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and, though the two injuries might have been combined in one suit, could it have been said that the subject-matter of each grievance was the same? Applying

the test of identity furnished by De Grey, C.J. in *Hitchin v. Campbell*, the first matter that is obvious is, that the same evidence would not have supported an action for trespass to the person and an action for trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do with the damage done to the goods and chattels. In the other case the plaintiff's title to the goods might have been in issue, in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And finally, the damage in one case might have been directly due to the wrongful act complained of; in the other case it might not. There is no authority, so far as I know, in the books for the proposition that the recovery in an action for a trespass to the person would be a bar to the maintenance of an action for any trespass to goods committed at the same time. In the present instance, as the defendant himself was not driving, but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated, and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine or instrument, are all based upon the same principle, viz., that a person who contrary to his duty conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve, and have been accompanied by, specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence, and the various uses that have been made either by judges or juridical writers of the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B. in *Embrey v. Owen* (6 Ex. 353), "is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says Littledale, J. in *Williams v. Morland* (2 B. & C. 916), "there must be temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case:" (see *Fay v. Prentice*, 1 C. B. 835, per Maule, J.) This

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leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only, or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the court below, and from the great authority of the present Chief Justice of England. According to the popular use of language the defendant's servant has done one act and one only—the driving of the one vehicle negligently against the other. But the rule of law which I am discussing is not framed with reference to loose popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which if no damage had ensued, would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's Act by the widow and children of a person who had been killed in a railway collision is barred by proof that the plaintiff recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once, and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter) against splitting demands which are essentially separable (see *Seddon v. Tutop*, 1 Term R. 607), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings, or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. In the present case the plaintiff's particulars in the County Court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the County Court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second: (see *Seddon v. Tutop*, 1 Term R. 607.) With all respect, I do not see how it can be said that *Nelson v. Couch* (15 Com. Bench N. S. 99) so decides. That case establishes only the converse rule, viz., that the maxim *Nemo debet bis vexari* cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of Coleridge, J. and the other members of the court in *Hodgson v. Stallebrass* (11 Adol. & Ell. 30) must, I think, be read by the light of the special cir-

cumstances of that case, and so read is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority in holding, as I do in the present instance, that the damage for which the plaintiff is now suing accrues from a different injury, and therefore a different wrong, from that for which he recovered damages in the County Court. The view at which I have arrived is in conformity with the reasoning of the judgment recently pronounced by this court in the case of *Mitchell v. The Darley Main Colliery Company*, where it was held (reversing *Lamb v. Walker*, 38 L. T. Rep. N. S. 643; 3 Q. B. Div. 389), that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law that none shall be vexed twice for the same cause of action to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths which would involve practical injustice. The present case is one in which I am conscious that lawyers of great authority do differ and will differ. But on the whole, in my opinion, the judgment of the Court of Queen's Bench ought to be reversed, and the judgment entered at the trial for the plaintiff be restored, with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C.J.—In this case I am, with much regret, unable to concur in the judgment of my brother Bowen, to which I understand the Master of the Rolls to assent. I should have been glad, in the face of this difference of opinion, to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same. That the injury done to the plaintiff is injury done to him, at one and the same moment, by one and the same act, in respect of different rights—i.e., his person and his goods—I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers, which contain his leg, and his coat-sleeve, which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think the court below was right, and that this appeal should be dismissed.

*Judgment reversed.*

Solicitors for the plaintiff, *Noon and Clarke*.

Solicitors for the defendant, *Arkcoll and Cockell*.



Tuesday, June 24.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

GRIFFITHS v. THE LONDON AND ST. KATHERINE'S DOCK COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Master and servant—Action for injury caused by dangerous premises — Knowledge of master — Ignorance of servant—Sufficiency of statement of claim.**In an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery on premises or materials provided by the defendant for the purposes of the work, it is necessary, in order that the plaintiff may succeed, to prove that the danger or defect which caused the injury was known to the defendant and was not known to the plaintiff, and a statement of claim which does not allege both these facts discloses no cause of action and is bad.**Judgment of Day and Smith, JJ. (50 L. T. Rep. N. S. 755) affirmed.*

ACTION to recover damages for personal injuries.

The statement of claim alleged that the plaintiff was, at the time of the accident thereafter mentioned, in the employment of the defendant company; that on Saturday, the 25th Feb. 1882, the plaintiff was lawfully in or near one of the warehouses of the Royal Albert Dock the property of, and in the use and occupation of the defendant company, when one of the iron doors, being part of the permanent construction of the defendants' premises, without any warning gave way and fell with great force and violence upon the plaintiff; that the defendant company at the time of and previous to the plaintiff receiving the injury complained of, knew or ought to have known of the defective, unsafe, and insecure condition of the iron door, and that it was altogether owing to the negligence of the defendant company that the same was not put into a safe and secure condition.

Objection of law, that the statement of claim was bad on the grounds, amongst others, that it did not show any contract between the defendant and the plaintiff that the door should have been in any condition other than the condition alleged, nor that the plaintiff was ignorant of its condition, nor any duty by the defendants towards the plaintiff in relation to the same.

The Divisional Court (Day and Smith, JJ.) held that the statement of claim showed no cause of action, and was bad, and from this decision, which is reported 50 L. T. Rep. N. S. 755; 12 Q. B. Div. 493, the plaintiff appealed.

Fillan, for the plaintiff, in support of the appeal, referred to

*Brown v. The Accrington Cottonspinning Company*, 13 L. T. Rep. N. S. 94; 3 H. & C. 511; 34 L. J. 208, Ex;

*Watling v. Oastler*, 23 L. T. Rep. N. S. 815; L. Rep. 6 Ex. 73;

*Williams v. Clough*, 3 H. & N. 258; 27 L. J. 325, Ex.

Barnes, for the defendants, was not called on.

BRETT, M.R.—I am of opinion that this is not a question of contributory negligence, but a question whether any cause of action is shown. Where an action is brought by a servant against

his master to recover damages for injury caused by the wrongful condition of machinery or premises, or of anything provided to enable him to do his work, the servant, if he confines himself to the allegation of danger, shows no cause of action. Except under one condition, there is no duty imposed upon the master to see that the premises or materials are safe. That has been the law ever since the decision in *Priestley v. Fowler* (3 M. & W. 1). The only case in which there is a cause of action is where the danger or defect is known to the master and is not known to the servant. The knowledge of the master, and want of knowledge on the part of the servant, together make a cause of action, and the general rule is that these two things have to be averred and proved. I am therefore of opinion that the learned judges who decided this case in the court below were right. The case of *Watling v. Oastler* (23 L. T. Rep. N. S. 815; L. Rep. 6 Ex. 73) was cited on behalf of the plaintiff, and it is said that the view taken by Martin, B. in that case conflicts with the judgment of the Divisional Court here. I am of opinion that it does not, because he held that, although one of these two propositions was not expressly put forward, still it could be implied from the language of the declaration, which he said contained enough to show that the deceased did not know the risk he was running. I think the case of *Williams v. Clough* (3 H. & N. 258) is against Mr. Fillan's contention, because it was held there that the declaration must contain an averment that the danger was not known to the plaintiff. It was suggested by Bramwell, B. that it ought also to contain an averment that he had no means of knowledge, but the rest of the court differed from him on that point, because they thought that any averment as to this latter question should come by way of answer. For these reasons I am of opinion that the judgments in the court below are right on the grounds on which they are based.

BOWEN, L.J.—I am of the same opinion. The old form of declaration showed that the danger was known to the master and unknown to the servant. Otherwise there was no cause of action, because in that case the servant ran the risk of the danger; this was part of the terms of his service, and he could not show that the master was in default. Therefore to show that the danger was unknown to the servant was vital, and if this was not proved directly, or could not be inferred from the circumstances which were proved, there must be a nonsuit. Mr. Fillan says that the objection should be set up in answer, but as to this the terms of the old pleadings are against him. In *Watling v. Oastler* (23 L. T. Rep. N. S. 815; L. Rep. 6 Ex. 73) Kelly, C.B. and Martin, B. only decided on the ground that, although the ignorance of the servant was not alleged there in terms, nevertheless it could be implied from the other averments which were contained in the declaration. But in the statement of claim in the present case there are no such averments. As to *Williams v. Clough* (3 H. & N. 258) I agree with the Master of the Rolls. For these reasons I am of opinion that the contention on behalf of the appellant cannot be supported. It is to be regretted that the statement of claim has not been amended.

FRY, L.J.—I am of the same opinion. It is

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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plain that the knowledge of the master and the ignorance of the servant are necessary ingredients in order to establish a cause of action.

*Judgment affirmed.*

Solicitors for plaintiff, *Bordman and Co.*  
Solicitor for defendants, *W. M. Hacon.*

Wednesday, Nov. 19.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

REG. on the prosecution of *HOOLEY v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE.* (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Mandamus—Return of unconditional compliance—Plea to—Rules of Supreme Court 1883, Order LIII., r. 9; Order LXVIII., r. 1; Order LXXII., r. 2.*

*Where a return is made to a writ of mandamus of unconditional compliance therewith, the prosecutor can still plead to the return, notwithstanding the provisions of Order LIII., r. 9, as the former practice is kept alive by Order LXVIII., r. 1, and Order LXXII., r. 2.*

*Judgment of Mathew and Day, JJ. affirmed.*

THIS was an appeal by the defendants from the judgment of Mathew and Day, JJ., dismissing a motion to strike out or set aside a plea to a return to a writ of *mandamus*.

The judgment appealed from is reported *ante*, p. 203, where the facts are fully stated.

The appeal was argued by *Bosanquet*, Q.C. (*H. D. Greene* with him) for the appellants, and by *Jelf*, Q.C. (*John Rose* with him) for the respondent.

The following statutes, rules, and authorities were referred to:

9 Anne, c. 20 (25 in Revised Statutes), s. 2, 1 Chitty's Statutes, 4th edit. 1248;

1 Will. c. 21, 4 Chitty's Statutes, 4th edit. 348;

6 & 7 Vict. c. 67, 4 Chitty's Statutes, 4th edit. 350;

The Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), s. 77, 3 Chitty's Statutes, 4th edit. 951;

The Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49), Annual Continuation of Chitty's Statutes, vol. 1, part 3, page 454, commencing on 24th Oct. 1883, and repealing all the above-mentioned enactments;

The Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 79), s. 21, 3 Chitty's Statutes, 4th edit. 759;

Rules of the Supreme Court 1883, Order LIII., r. 9, Order LXVIII., r. 1, Order LXXII., r. 2;

Tapping on *Mandamus*, 408;

*Reg. v. Mainwaring*, 27 L. J. 278, M. C.;

*Reg. v. Bingham*, 4 Q. B. 877;

*Reg. v. The Earl of Dartmouth*, 5 Q. B. 878.

BRETT, M.R.—The dispute which gives rise to the present appeal is this. A writ of *mandamus* was issued to the magistrates, and it was alleged that they had failed to hear and determine an application for the renewal of a licence. The magistrates make a return to the writ, and the person who claims the *mandamus* disputes the accuracy of that return. The magistrates say that they have obeyed the writ, but the prosecutor wishes to bring forward facts to show that they are wrong in saying so. It is said on behalf of the magistrates, that the prosecutor cannot do this, but that he must bring an action for a false return. The falsehood complained of in such an

action would be that the magistrates did not, in fact, hear and determine the application. The same facts that are stated in the plea now before us would be brought forward, and the opinion of the court as to those facts would be taken. The point to be decided comes to this: Are the parties entitled to raise the question at this stage, or must these proceedings now be stopped, and other proceedings begun? This is what we are called upon to determine, and unless we are obliged to decide otherwise, I think we ought to prefer the more simple form of proceeding, which is, to raise the question now, to the other form of proceeding which has been suggested, which is not so simple, namely, to bring an action for a false return. The writ here is not a peremptory writ of *mandamus*, so we need not now determine as to the course of procedure in the case of a peremptory writ. The magistrates must know that the parties wish the dispute as to whether the application has been heard and determined to be decided. The usual way of determining such a question (as to which there are very few cases in the books) appears to have been for the magistrates to state what they have done, so as to raise the question before the court. I should suppose that this had been the almost invariable course. It is not denied that the facts which the magistrates thus alleged could be traversed, or that there could have been a demurrer. Here, however, the magistrates take upon themselves to decide as to whether they have obeyed the writ or not. If the appellants' contention is to prevail the magistrates would always have it in their power, by adopting this course, to force on the prosecutor the necessity of bringing an action for a false return. Now, how were the proceedings regulated by the statute of Anne? Could the return be questioned by a traverse under that statute? It seems to me that the words of the statute of Anne are large enough to bear the construction that the return could be so questioned. The fact that the magistrates have obeyed the writ is a material fact, and therefore an allegation that they had done so could be traversed. That was the course of procedure where it was necessary, but the practice which was ordinarily followed never made it necessary. We must now see how the Judicature Acts and Rules have dealt with the practice. By Order LIII., r. 9: "Where any return is made to a writ of *mandamus* other than an unconditional compliance therewith, the applicant may plead to the return," &c. It is clear to my mind that the person who drew that rule, and the judges who passed it, thought there could be no plea to a return of unconditional compliance. However, the rule has not in terms dealt with that case, but has excepted it; and, as it is a matter coming under the head of proceedings on the Crown side of the Queen's Bench Division, which is not expressly provided for by the rules, it comes within the provisions of Order LXVIII., r. 1, and is not affected, while, by Order LXXII., r. 2, the old procedure is continued. Then it comes to this, that under the statute of Anne a return such as this might be pleaded to, and the rules made under the Judicature Acts preserve that right. But it is said that the statute of Anne is repealed, and this is true, but it was not repealed until the exact time when the rules came into force, and

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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therefore the procedure under it was, up to that date, then existing procedure. If the rules say that the procedure is to be applied to future proceedings the statutes which created that procedure are no use, and therefore they are repealed, because they have become an incumbrance on the Statute-book. For these reasons I am of opinion that the better course in this case is to adhere to the view adopted in the judgment of the Divisional Court, although I do not say that good reasons could not be given either way. I think the judgment ought to be affirmed, principally on the ground which I first mentioned, that it is our duty, where possible, to advance and simplify the remedy.

COTTON, L.J.—I also think this appeal must fail. The question is one of procedure, and we have to decide whether the dispute can be tried in this way, or whether there must be an action for a false return. I think it should be tried by a traverse. The question is whether what was done here was a hearing and determining of the application for the renewal of a licence as alleged in the return made by the magistrates to the writ of *mandamus*. Order LIII., r. 9 deals with returns to writs of *mandamus*, but it excludes this case by the words "other than an unconditional compliance therewith," and therefore it does not apply. Then it is said that the practice of pleading to writs of *mandamus* existed only under the statutes of Anne and William IV. which have been referred to, and that these Acts have been repealed by the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49.) I think it would be a wrong construction of that Act to hold that the repeal prevented the practice under the repealed Acts from being "present procedure and practice" within the meaning of Order LXXII., r. 2, which came into operation at the same time as the repealing Act. I cannot see that any return is excepted from the words of 9 Anne, c. 20, s. 2, "As often as . . . any writ of *mandamus* shall issue . . . and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus* to plead to or traverse all or any the material facts contained within the said return." I cannot see what there is to restrict the generality of the word "return" in that Act. That this is a return is shown by the words of Order LIII., r. 9, which expressly except a return of unconditional compliance. I therefore see no reason to restrict the meaning of the word, and I think that the former procedure remains in force, because by Order LXXII., r. 2, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." There is properly speaking no practice, because there are no cases to be found, but the statute of Anne regulated procedure, and this therefore was the procedure existing when the rules came into force. But it is said that Order LXVIII., r. 1, prevents Order LXXII., r. 2, from applying to a prerogative *mandamus*, because by the former rule "nothing in these rules save as expressly provided shall affect the procedure or practice in . . . proceedings on the Crown side of the Queen's Bench Division," and because there is not an express reference to prerogative *mandamus* in Order LXXII., r. 2, therefore that rule does not preserve the previously existing practice in the case of prerogative *man-*

*damus*. I am of opinion that this is an unsound construction, and that it is wrong not to construe the rules as made with knowledge of the repeal (when the rules came into force) of the statute of Anne, which clearly applied to prerogative *mandamus*.

LINDLEY, L.J.—I am of the same opinion. The difficulty in this case arises from the wording of Order LIII., r. 9. It is obvious that the framers of that rule thought that returns such as this could not be traversed. That in practice they have not generally been traversed is beyond question, but it does not by any means follow that they are not traversable. Mr. Bosanquet says that the meaning of the word "return" in the statute of Anne is narrower than in Order LIII., r. 9, and does not include a certificate of compliance. I cannot find from the wording of that Act that this is so. I think the present case comes within the rule preserving the existing practice (Order LXXII., r. 2). The argument as to the repeal of the Acts of Anne and William IV. is too refined to be sound. Its effect is to invite us to defeat the object of the Legislature, and to work the repealing Act of 1883 and the rules of the same year so as to destroy each other.

*Appeal dismissed.*

Solicitors for the prosecutor, *Robinson, Preston, and Stow*, for *Hollinshead and Moody*, Tunstall.

Solicitors for the defendants, *Thomas White and Sons*, for *Hand, Blakiston, and Everett*, Stafford.

#### SITTINGS AT WESTMINSTER.

Monday, Nov. 17, 1879.

(Before Lord COLERIDGE, C.J., BRAMWELL and BRETT, L.JJ.)

PERKINS v. DANGERFIELD AND WIFE. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Finding of jury—Judgment given contrary to finding—Order for new trial—R. S. C. 1875, Order XXXVI., r. 22 a; Order XL., r. 4; Order LVIII., r. 5 a.*

*Under the Rules of the Supreme Court 1875 a judge, after leaving a question to the jury at the trial of an action, had no power to give judgment contrary to the finding of the jury on the question so left to them, and therefore where this course was adopted the Court of Appeal ordered a new trial.*

THIS was an action to recover the sum of 200*l.*, as liquidated damages, for an alleged breach by the female defendant, after marriage, of a covenant entered into by her before marriage.

The defendants were sued jointly under 37 & 38 Vict. c. 50 (since repealed by 45 & 46 Vict. c. 75, s. 22.)

In 1877 the female defendant, then a widow, sold to the plaintiff a dairy business which she had been carrying on, and at the same time covenanted with him not to carry on a similar business within the distance of one mile from the premises. She then removed to other premises, within the distance of one mile, and set up a business of a different kind.

In 1878 she married the male defendant, and shortly afterwards the business of a dairy was set

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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up and carried on on the premises to which she had removed, which was the alleged breach of covenant relied on for the plaintiff.

At the trial before Pollock, B. and a common jury it was objected that there was no evidence against the defendants.

The learned judge, however, left to the jury the question whether the dairy business which was carried on was the business of the husband or of the wife. The jury found that it was the business of the wife.

The case was reserved for further consideration.

Afterwards Pollock, B. gave judgment for the defendants, and from that judgment the plaintiff now appealed.

*Talfourd Salter, Q.C. (C. C. Scott with him)* for the plaintiff.—The judgment was wrongly entered, and ought to be set aside: (R. S. C. 1875, Order XL., r. 4.) (a) The finding of the jury, that the business belonged to the wife, has never been set aside by the court, and while it remains the defendants cannot be entitled to judgment. There was sufficient evidence to justify the jury in finding as they did:

*Lovell v. Newton*, 39 L. T. Rep. N. S. 609; 4 C. P. Div. 7;

*Ashworth v. Outram*, 37 L. T. Rep. N. S. 85; 5 Ch. Div. 923;

*Laporte v. Costick*, 31 L. T. Rep. N. S. 434.

*Henry Sutton (Kemp, Q.C. with him)* for the defendants.—There is no ground for this appeal. The point that there was no evidence for the jury was taken at the trial, and all that Pollock, B. did was to ask the jury a question, which, if it had been answered in favour of the defendants, would have ended the case. By R. S. C. 1875, Order XXXVI., r. 22 a, (b) "the judge may at or after the trial direct that judgment be entered for any or either party." This gives power to the judge to disregard the findings of the jury:

Lord COLERIDGE, C.J.—We all think it would be more satisfactory that there should be a new trial, which we have power to order by R. S. C. 1875, Order LVIII., r. 5 a. (c) We think this will be the best and most just way of ending the matter. We are all of opinion that, whatever may be the merits of the case, Pollock, B. had no power to do what he did in giving judgment for the plaintiff, contrary to the finding of the jury, on the question which he had submitted to them. The costs of the appeal will be the plaintiff's.

*Order for a new trial.*

Solicitors for the plaintiff, *Collins, Wilkinson, and Co.*

Solicitors for the defendants, *Lowless and Co.*

(a) Where at or after the trial of an action by a jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment, and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

An application under this rule shall be to the Court of Appeal.

The corresponding provisions now in force are contained in R. S. C. 1883, Order XL., rr. 3, 4, and 5.

(b) Re-enacted by R. S. C. 1883, Order XXXVI., r. 39.

(c) Re-enacted by R. S. C. 1883, Order LVIII., r. 5.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Saturday, Nov. 1.

(Before BACON, V.C.)

WOODRUFF v. THE BRECON AND MERTHYR TYDFIL JUNCTION RAILWAY COMPANY. (a)

*Railway—Siding—Order of Board of Trade—Costs of repairs—Injunction—5 & 6 Vict. c. 55, ss. 4, 6, and 12—Railways Clauses Act 1845 (8 Vict. c. 20), ss. 76 and 92.*

A railway company requested the plaintiff in this action, the owner of a siding, to provide signalling or interlocking apparatus for his junction in accordance with an order of the Board of Trade, or to pay the cost of the work if done by the company. On his refusal the company took up the junction.

On motion by the plaintiff to restrain the company from interfering with his junction, the Court held that the company was not entitled to compel the plaintiff to do the work, or pay the cost of it, and granted an injunction.

THIS was a motion on behalf of the plaintiff in the action, Mr. Philip Thomas Woodruff, the occupier of a foundry at Machen, a station on a branch line of the defendants' railway, asking that the defendants, their officers, servants, and agents, might be restrained by the order and injunction of the court from continuing to prevent communication between the plaintiff's branch railway at Machen, in the county of Monmouth, and the defendants' railway, and from continuing to prevent the plaintiff from bringing carriages to and from the said branch railway and the defendants' railway, and that the defendants might be ordered to restore the junction between the said branch railway and the defendants' railway in such a manner as to permit carriages to be brought to and from the said branch railway and the defendants' railway.

A junction has existed communicating between the plaintiff's foundry and the defendants' railway since 1855, and is the sole means by which the owners of the foundry can remove their castings. The junction was formed by movable points or switches worked by a hand lever.

Under an Act passed in 1882 the defendants doubled their line for the purpose of increased passenger and goods traffic, and Col. Rich, the Inspector of the Board of Trade, after surveying the line, in his report required the defendants to provide signalling or interlocking apparatus for the plaintiff's junction, so as to enable the points to be worked by a lever from the signal-box. The defendants requested the plaintiff to do the work, or to pay the cost of the work if done by them. This the plaintiff refused to do.

In May 1884 the defendants removed the junction. The foundry has not been worked since 1882, but there are on the premises plant, machinery, and castings, and the plaintiff said that he intended to work the foundry when the junction was restored.

*Marten, Q.C. and Hunter* for the plaintiff.—The plaintiff has a right to the junction under sect. 76 of the Railways Clauses Act 1845 (8 Vict. c. 20). The company have no right to make us pay the

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expenses of their new system of interlocking points; in any case they had no right arbitrarily to cut off our junction; they cannot withdraw the licence to make a siding when once given. The court has power to interfere to protect statutory rights under the Act:

*Todd and Co. v. The Midland and Great Western Railway of Ireland*, L. Rep. Ir., 9 Ch. 85;  
*Bell v. The Midland Railway Company*, 3 De G. & Jones, 673.

*Horton Smith, Q.C. and Dryden* for the defendant company.—This is a passenger railway. The Board of Trade has complete power to compel us to do any works necessary for the safety of the public: (3 & 4 Vict. c. 97, and 5 & 6 Vict. c. 55, ss. 4, 6, and 12.) But sect. 76 of the Railways Clauses Act 1845 provides that "the persons making or using such branch railway shall be bound to construct, and from time to time as need may require to renew, the offset plates and switches according to the most approved plan adopted by the company, and under the direction of their engineer." The plaintiff therefore is bound to do the things ordered by Col. Rich at the instance of the Board of Trade, or to pay the cost of them. As he has declined to do either, we have a right to cut off his junction. Then the court cannot grant an injunction to give effect to the rights conferred by sect. 92 of the Railways Clauses Consolidation Act 1845; the court will not order anything which involves doing something from day to day for an indefinite period:

*The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company*, 30 L. T. Rep. N. S. 206; L. Rep. 9 Ch. App. 331.

Then the foundry is not running.

*Marten, Q.C.* in reply.—As to want of power in the court to make the order, the court did interfere to make a railway construct and maintain a siding:

*Greene v. The West Cheshire Railway Company*, 25 L. T. Rep. N. S. 409; L. Rep. 13 Eq. 44.

If the plaintiff is liable to pay the cost, the company should do the work, and sue him for the cost of it. The defendants are trying by means of sect. 76 of the Railways Clauses Act 1845 to put the cost of the new system of points ordered by Col. Rich upon the traders, but sect. 76 does not apply to a new system such as an interlocking apparatus. Sect. 12 of 5 & 6 Vict. c. 55 also only refers to new branch lines.

BACON, V.C.—The defendants are empowered by an Act of Parliament to make additions to their railway, and in this way they come under the control of the Board of Trade. The inspector goes down and looks at the line and says, "You have several branch lines running out of your line, and one in particular, the plaintiff's, which requires alteration;" that is to say, he, having the control of the defendants' railway, points out to them that for the safety of the public they must do one of the two things, they must have the points at that junction interlocked with signals, or the junction must be taken up altogether. That is a direction to the company, with which the plaintiff has nothing to do. But the plaintiff has a right under sect. 76 to have his siding connected with the railway. The defendants desire to vary the railway, and they have to get the leave of the Board of Trade to make the alterations.

That leave is given under certain conditions, and then they come to the plaintiff and say, "We are compelled to make improvements at your junction, and you must pay for them." What possible right have they to say that? It can only be by contract, or under the statute; but there is no contract between the parties, and there is no statutory right of the kind. The company gave notice of their claim to the plaintiff, and he declined to comply, and thereupon they took up the junction, and deprived him of the use of the siding, to which he was entitled under the Act. In fact they repealed the 76th section as far as he was concerned. The case in the Court of Appeal, *The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company*, was different. There an order was asked for that the company should do something; here no such order is wanted, only an injunction to make them leave him alone, and refrain from interfering with him. It is the defendants who have to deal with the Board of Trade inspector, and they must settle their dispute with him themselves. There is no suggestion that there is any invalidity in the plaintiff's title, and no such question is before me. He asks that his right under the 76th section should be respected; and it seems to me that he has made out his right to an injunction.

Solicitors: *Robinson, Preston, and Stow*, for Colborne, Ward, and Colborne, Newport, Monmouth; *S. F. and H. Noyes*.

Friday, Aug. 1.

(Before PEARSON, J.)

JOHNSTON v. JOHNSTON. (a)

*Marriage settlement—Setting aside—Fraudulent misrepresentation—Jurisdiction.*

*The plaintiff in an action to set aside a settlement made upon his marriage with the defendant I. S., then a widow, by his statement of claim alleged that, previous to the execution of the settlement, I. S. stated to him that her first husband had been divorced from her, and at her suit, by reason of his cruelty and adultery, and further, that she had not herself been guilty of adultery with G. W., to whom, after the death of her first husband, she was married. He further alleged that such statements were made to induce him to enter into the marriage and execute the settlement; that, in reliance on the representations, and in consideration of the marriage, he executed the settlement; that the marriage was solemnised, and the plaintiff had subsequently discovered, and it was the fact, that the representations were false to the knowledge of the defendant I. S., the truth being that she had herself been divorced from her first husband at his suit, and by reason of her adultery with G. W.*

*Held, that the statement of claim disclosed no case upon which the court had jurisdiction to grant relief, and that it must therefore be ordered to be struck out under Order XXV., r. 4.*

THIS was an application by the defendants in the action for an order under Order XXV., r. 4, to strike out the statement of claim, on the ground that it disclosed no reasonable cause of action.

The allegations of the statement of claim were as follows:

(a) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

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## JOHNSTON v. JOHNSTON.

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1. In the month of Jan. 1881 a marriage was contemplated between the plaintiff, D. W. J., and the defendant, I. J. (then I. S., widow), and it was arranged between the plaintiff and the said I. J. that the said marriage should be solemnised on the 6th Jan. 1881.

2. On the 4th Jan. 1881, and previous to the execution of the deeds hereinafter stated, the defendant, I. J., stated to the plaintiff that her first husband, J. P., had been divorced from her, and at her suit, by reason of his adultery and cruelty; and further, that she had not cohabited or had any connection with her second husband, G. W., before her marriage with him. The said statements were made by the said defendant to induce the plaintiff to celebrate his intended marriage with her, and to execute the two indentures hereinafter stated.

3. The plaintiff, relying on the said representations made to him by the said I. J., and having full confidence in their truth, and in consideration of the marriage about to be solemnised between the plaintiff and the said I. J., entered into and executed the two indentures hereinafter stated.

4. By an indenture dated the 4th Jan. 1881, and made between the plaintiff of the first part, I. S. (the defendant I. J.), widow, of the second part, and the defendants Whiteford and Jones, of the third part, the plaintiff covenanted with the said defendants to convey at any time after the celebration of the said marriage, if required in writing so to do, unto and to the use of the said defendants, their heirs and assigns for ever, certain real property upon trust to sell the same and stand possessed of the proceeds upon certain trusts declared by the indenture next hereinafter stated.

5. By another indenture dated the 4th Jan. 1881, and made between the same persons as the last-stated indenture, it was declared that the said trustees should stand possessed of the moneys to arise from the sale of the hereditaments comprised in the last-stated indenture and the rents and profits thereof, in trust to pay the interest and income thereof, or the said rents and profits, to the defendant I. J. during her life, for her separate use, and after her decease to the plaintiff during his life, and after the decease of the survivor of them, the defendant I. J. and the plaintiff, in trust for the child or children of the marriage as therein mentioned (if any), and in default of children in trust for B. S., the daughter of the defendant I. J. if she should be living at the death of the survivor of them, the plaintiff and the said defendant; but in case she should then be dead, upon trust for the survivor of them, the plaintiff and the said defendant absolutely. And by the same indenture the plaintiff covenanted with the said trustees to make up the yearly income payable to the defendant I. J. under the trusts thereinbefore declared to the full sum of 350*l.*, and also to deposit immediately upon the said marriage taking place the certificates for 1000 shares in J. and Sons Limited, by way of security for the conveyance by the plaintiff of the hereditaments comprised in the indenture stated in the previous paragraph hereof, and also to assign to the trustees all the furniture, plate, china, glass, linen, books, pictures, and other household goods and effects to which the plaintiff then was or should at any time thereafter during the coverture become possessed of, in trust for the separate use of the defendant I. J. during her life, and after her decease for the plaintiff during his life, and in default of children of the marriage in trust for the survivor of them, the plaintiff and the said defendant. And by the same indenture the defendant I. J. assigned to the said trustees the household furniture and effects to which she was entitled, and then in or about her house, No. 25, — square, upon trust for herself, for her separate use for life, and after her decease upon trusts for the benefit of the plaintiff during his life as therein mentioned; and after the decease of the survivor of them, the said defendant and the plaintiff, in trust for the defendant B. S. absolutely.

6. The furniture and effects to which the plaintiff was entitled at the date of the said settlement are now in the possession of the defendant I. J., who claims to be entitled to the same for her life under the settlement.

7. The marriage between the plaintiff and the defendant I. J. was duly solemnised on the 6th Jan. 1881. There has not been any issue of such marriage.

8. The plaintiff has recently, and since the said marriage, discovered, and it is the fact, that the said representations and statements made by the defendant

I. J. to him as aforesaid were entirely false, to the knowledge of the said defendant. At the date of the said representations the defendant I. J. had been divorced from the said J. P. at his suit and by reason of her adultery with the said G. W.

The defendants to the action were I. J. herself, the trustees of the deeds of settlement, and B. S., an infant mentioned in the latter of those deeds.

The plaintiff's claim was:

1. That it might be declared that the two deeds of settlement were obtained by the fraud of the defendant I. J., and that the same might be set aside and cancelled and delivered up.

2. That the defendant I. J. might be ordered to give up to the plaintiff the household furniture and effects which belonged to the plaintiff at the date of the settlement, and were settled by him (the plaintiff), making no claim to the furniture and effects brought into settlement by the said defendant.

3. Payment by the defendant I. J. of the costs of the action.

4. General relief.

*Cozens Hardy, Q.C. and Stallard* for the defendants.—The court has no jurisdiction to set aside the settlement on the grounds alleged:

*Evans v. Carrington*, 1 L. T. Rep. N. S. 299; 1 T. & H. 598.

The jurisdiction is restricted to the administration of the trusts. The pleading discloses no reasonable cause of action, and would have been demurrable under the old practice.

*Higgins, Q.C. and Swinfen Eady* for the plaintiff.—This case is distinguishable from *Evans v. Carrington* (*ubi sup.*). What was wanting there is to be found here, namely, a sufficient allegation of fraud inducing the settlement and marriage. In the judgment, moreover, on the appeal in that case there are remarks in our favour: (4 L. T. Rep. N. S. 65; 2 De G. F. & J. 481.) The marriage with the person to whom the misrepresentation is made does not absolve the person making the misrepresentation from its effect. [PEARSON, J.—Every part of the consideration runs through the whole deed; the marriage was the consideration, and that cannot be set aside.] The doctrine of *restitutio in integrum* has latterly been interpreted to mean that the parties are to be restored to their original position so far as may be without default on the part of the person seeking restitution. The settlement can be severed from the marriage. The point to consider is whether the misrepresentation was material to induce the settlement. They referred also to

*Columbine v. Penhall*, 1 S. & G. 228;

*Davidson's Precedents, Settlements*, p. 669, note.

PEARSON, J.—I entertain so strong an opinion upon this case that I think it very much better to decide it at once, in order that if I am wrong I may be set right by a higher court. The action is instituted by Mr. D. T., who is the husband of the first-named defendant I. J., and it seeks to set aside the marriage settlement executed on their marriage on the ground that the lady made false representations to him with respect to herself and her previous conduct, which if she had not made he would not have married her. That is what I assume rather than find in the statement of claim. That is what I infer, even if it be not expressed there. I must say that in the whole course of my experience I have only seen one action at all within the range of this. I do not recollect the facts of that case sufficiently accurately to be able to state them, but in substance

they came not exactly to this, but to something like it, and undoubtedly that action was not successful when it went to the Court of Appeal. (a) Now the allegations that are made in this claim as to the misrepresentations of the lady are these, that she stated to her future husband before the marriage that she had herself obtained a divorce from her first husband by reason of his adultery and his cruelty, and that she had not been guilty herself of adultery with G. W. It is alleged in the statement of claim that the facts were otherwise, and that the divorce was obtained against her by her first husband on the ground of her adultery with G. W. The first observation which I will make with regard to that is this that, if the husband were entitled to any relief in consequence of such misrepresentations, the relief, as it seems to me, to which he ought to be entitled would be a dissolution of his marriage with the present defendant, because they are misrepresentations not with regard to property at all, but with regard to her own character and her own condition, and they are those which would go really to prevent the marriage altogether, and have no bearing whatever upon any settlement which might be made on the marriage. It is admitted, and no one would for one moment contend otherwise, that it is impossible for me to divorce the plaintiff and the defendant. Whatever conclusion I may come to with regard to this action, the marriage is a good and valid marriage and must stand. It is one of those cases in which the parties having undertaken to come together for better or worse, unfortunately find that they have come together for worse, and must abide by it. It seems to me that, if you are to adopt this argument, and to go on with it, it would come to this: inasmuch as every wife who marries, by the simple act of marriage, as well as by the vows which she makes, undertakes to live a chaste life, belonging to her husband, and having no sort of improper intimacy with anybody else, that then you ought to come to the conclusion that, in all cases where the wife breaks her marriage vows, that is a sufficient reason for setting aside the settlement, or depriving her of any benefit of the settlement which she has obtained. If a misrepresentation before marriage is a sufficient consideration for setting aside a settlement, I can conceive no reason why a breach of the marriage covenant should not be also a sufficient consideration for setting aside that settlement also. It is quite plain it is not so according to the law as it now stands. I have nothing to do with the question which may very fairly be raised as to whether our marriage laws are capable of improvement or not; but with regard to the settlement here, it is perfectly plain that the consideration for the settlement is the marriage, and the marriage was had; the consideration was given, and the consideration remains. I can no more set that aside simply because the marriage was induced more or less by misrepresentation, than I can set aside any other deed simply because the parties are dissatisfied after having entered into it. I must say that to my mind there is no ground whatever for any relief in this action according to the statements in the statement of claim, as I under-

stand the law at the present moment, and I therefore order this statement of claim to be struck out, and I dismiss the action against the defendant.

Solicitors for the plaintiff, *Parker, Garrett, and Parker.*

Solicitors for the defendants, *Bartley and James.*

### QUEEN'S BENCH DIVISION.

June 26 and July 1.

(Before FIELD, MANISTY, and LOPEZ, JJ.)

WRIGHT v. MIDLAND RAILWAY COMPANY. (a)

*Negligence—Railway company—Level crossing in station — Contributory negligence — Accident caused by deceased's own negligence—Province of judge and jury.*

The action was brought, under Lord Campbell's Act, by a widow, for the loss of her husband. The deceased intended travelling by the defendants' railway to N. by the train leaving W. at 9.50 p.m. He arrived at W. station about 9.30 p.m., and took his ticket at the booking-office, which was on the down platform. On the up platform, from which his train was to start, there was no waiting-room of any kind for passengers, and there was no shelter, except a shed, open in front, and without either fire or fireplace. As the night was very cold and dark, the deceased went into the waiting-room on the down platform, and there waited by the fire until the train was heard approaching. On hearing the train approaching, the deceased got up quickly and hurried to get over to the other side of the line from which the train was to start. There was no bridge or subway across the line, but only a level crossing, at each end of which a lamp was fixed. The deceased went to the level crossing, and attempted to cross the line, when the train was about twenty yards distant from the crossing, but before he was able to cross he was struck and killed on the spot by the engine of the train by which he intended to travel. The ticket-office being on the opposite side of the line to that from which the train was to start, it was necessary for the deceased, after getting his ticket, to cross the line, and there was no means of crossing except by the level crossing. At the approach of a train it was usual for a porter to stand at this crossing, to warn passengers against crossing when a train was approaching; but on the night in question there was no porter at the crossing to give warning of such danger, and no notice was given of the approach of the train; no whistle was sounded, and no bell was rung.

The learned judge, holding that there was evidence of negligence on the part of the defendants in not having a porter at the crossing to warn passengers, and in not giving notice of the approach of the train, left the whole question to the jury, who found a verdict for the plaintiff for 100l.

Held, that the judge ought to have withdrawn the case from the jury and directed a nonsuit, on the ground that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased, and showed that he had so far conducted, by his negligence, to his own death, as to disentitle the plaintiff to recover.

Held also, that in an action for damages for the negligence of the defendants, it is not sufficient to

(a) His Lordship referred to an unreported case of *Heneage v. Heneage*.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.



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entitle the plaintiff to have his case submitted to a jury that he has proved some negligence on the part of the defendants, if it also appears, in the opinion of the judge, that the plaintiff was guilty of such contributory negligence that no reasonable jury could find a verdict in his favour. *Per Manisty, J.:* To render defendants liable for negligence in such cases, it is not sufficient to prove that there was some negligence on their part; it is necessary to prove that that negligence was negligence "whereby" the accident was caused. In the present case there was no evidence of negligence "whereby" the injury was caused; the only negligence as to which there was any evidence was the negligence of the deceased himself.

MOTION to set aside the verdict and judgment entered for the plaintiff, and enter judgment for the defendant, or for a new trial.

Action tried at Leeds Assizes on the 9th May 1884, before Butt, J. and a special jury, resulting in a verdict for the plaintiff for 100l.

The action was brought under Lord Campbell's Act by a widow for the loss of her husband.

The deceased, William Wright, was a coal miner living near Leeds, and at the time of the accident his earnings averaged about 27s. a week, though some few years ago he earned as much as 3l. per week. The only person dependent on the deceased was the plaintiff herself, with the exception of a son about eighteen years of age, who was partially dependent on his father, though he was earning about 10s. 6d. a week. The deceased intended travelling by the defendants' railway to Normanton by the train leaving Woodlesforde at 9.50 p.m. on Sunday the 17th Feb. 1884. He arrived at Woodlesforde station about 9.30 p.m., and took his ticket at this booking-office, which was on the down platform, the opposite side of the line to that from which his train was to start. On the up platform, from which his train was to start, there was no waiting-room of any kind for passengers, and there was no shelter except a shed, open in front, and without either fire or fireplace. As the night was very cold and dark, the deceased went into the waiting-room on the down platform, and there waited by the fire until the train by which he intended to travel was heard approaching from Leeds. There was no bridge or subway for passengers to cross the line by, but only a level crossing at the end of the down platform. On hearing the train approaching, the deceased got up quickly and hurried to get over to the other side, from which the train was to start. He went to the level crossing and attempted to cross the line when the train was about twenty yards from the crossing, but before he was able to cross the engine struck him and he was killed on the spot. There were other passengers in the waiting-room with the deceased; some of these passed over in safety before the deceased; others waited till the train had stopped. At the approach of a train it was usual for a porter to stand near the level crossing for the purpose of warning passengers against crossing the line when a train was approaching; but on the night in question there was no porter there to warn passengers of the danger, and no notice was given of the approach of the train either by porters, or by the engine-driver using his whistle, or by a bell being rung.

The judge left the case to the jury, who found a verdict for the plaintiff for 100l.

*Wills, Q.C. and John Edge* for the defendants. —The learned judge ought to have withdrawn the case from the jury. There was no evidence of any negligence on the part of the defendants, and certainly none which caused the death of the deceased. His death was caused by his own negligence, in not taking that ordinary care which a prudent man ought to have taken under the circumstances. He knew the train was coming, and if he had looked he must have seen it only a short distance off. There is no authority to show that a railway company is bound to keep a porter at a crossing. In the case of *Stubley v. London and North-Western Railway Company* (13 L. T. Rep. N. S. 376; L. Rep. 1 Ex. 13; 4 H. & C. 83; 35 L. J. 3, Ex.; 11 Jur. 954; 14 W. & B. 133) it was held that there was no general duty on railway companies to place watchmen at public footways crossing the railway on the level. Nor is there any statutory obligation on a railway company to provide a porter at a level crossing. They also cited

*Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 39 L. T. Rep. N. S. 365; 3 App. Cas. 1155; 27 W. R. 191;

*Metropolitan Railway Company v. Jackson*, 37 L. T. Rep. N. S. 679; 3 App. Cas. 193; 47 L. J. 303, C. P.; 26 W. R. 175;

*Cliff v. Midland Railway Company*, 22 L. T. Rep. N. S. 382; L. Rep. 5 Q. B. 358; 18 W. R. 456;

*Davey v. London and South-Western Railway Company*, 11 Q. B. Div. 213; 52 L. J. 665, Q. B.; affirmed on appeal, 49 L. T. Rep. N. S. 739; 13 Q. B. Div. 70; 53 L. J. 58, Q. B.;

*Siner v. Great Western Railway Company*, 20 L. T. Rep. N. S. 114; L. Rep. 4 Ex. 117; 33 L. J. 67, Ex.; 17 W. R. 417.

*Digby Seymour Q.C. and Macmorran* for the plaintiff. —There was evidence here of negligence on the part of the defendants in not having a porter at the crossing to warn passengers of the danger of crossing when a train was approaching. It was necessary for the deceased, after taking his ticket, to cross the line in order to get to the train, and as there was neither bridge nor subway, the defendants ought to have had a porter at the level crossing. That being so, evidence of contributory negligence on the part of the deceased, even if there were such negligence, does not entitle the judge to withdraw the case from the jury. It is not negligence if a person sees a train some distance off, and, misjudging the distance, risks crossing, having in fact received no warning. They cited

*Rogers v. Rhymney Railway Company*, 26 L. T. Rep. N. S. 879;

*Radley v. London and North-Western Railway Company*, 35 L. T. Rep. N. S. 637; 1 App. Cas. 754; 42 L. J. 573, Ex.; 25 W. R. 147;

*Dublin, Wicklow, and Wexford Railway Company v. Slattery* (ubi sup.);

*South-Eastern Railway Company v. Smitherman*, 47 J. P. 773.

FIELD, J.—I am of opinion that the learned counsel for the defendants have made out their right to have the order which they pray for in this case, namely, that there should be judgment of nonsuit, or that the defendants should have judgment. The case is a very important one, because it relates to a duty which comes home to everybody. It is a subject also which has necessarily been a great deal discussed, and upon which a great many very opposite views have been taken, of the respective duties and rights of railway companies and their passengers, and also because

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it involves the most important question of the limits within which it is the duty of the judge either to decide the case himself, or to leave it to the decision of the jury. But, although the general principles on which these points rest have been decided, yet, having regard to the particular circumstances of cases, it is very often exceedingly difficult to draw the line and say, first, whether there is any evidence of negligence in the defendants at all; whether there is negligence on the other side or not; and lastly, the most important question, what is the duty of the judge when he is trying a case with a jury. If he is trying the case without a jury, half of these difficulties vanish, because, being judge of law and judge of fact, then apart from the law he can draw his own conclusions of fact, and there is no difficulty arising from the separation of the two; but in this country the rule and practice is to leave questions of fact to be decided by juries, and it is the duty of the judge—and it is a duty which is always performed—not to trench upon the rights of juries to decide such questions as are bound to be left to them. On the other hand judges must not, and do not, shrink from doing their duty, and withdrawing the case from the jury if, under the circumstances, they think there is no evidence upon which the jury could reasonably decide. Now in this particular case, the plaintiff, who is the widow and personal representative of William Wright, alleges, according to the new form of pleading; that she has suffered damage by the negligence of the defendants, whereby William Wright was killed. The defendants, on the other hand, say specifically, "William Wright was not killed by any negligence of ours; moreover, we were not guilty of any negligence at all." There is not a railway in the kingdom that is not guilty of negligence now at this moment going on, but that gives no right of action until damage has been sustained by some person in consequence of such negligence. It is not, therefore, until a person is found who has sustained damage by the wrongful act of the railway company, that that wrongful act forms any ground for an action by anybody. That is the plaintiff's right of action; viz., the negligence whereby her husband was killed. The way of proving such a case usually is this: the plaintiff calls witnesses to show that the death was caused by negligence, then that negligence must be enlarged in detail, and it is enlarged in this particular case by the plaintiff's saying, "He was killed by one of your engines and a train which ran over him; that is, first of all, in general the negligence I complain of." But then the company say: "No, there was no negligence with regard to that train; it came at its due time; it was in its proper place; it was where it ought to have been; and therefore there was no negligence there." "That may be," says the learned counsel for the plaintiff, "but I will show you where there was negligence: you had contracted with me to give me a ticket, and had given me a ticket, whereby I should be able to go to Normanton; you gave me a ticket on one side of your line of railway, and in order to get to the carriage which you had promised you would put me into, or let me travel in, you knew, or must or ought to have known, that I should have to cross the railway line, and you did not give me a bridge

or a subway, but you assigned for me to get across the railway a piece of ground, properly paved and level—I do not complain of that—but a piece of ground in which, when I was exercising that right, and going across, I might be exposed to the danger of an approaching train, because the train by which I was to travel would pull up at the shed on the opposite side of the line, to which shed I had to go, and for the train to get to the front of that shed the engine must be, at some time or other, on the spot upon which I, at some time or other, must be to get across; therefore I say that there was a want of due care; you had contracted to give me a reasonably safe way for my passage, and you gave me a way which certainly and admittedly was under the circumstances a dangerous way. I do not mean to say that I am entitled to have a subway and a bridge at every station all over England; I do not say that in this particular case the provision may not have been reasonable, because the traffic may be such that it would be very unreasonable to expect that a railway company should have a bridge or a subway at that spot; but what I do say is, that if you perform your contract with me by giving me a way which is exposed to danger, then it is negligence in you not to take some kind of precaution to warn me of that danger." Now I had some doubt for some time whether the plaintiff was entitled to carry the duty to so fine a point as she proposed to do, and to some small extent I was struck, for some time, by the cases that have been referred to (and which I have looked at again), where it has been held, over and over again, that there was no duty, no active duty, on the part of a railway company to place a watchman or a gateman at level crossings; but it appears that these were cases where the parties were exercising their independent rights, absolutely free from any contract at all. The railway company have no duty to take care of a passenger, any more than the passenger has to take care of the company—none whatever; they have no duty to take care that people shall not drive across their land, except so far as the statute imposes a duty upon them, and that it has done with regard to carriage roads, because it has put up gates which are only to be opened at certain times, and if they performed that duty, if they did their statutory duty, I quite agree they have no other duty whatever upon them. Take the case of an ordinary footpath, a field footpath that goes across a railway, of which there are hundreds in this country. If it was to be held that the company were bound to have someone at every footpath in the country to say to a man, "For God's sake, man, don't go there," it would be almost impossible to say where the obligation would end. Therefore I thoroughly and cordially agree with those decisions, but I think they do not apply to the present case. Now, then, does the plaintiff show enough of want of care in reference to that proposition? I certainly should not myself have felt able—I do not know what I should have done if I had been a jury sitting on the question of fact, but I am well aware that I should have felt myself unable—to have withdrawn that case from the jury. There are many cases of the same kind. The very well-known case of *Barnes v. Ward* (9 C. B. 392; 19 L. J. 195, C. P.) is a case in point. In *Barnes v. Ward* (*ubi sup.*) the defendant made

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a hole, which he had a perfect right to do, on his own land, but he made it so close to the roadway that a person lawfully standing on the roadway met with an accident. Well, there was evidence of negligence there. Why? There was no negligence in making the hole: he had a perfect right to do that, but knowing, as he did, that a passer-by might fall in, it was incumbent on him to put up a fence, or a notice of some kind or another. All the ordinary cases we have every day of persons putting things on the side of the road are illustrations of the same principle. But to come to the present question here: there is no laying down any rule; there is no hard and fast line at all about the matter; still, without saying what a jury might or might not reasonably do, I must confess for myself that I agree with my brother Butt, and upon that branch of the case I should not myself, if I had the same light that I have now to day, have withdrawn the case from the jury. It is a most important principle, but I think that if railway companies are unable, from want of sufficient traffic receipts at a particular station, to make a subway or a bridge, yet as soon as a station becomes populous in traffic it is for them to decide what they will do, and until they come to the position of being able to give their passengers clear ways to get to the carriages of advancing trains, I think they ought to take some precaution, some extra precaution, to see that danger does not arise from crossing the line. That is all I have to say with regard to the first branch of the case. Now, was William Wright thereby killed? That is the next question. Upon that point it is clear that the impact of a man and an engine may arise from several causes, and under various circumstances. First of all, it may have arisen from the sole and exclusive negligence of the railway company. For instance, a man may be upon a siding at a station, attending to his goods there, taking care of his cattle, and the pointsman may send an express train into the siding and kill the man. There will be no question at all about that. That would be negligence by them: he would be killed by the negligence of the company, and nothing else. But the impact of a man and an engine may take place from another cause, from the negligence or wilfulness of the man himself. Take, for instance, a passing train going through a station, and a man on the platform, no duty whatever, no contract on the part of the company that he shall cross the line, nor any right in him to cross the line at all, but yet he deliberately chooses to put himself in front of the train; there I should say that the cause of death was the sole act of the man, and that the company had nothing whatever to do with it. In such a case there would be no difficulty. The difficulties arise when there are conjoint acts of negligence; and that is the case we have to deal with here. Because, the jury having found—and I am not prepared myself to set aside the verdict on that ground, so far as that is concerned—the jury having found negligence, and I think there was reasonable grounds, perhaps, for their doing so—then it is said the accident would not have happened but for that negligence. We are reminded of what Lord Cairns said in *Slattery's case* (*ubi sup.*). He says: "You may tell me that the man knows of this and knows of the other thing, but still had you touched him on the shoulder just as he

was going to jump off the platform, and said 'Do not run the risk,' the accident might not have happened." Therefore I cannot say myself that the negligence of the company or that the negligence of the man was the sole cause, either of them. But I am very clearly of opinion that it is the duty of everybody travelling by railway or road, or in any other relation of life, I do not care what it is, to use ordinary care in reference to dealings with those with whom they enter into a contract. And what has been held for years, and what, in point of fact, although it is expressed sometimes in different language, is the foundation of almost all the cases on the subject, is expressed or included, perhaps somewhat illogically, and not certainly grammatically, under the well-known maxim, *Volenti non fit injuria*. Of course a man may wilfully do a thing, and then that maxim would have nothing to do with it. It has always been applied to a man who does a thing in neglect of ordinary care, in absence of due care. Therefore I have, over and over again, told juries that, if they should be of opinion that the plaintiff himself exercised so little care as that, but for his want of care, the accident would not have happened, they might find a verdict for the defendant, because a man cannot have an action out of a wrong to which he himself is a party. I assume it to be that the impact of the man and the engine is the joint act of both; but suppose, for instance, that the man was heavier than the engine, then the engine would be smashed, not the man, yet the railway company could not sue if they had been guilty of negligence in putting their engine there. It is exactly the same question. Suppose the engine runs into a rock, and it is knocked to pieces; it is precisely the same question; neither side can sue the other. We generally say it is the engine kills the man; so the engine does, because the engine is heavier; but if the man were the heavier he would destroy the engine, and then there would have to be equal negligence on the other side. That leads us to the question whether or not there was in this case evidence of want of care and skill; and secondly, to the more important question whether that so appeared at such a time and in such a way as that the want of care and skill, which is ordinarily a question for the jury, was a question for the judge. While this argument was going on, I was at one time doubting whether it was competent for me to say anything about negligence; or whether, as soon as negligence was alleged, I should say, "It is a question for the jury, I shall not interfere." But the other side say that is not so. Now, I came across a very valuable observation of Sir Montague Smith's in the course of a well-known case he had before him, I mean the case of *Siner v. Great Western Railway Company* (*ubi sup.*), to the effect that a judge must be taken to have some common sense—he says a judge must be taken to know the ordinary modes and habits of life of the people of this country, whose causes he has to try; a judge must know what are the ordinary operations of a railway; and a judge, after all, must know what negligence means, because he has got to tell the jury what it is. That is quite true. I generally tell the jury it means want of reasonable care and skill, but I tell them in what sense I use the words "want of reasonable care and skill." But, if it is proved beyond all doubt that there was an excess of,

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or that there was the very greatest possible care and skill, and that there is no ground for the allegation of negligence, is the judge to leave that case to be decided—perhaps by the sympathies of a jury? No. He would be deserting his duty if he did not say, "I will take it into my own hands; I am satisfied there is no evidence that can reasonably go to the jury." That must be the case, because we must bear in mind the weaknesses of human nature, and, with the highest respect for juries, I cannot help continually seeing that people are moved by sympathies and feelings, and that therefore juries are liable sometimes not to be able to take that clear, firm, and accurate view of the law which it is a judge's duty to take; and therefore, under those circumstances, it is the judge's duty to take the case into his own hands. Now, then, in the present case, did the want of care and skill on the part of the deceased appear, and did it appear at such a stage as that the learned judge ought to have nonsuited? Now, first of all, when is there any question for the jury? First of all, if there is a conflict of fact, there is clearly a question for the jury, and the judge has to leave it to them immediately. If the facts are admitted (as they are here) on both sides, but the inferences are disputed, then the judge will consider whether he ought to leave the inferences to the jury. If they are such as an intelligent man, nay even a stupid man, on the jury might draw, then I should not nonsuit. I cannot put myself in the place of a better man, and say, "I am a better man than you are." If I do come to the conclusion that even a stupid man on the jury might honestly draw the proper inference, then I should leave it to the jury. I might go a step further; I might have a strong, as I have very often a strong, preponderating view that the evidence ought to be believed only on one side, and that one side ought to succeed: yet, though my views may be as strong as possible, I must leave it to the jury. Now, when may I take the case into my own hands? I say I may take it into my own hands when no reasonable jury, acting fairly and impartially between the plaintiff and the defendant, ought to draw, or would draw, any but one conclusion, and that conclusion is conclusive against the plaintiff; then I must take the case into my own hands. That is what I think to be the principle laid down in, and to be deduced from, the various cases, and that principle also is laid down strongly in the passage I read from Lord Cairns' judgment in *Slattery's case* (*ubi sup.*), and even more strongly still by Lord Blackburn and Lord Hatherley and those judges who dissented from the verdict in that case. It is in harmony with all the authorities, and in conflict with none; and I think therefore it is the proper view. It is, of course, strongly marked now by the decision of the Court of Appeal in the case of *Davey v. South-Western Railway Company* (*ubi sup.*). Whatever might have been my view of the facts of that case, it is not for me to form any judgment upon them. I find the principle laid down there and I think I must act on it. That principle I understand to be, that if, upon the facts of the case, the facts appearing on the plaintiffs' case, and on the plaintiffs' cross-examination of the defendants' witnesses, or, as admitted, if the judge can see that the accident was clearly due, not to the

negligence of the company, but to the deceased's own rashness and want of care, then it is his duty to take the matter into his own hands and nonsuit. Now, can I plainly see that in the present case? I think I can. What are the facts? The deceased was going by the train to Normanton at half-past nine on a Sunday night; he had got his ticket; and in order to get it he had gone to what is called the booking-office, and in order to reach his train (which he knew was coming, because he knew at what time it was due) he had to cross the line. He was sitting in the waiting-room at the time when the train was coming under the bridge. There is some doubt about the distance. I do not know whether it matters very much, if it was either half a mile or a quarter of a mile one way or the other; but, at all events, the man heard the train coming. Now, first of all, was it the part of a careful man, using ordinary care, to remain so long on that side of the railway as that he should only be able to get across when the train was coming in in that way? I think not. Mr. Digby Seymour said, when I cited the case of a man going across before the deceased, and put that as an instance of a reasonable man, "Oh, he went over there to smoke his cigar probably." I think it was a prudent thing to do. I observe Butt, J. was rather struck by the fact that it was a cold night, and that the shed on the opposite side was less comfortable; but that is the case all over England, and I cannot see myself that that is any justification for a man's waiting so long on that side of the railway that, when he is crossing, he is knocked down by the engine of the very train by which he is intending to travel. Had he been knocked down by a passing train, I could follow that; but here is the very engine of the train that he is going by. Well, he jumps up, evidently anxious. There were in the waiting-room a woman and three men. Now, it is admitted, or at any rate the evidence is, that the deceased saw and heard the train; admitted that he went to the platform, and that there was a light at one end and a light at the other end, and that then he started to run just in front of the train as it was coming in. Now, I must bring my reasoning powers to bear upon that, and see what an ordinary man would do, with ordinary care; and I am bound to say that this poor man did not exercise ordinary care. On the contrary, so far from using ordinary care, I think he was guilty of very great carelessness. I cannot say the whole cause of the death was due to it, but there was so much that he could not have sued the company for their negligence. Now, I have read very carefully Butt, J.'s summing up to the jury upon that point, and I am not quite prepared to follow all that he says. First of all, he puts the principle which I have put, and he says, "It is perfectly true that a person must take ordinary care of his own life and limb, and if by want of that ordinary care, even although conjoined with negligence on the part of others, he suffers, he cannot recover in a court of law." But the question which, it seems to me, arises here is this: there is no evidence that the man did not see the light on that engine; the presumption, I think, would rather be the other way. If he saw the light on the engine approaching, it would depend upon the proximity of that light to the level crossing at the time he observed

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it, whether it was prudent or not to cross. If he saw it, and thought it was a very considerable distance away, allowing plenty of time for him to cross without any damage, then I think there would be no negligence in crossing. Now, then, what does Lord Cairns say? He says, if the man knows the train is coming in, would not, ought not, a man of ordinary care to look up the line to see where the train was coming, and ascertain whether he could safely cross, or whether he must wait? There is no proof that the deceased exercised any judgment of the sort. Surely that is want of ordinary care. A man must not part with common sense the moment he gets into a railway station, and we should be doing very bad service to the public if we induced people to think they could do so. A man must exercise care; he must look about him—people do it every day. If they are walking along the pavement, I suppose they look to see where the edge of the pavement is, or they look to see whether it is safe from carts along the road. That is what people of ordinary care do, and it is by people of ordinary care that we must take the standard of what is common ordinary care. That is the standard, the exact height, and length, and breadth of which we know, and there is no difficulty in a judge's saying, "That exceeds this standard; it is broader, or higher, or longer." Under these circumstances, that being so, and this appearing from the plaintiff's case, I think there was here no case to go to the jury. Then Butt, J. says this: "If he saw the train and thought it was a very considerable distance away, allowing plenty of time for him to cross without any danger, then I think there would be no negligence in crossing; but the question is, seeing the light coming at night in that way, when it was difficult or perhaps impossible to judge to a nicety its distance from him, was it ordinary care, or did it show an absence of ordinary care, to attempt to cross the line?" Now, I have not the faintest doubt in this case. I think that the case, at the end of the plaintiff's evidence, disclosed such a want of care on the part of the deceased as to disentitle the plaintiff to recover. I think it is better to put it boldly at once in that way, so that the public may fully understand what their duties are in going by a railway train.

MANISTY, J.—I agree, on the whole, with what has been said by my learned brother Field, but I do not propose to go into a good deal that he has dealt with. I think this case ought to be decided, and may be decided, upon a clear, distinct, and, I think, unanswerable ground, without going into the debateable ground which has been the cause of so much litigation. I do not suppose there is any class of cases upon which so many opinions have been expressed, and in such different language, and sometimes with such different results, as this class of cases, namely, accidents; and to my mind the less we incur this case with questions of that sort the better. Now, the issue which was raised, and the question to be tried, was simply this: Were the defendants, the railway company, guilty of negligence, *whereby* William Wright was killed? That is what the plaintiff has to prove. The alleged negligence is, that the railway company did not have a porter or someone there to warn the passenger Wright of the danger which he would incur if he crossed the line. What was the danger? It was the danger

of an approaching train. My learned brother Field seems to think there was some evidence of negligence. I abstain from saying whether I do or not, because that, I admit, is a very debatable point. It think it is a very debatable point, whether or not the company was bound to have a porter there to warn Wright. It is not necessary to decide it, and why is it not necessary? Because, if there had been a porter there, he could only have given the information which Wright himself possessed. He had the information; he knew that a train was approaching; he knew it was coming into that station, and that he was going to travel by it; he knew, to my mind, even giving latitude to him, all that, under any circumstances, it would have been the duty of the railway company to have informed him of—he knew it all. But then, knowing all that, what we have to say is, whether or not, if there was negligence in not having a porter there, that in any way caused the death of Wright; in other words, was it negligence *whereby* Wright was killed? For the reason I have given I am clearly of opinion that there was no evidence whatsoever of any negligence *whereby* Wright was killed. Having proved negligence you must show that that negligence was negligence that caused the death. I am now dealing simply with negligence on the part of the company, not at all introducing the question of "contributory negligence." That is essentially a separate and distinct question, and the first question in all these cases is, Is there evidence to go to the jury of negligence whereby the man was killed? Now, there may be negligence in some remote degree, but so remote as not to be properly connected with the accident. You cannot have a stronger instance of that than you have in the case of the *Metropolitan Railway Company v. Jackson* (*ubi sup.*). Probably there is no case which illustrates that proposition better than that case. The negligence alleged there was allowing too many passengers to get into the carriage; and then it was said that, although there was that negligence, Jackson, at the time when the porter ran along and shut the doors, happened to have his thumb upon the hinge, and thereby the injury was caused. Now all the learned Lords admitted that there was negligence in allowing so many people to be in the carriage; but they held that that was not connected with the accident or the injury so as to say that it was negligence whereby the accident was caused; and, therefore, in that unfortunate case, which went through many and divers stages of litigation, they ultimately decided that, although there was negligence on the part of the company, there was no evidence that it was connected with the injury which was caused. Now, assuming for the present purpose that it was negligence not to have a person there to warn Wright, then I say that, if there had been, all he could have done would have been to tell Wright, "There is a train approaching;" in other words, to tell him that which he already knew. Therefore I am of opinion that in this case there was no evidence of negligence *whereby* the injury was caused, and that the only negligence as to which there was evidence was the negligence of the deceased man himself. Well, if that be so, that brings us to the question of what is the duty of the judge in such a case—call it

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"contributory negligence," or call it "counter negligence," or whatever else you choose to call it; what is the duty of the judge? Now, we have had two cases brought under our notice. One is the case, in the House of Lords, of the *Dublin, Wicklow, and Wexford Railway Company v. Slattery* (*ubi sup.*). At one time I felt very much inclined to go through that case, and to point out *seriatim* how each of the opinions (for they are only opinions) expressed by those noble and learned Lords were entirely in consonance with the view I am now taking; but it would take up a great deal of time. I have got the reference to every one of them, and I think that may fairly be left to those who have to deal with the case, and anyone who chooses to take the trouble that I have taken will arrive at the same result, and that result is, I think, that, although those noble and learned Lords came to the conclusion that there was evidence in that case to go to the jury, yet, taking the opinions expressed as to what might have been the case, as distinct from what was the case, that all the opinions, fairly taken, tend to one end, namely, that it is the duty of the judge, if there is no evidence except evidence of negligence on the part of the man himself, to deal with the case himself, and not to leave it to the jury. Now that, I believe, will be found to be the result as regards the opinions expressed, as distinguished from the judgment given upon the point in that case. It will be seen that three noble and learned Lords differed from the other five, those who differed being Lord Hatherley, Lord Coleridge, C.J., and Lord Blackburn; and the other five being the Lord Chancellor (Lord Cairns), Lord Penzance, Lord O'Hagan, Lord Selborne, and Lord Gordon. I believe I am correct in saying that, if this case had been before them, and they had given effect to their opinions, they would have said it was a case in which the judge ought to take the matter into his own hands, and not leave it to the jury. But we are not bound to rely upon that case only, because there is a case which, if it be law, as to which I have no right now to inquire, then *à fortiori*, the case ought not to be left to the jury. I mean the case of *Davey v. The South-Western Railway Company* (*ubi sup.*), which was decided in the Court of Appeal. In that case I dissented from the judgment, and so did Baggallay, L.J. in the Court of Appeal. There are circumstances in that case which, to my mind, distinguish it altogether from the present. There was the position of certain buildings impeding the view, so that the passenger could not get a view of what was coming or going until he got within a step or two of the down line; he admitted that he looked up one way, but he did not look the other; if he had he would have seen the train coming; but he did not perceive it, and, notwithstanding that there was an obstruction which obscured the view until the man was close upon the line, and notwithstanding that there was no whistling to warn him, and no other warning given, the Court of Appeal held that a man was bound to use his faculties of sight and hearing, and that, having both sight and hearing, and not looking, that was a case in which judgment ought to be entered for the defendants, and that the case ought not to have been left to the jury. Now in this case what is the evidence? There was no obstruction here, and the man knew the train was coming. He

knew it. Well then, if that case be law, *à fortiori* we must decide this case in favour of the company. Of course, speaking with the greatest possible respect for the Court of Appeal, and speaking now after that judgment with that diffidence and respect which is due to it, still, upon consideration, I cannot help feeling almost a desire that that case may be further considered, because there has been a considerable difference of opinion upon it among the judges, and to my mind it goes a very long way. But I agree with the observation of my learned brother Field, that if in this case we were to hold that which Mr. Digby Seymour has contended for, namely (and that is the whole of this case and, I believe, the whole of his contention in two lines), that, if a passenger, knowing that a train is approaching, runs across the line in front of it and is killed, it is for the jury to say whether he is guilty of negligence or not; all I can say is that, whenever such a decision is arrived at, I think it will be most unfortunate, and end, I should hope, in leading to some alteration in the law. My opinion is that there was no evidence in this case to go to the jury of negligence on the part of the defendants, which contributed to or which caused the accident.

LOPES, J.—After the judgment of my learned brother Field, with every word of which I agree, I am almost unwilling to say anything with regard to this matter. I doubt very much whether a more able and exhaustive judgment, with regard to what is "contributory negligence," and to the question when negligence or contributory negligence ought to be left to or withdrawn from the jury, exists in any of the books, than that which has just been delivered by my learned brother Field; and I again say I agree with every word of it, and I much hope that this case may be reported. However, this is an important matter, and I should like shortly to express my view with regard to it. I think that there was nothing in this case about which the opinion of the jury ought to have been taken, having regard to the state of the evidence at the end of the plaintiff's case. If the deceased had done nothing negligent himself I should have thought that the case ought to have been submitted to the jury, and for the following reasons: The deceased was invited, in fact compelled, in order to reach the train by which he was going, to walk across a dangerous crossing. For such crossing a subway or a bridge might have been substituted, but the company elected not to afford such facilities. The night was dark; there was no porter to warn a passenger of the near approach of the train; no bell was rung, and there was no whistle; in fact, no precaution whatever was taken to avoid an accident. A passenger, it must be remembered, is comparatively ignorant of the nature of a crossing like this, and is comparatively ignorant of the speed with which the train approaches the spot, whilst the company's servants, on the other hand, are experienced and expert in these matters, and better able to calculate the distance, and appreciate the speed at which an advancing train is approaching. I should have thought, therefore, had that been all the case (and these facts are admitted), that there might have been a case which ought to have been left to the jury; and I do not hesitate to say that if, upon those facts, with nothing more, the jury had found a verdict for the plaintiff, I should not have been willing to disturb it.



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I should have thought that it was a proper question for the jury to determine, whether, having regard to all the circumstances, such reasonable precautions had been taken as would exonerate the company from negligence. But what the plaintiff complains of here in fact is, the absence of any warning of the approach of the train. How can she complain of this under the circumstances; or how can she say that such absence of warning was the cause of the mischief, and that the deceased did not materially contribute, by his own want of care, to that which happened? How can she say that, when she admits that the deceased well knew that the train was close at hand, that he saw it, and, indeed, ran across the crossing in order to avoid it? All this appears in the plaintiff's case, and in point of fact is admitted. That being so, can any inference but one be drawn from such circumstances, namely, the inference that the deceased materially, by his own negligence, contributed to the mischief? If so, the plaintiff is disentitled to recover. According to my view, that the man materially contributed to that which happened is the obvious conclusion, the only inference which can be fairly drawn from the facts which were made to appear at the close of the plaintiff's case; facts, too, it must be remembered, that were not in controversy. I think, therefore, that there was nothing in this case about which the opinion of the jury ought to have been asked. Now, my brother Manisty has arrived at the same conclusion, but by a somewhat different road. I understand my brother Manisty's view—for which, I need not say, I have the greatest respect—to be this, that he does not consider that there was any case to be submitted to the jury, because, even assuming negligence on the part of the defendants, that was not negligence which was the *causa causans* of the deceased's misfortune. I cannot help thinking that, if it is put in that way, I am then not prepared to say but that, in the circumstances of this case, the question whether the defendant's negligence was the *causa causans* of the misfortune would be a question for the jury. I therefore prefer to arrive at what, no doubt, is the same conclusion, upon the view taken by my brother Field, rather than that taken by my brother Manisty. With regard to *Davey's* case, to which my brother Manisty has alluded, I can only say that I entirely agree with him. If it is law, of course we are bound by it, because it is a decision of the Court of Appeal. If it is law, then clearly the present is an *à fortiori* case, and I do not hesitate to say that the Master of the Rolls in that case has laid down the law, with regard to what it is incumbent on a plaintiff in an action of negligence to prove, in a way in which—I will not say I never understood it, because that would amount to very little, but which I am convinced, from conversations I have had with my brother judges, they never understood to be the law before. I think, therefore, there should be a nonsuit in this case.

*Rule absolute to enter judgment for defendants.*

Solicitors: for the plaintiff, *Hamlin, Grammer, and Hamlin*, for *Dunn and French*, Leeds; for the defendants, *Beale, Marigold, Beale, and Groves*

## Judicial Committee of the Privy Council.

March 14, 15, 18, and April 9.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, Sir R. COUCH, and Sir A. HOBHOUSE.)

REG. v. WILLIAMS. (a)

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

*Negligence—Evidence of—Liability of harbour authority—Crown Suits Act 1881—Public work—"Work of like nature."*

The harbour of W. was under the control and management of the Executive Government of the colony. The staithes and wharves belonged to the Government, which received wharfage and tonnage dues in respect of vessels using them. There were no harbour dues, and the public had a right to navigate subject to the harbour regulations made by the Government, which had a right to remove obstructions in the harbour.

A ship of the respondents, while lying alongside the wharf or staithes, in the usual and customary manner at the port, settled with the fall of the tide upon a snag lying at the bottom of the water and sustained damage.

There was evidence that the harbour master was aware, before the accident, of the existence of a danger at the spot, though not of its precise nature.

Held, that it was the duty of the Government to take reasonable care that vessels using the staithes in the ordinary manner might do so without danger, and that they were liable for the injury sustained.

The Crown Suits Act 1881, s. 37, enacts, "No claim or demand shall be made upon or against Her Majesty . . . unless the same shall be founded upon . . . a wrong or damage, independent of contract, done or suffered by or under" the authority of the Executive Government of the colony, "in, upon, or in connection with a public work as hereinafter defined. 'Public work' means any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by the Government of the colony."

Held, that the omission to take reasonable care in this case was a wrong done by or under the authority of the Executive Government, and that the staithes were "a work of a like nature" within the meaning of the section.

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Court of Appeal of New Zealand (Prendergast, C.J. and Richmond, J.) discharging a rule nisi for a new trial of issues of fact joined between the parties on a petition of right, and tried before Richmond, J. and a special jury.

The facts appear fully from the judgment of their Lordships.

Cohen, Q.C. and Gorst, Q.C. appeared for the appellant.

Ollivier (of the New Zealand Bar) and Cracroft for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

April 9.—Their LORDSHIPS gave judgment as follows:—The respondent in this appeal presented

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

ERRATA.—In *Freeman v. Newman*, ante, p. 397, col. 2, line 12 from bottom, for "O. S." read "N. S."; and p. 398, col. 2, line 36 from top, for "respondent" read "appellant."



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in the Supreme Court of New Zealand, under the provisions of an Act in force in that colony, called the Crown Suits Act 1881, a petition of right, in which it was stated that the suppliant was the owner of the steamship *Westport*, and on Feb. 16, 1882, the steamship entered Her Majesty's port or harbour of Westport, in the county of Buller, in the colony of New Zealand, and, by and under the direction of Her Majesty's harbour master, was moored at the staithes or wharf in the harbour erected by Her Majesty's Executive Government in the said colony for the use and accommodation of vessels frequenting the port; that the harbour at Westport is a tidal harbour, at or near the mouth of the Buller river, and is under the control and management of Her Majesty's Executive Government in the colony, which appoints the harbour master and all other officials exercising control over the same, and the staithes and wharves, and over the movements of all vessels therein, and receives the dues payable in respect of vessels frequenting the port and using the accommodation therein provided; that all wharfage and tonnage rates, and all other rates and dues in respect of the harbour and of the staithes or wharves therein, are payable to and received by the authorities appointed to receive the same by and on behalf of Her Majesty's Executive Government, and on the 4th March 1882 1*l*. 1*s*. 11*d*., by way of dues in respect of the use by the *Westport* of the staithes or wharf and harbour, was paid on behalf of the suppliant, and a receipt given for the same; that prior to the 16th Feb. 1882 the *Westport* had frequently visited the harbour, and been laden with coal and general merchandise in the usual and customary manner at the port; that the rise and fall of the tide was at the time of the happening of the events after mentioned eleven feet or thereabouts; that on the 17th Feb. 1882, while alongside the wharf or staithes, and being laden with coal and cargo in the usual and customary manner at the port, the *Westport* settled with the fall of the tide upon a snag lying at or near the bottom of the water of the harbour, and was so greatly damaged thereby that the steamer became filled with water, and sank to the bottom of the harbour alongside the wharf or staithes; that Her Majesty's Executive Government in the colony, and the harbour master and other officials exercising authority at the port were at that time, and for a long time previously had been, well aware of the existence of this snag, and of the danger and risk incurred by vessels moored at and using the staithes or wharf or frequenting and navigating the harbour in consequence thereof, but had negligently and improperly suffered the same to remain there, and no steps whatever had been taken by the Executive Government or the harbour master or other officials to indicate to masters of vessels frequenting the port the existence of the hidden danger occasioned by the position of the snag, or to warn the master of the *Westport* thereof, and the master was at the time of the accident wholly ignorant of the existence of such danger; that, in consequence of the injuries to the steamer, the suppliant had suffered loss and damage to the amount of 1500*l*. and upwards. The Solicitor-General for New Zealand, duly authorised, and acting for and on behalf of Her Majesty, by his first plea denied all the material allegations in the petition of right, and in his second and third pleas he alleged that there was

water to the height of 11 feet, covering the snag at low tide, and the *Westport*, when fully laden, might and could easily and without damage have been hauled over and above the snag in any state of the tide in the harbour whilst loaded, so as to float in the same depth of water fore and aft, but the master improperly loaded the forehold of the steamer so as to cause the bow of it to sink to a depth of 13 feet 6 inches or thereabouts, and the stern to sink only to a depth of 8 feet 6 inches or thereabouts, and then and whilst the steamer was so loaded, negligently, carelessly, and improperly hauled the steamer from the berth where she was lying (2nd plea), and on his own responsibility, and without communication with the harbour master, carelessly, negligently, and improperly moved the steamer from the berth where she was lying (3rd plea), and whilst the steamer was being so hauled and moved she struck upon the snag and was injured. The replication to the second and third pleas denied the allegations in them in the terms of the allegations. At the trial of the issues of fact by a special jury at Nelson, New Zealand, on the 21st and 22nd Dec. 1882, the allegations in the petition preceding the allegation of what happened on the 17th Feb. were either admitted or found to be true, except the allegation that the harbour was under the control and management of the Executive Government, the issue as to this being struck out, and except also the allegation of the receipt of rates and dues, as to which it was found that there are no harbour dues, and the 1*l*. 1*s*. 11*d*. was received for wharfage and tonnage dues. The other issues with the findings of the jury thereon, were as follow:—  
 "9. Did the said steamship *Westport*, on the 17th Feb. 1882, while alongside the said wharf or staithes, settle with the fall of the tide upon a snag lying near or at the bottom of the water of the said harbour? Yes, on the obstruction called the vertical snag. 10. Was the said steamship so greatly damaged thereby that she became filled with water and sank to the bottom of the said harbour alongside the said wharf or staithes? Yes. 11. Was Her Majesty's said Executive Government, at the time of the happening of the events in the said petition mentioned, and for a long time previously, well aware of the existence of the snag which caused the damage, and of the danger and risk incurred by vessels moored at and using the said staithes or wharf, or frequenting and navigating the said harbour, in consequence thereof? No; but after the communication from the harbour master, if proper steps had been taken promptly, they would have been aware. 12. Did Her Majesty's said Executive Government negligently and improperly suffer the last-mentioned snag to remain alongside the said staithes or wharf, to the great danger of vessels moored at the said staithes or wharf? Yes. 13. Did Her Majesty's said Executive Government take any steps, or did the harbour master or other officials take any steps to indicate to masters of vessels frequenting the said port the existence of the hidden danger occasioned by the position of the said last-mentioned snag, or warn the master of the said steamship *Westport*? No. 14. Was the master of the said steamer *Westport*, at the time of the happening of the events in the petition mentioned, wholly ignorant of such danger? Yes. 15. Could the said steamer *Westport*, when fully laden, have easily and without danger been hauled over and above the said snag

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in any state of the tide in the said harbour, whilst loaded, so as to float in the same depth fore and aft? No. 16. Did the master of the said steamer *Westport* load the forehold of the said steamer so as to cause the bow of the said steamer to sink to a depth of 13 feet 6 inches or thereabouts, and the stern of the said steamer to sink only to a depth of 8 feet 6 inches or thereabouts? Admitted. Yes. 17. Did the master of the said steamer negligently, carelessly, and improperly haul the said steamer from the berth where she had been placed by the harbour master; and did the said steamer then, and whilst being so hauled, strike upon the said snag and suffer the injury in the petition mentioned? No. 18. Did the master of the said steamer move the said vessel carelessly, negligently, and improperly? No. 19. Did the master of the said steamer move her on his own responsibility, and without communication with the said harbour master, and unknown to the said harbour master? Yes; but there was an implied permission, according to the usage of the port. 20. Has the suppliant, in consequence of the injuries mentioned in the petition, suffered damage and loss; and, if so, to what amount? 1500*l*." On the 19th Jan. 1883 the Supreme Court of New Zealand granted a rule to show cause why the verdict should not be set aside, and a new trial had, upon the grounds that the verdict was against the weight of evidence; that the learned judge improperly rejected evidence of the harbour regulations; that the learned judge misdirected the jury upon the question of negligence. This rule was discharged by the Supreme Court on the 18th May 1883, and the present appeal is from that order. Before proceeding to discuss what their Lordships consider the real question on the merits, they think it best to dispose of some other questions which have been raised. The harbour regulations for the ports of New Zealand, made by Order in Council, provide that the master of every vessel shall anchor or moor where the harbour master or person deputed by him may direct, and he shall not unmoor or quit the anchorage, nor shall he haul his vessel alongside any public pier, wharf, or jetty without having previously obtained permission from the harbour master or his deputy to do so, and any master offending against this regulation shall be liable to a penalty not exceeding five pounds. The evidence of the mate of the *Westport* was that she crossed the bar of the harbour on the morning of the 16th Feb. 1882, and made fast to the coal staithes under the direction of the harbour master, with the forehatch under No. 1 shoot, head up the river; that the following day, having finished loading the fore hold, about 1 or 2 p.m., they slacked astern about twenty-five feet, to take in a few packages of cargo from the gangway, which they generally do whilst they are loading coal; when they went about twenty-five feet astern the vessel struck on a snag, which, as the tide fell, made a hole in her bottom. The *Westport* measures about one hundred and sixteen feet from the forehatch to the stern, counting to about the centre of the hatch, and her beam is twenty-three feet. The snag struck her about five feet abaft the mid-ship section on the starboard side of the keel, which was outside as she lay, and at the garboard streak, where she would be drawing about 10 feet 9 inches of water. As the head ropes were slacked, the current necessarily set the bow out, there being

a slight curve in the river at that point. The bow was about eight feet off the staithes when she struck, and the stern about fifteen feet. Opposite the point where she struck, she was about thirteen feet from the staithes, and the edge of the hole in her bottom being about one foot from her keel, the snag must have been about twenty-five feet from the staithes. It may be convenient to notice here the variance between this evidence and the allegations in the petition that the steamer was alongside the wharf or staithes when she settled with the fall of the tide, upon which the ninth issue was framed. As to this the Supreme Court in its judgment says: "There was therefore a variance from the case stated in the petition, inasmuch as the steamer was damaged whilst shifting her berth. But there was no application for a nonsuit upon this or any other ground. Had the objection been made it would have been properly met by the allowance of an amendment in the petition. The question whether the vessel had been moved was not really but only formally in issue between the parties. As regards the suppliant's conduct, the only questions raised were, whether the vessel had been moved negligently so as to cause or contribute to the damage, or illegally. These were the questions which the parties went down to try." And as to the ninth issue, the Court says, "The objection here seems to be that the jury have found that the *Westport* was damaged" while alongside the wharf, "the damage having in fact occurred whilst her position was being slightly altered. But as the vessel was only allowed to move a few feet along the wharf, remaining always connected with it by her head and stern lines and springs, it appears to us that she may properly be said to be injured while alongside." Their Lordships think that the finding of the jury may be so understood, and then it is in accordance with the evidence. The question whether the steamer was negligently and improperly moved was raised by the seventeenth and eighteenth issues. These were answered by the jury in the negative. The evidence of the mate was that the harbour master directs the movements of the vessel if he happens to be there, but he had never objected to their dropping astern to the gangway; that they moved the vessel without his directions and he never complained, it is the custom of the port, of all ports; when the harbour master knew of the accident he did not object that the ship had been moved without his permission; and the harbour master himself, in answer to the question by the court, "Was it imprudent to move her?" replied only that it was unusual. The only ground upon which it can be contended that these issues ought not to have been answered in the negative is that there was a breach of the harbour regulations. The jury found upon the nineteenth issue that the master of the steamer moved her without communication with and unknown to the harbour master, "but there was an implied permission according to the usage of the port." There was evidence upon which the jury might reasonably find this, and that under the circumstances the master did not negligently and improperly move the vessel. The Supreme Court thought that the defence that the master was doing an illegal act prohibited under a penalty, and that no action could lie for damage to the vessel consequent upon the illegal act, was not raised by the pleas. Their Lordships see no

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reason to differ from this. The main question is, whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staithes or wharf and inviting ships to visit them in the same manner in which the Executive Government are shown to have done. In *Parnaby v. The Lancaster Canal Company* (11 Ad. & E. 223), where a company had, under powers given by an Act of Parliament, made a canal for their profit, and opened it to the public upon payment of tolls to the company, it was held by the Court of Exchequer Chamber that the common law imposed a duty upon the proprietors to take reasonable care, so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate without danger to their lives or property. This decision was approved of in *The Mersey Docks Trustees v. Gibbs* (14 L. T. Rep. N. S. 677; L. Rep. 1 H of L. Cas. 93), in which it was held that, if the cause of the injury was a bank of mud in the dock, and if the defendants, the trustees, by their servants had the means of knowing that the dock was in an unfit state, and were negligently ignorant of it, they neglected their duty, and did not take reasonable care that it was fit. The present case differs from *Parnaby v. The Lancaster Canal Company* and the *Mersey Docks Trustees v. Gibbs*, in that there are no harbour dues, and the public have a right to navigate subject to the harbour regulations, but the harbour is under the control and management of the Executive Government, which has authority to remove obstructions in it. The staithes and wharves belong to the Executive Government, which receives wharfage and tonnage dues in respect of vessels using them. These are collected by the railway authorities appointed by the Government, and the manager of the Railway Department directs where the vessels which are to load with coals shall be placed. It appears to their Lordships that this case is within the principle upon which the above cases were decided, and upon the facts proved they are of opinion that the law imposes a duty upon the Executive Government to take reasonable care that vessels using the staithes in the ordinary manner may do so without danger to the vessel. The principal evidence on this question is the harbour master's, and his letters to the Marine Department of the Government of New Zealand. He first became aware of the existence of a snag near the place where the *Westport* struck at the end of January 1882, by a vessel called the *Ladybird* touching on it. He sent down a man who was not a professional diver to examine it, and reported to the Secretary of the Marine Department. No notice of danger was given until after the accident to the *Westport*, when the harbour master put up a notice on the piles, "Snag here, 11 feet 6 inches low-water springs." On the 8th May 1882 a diver employed by the Public Works Department went down and found a horizontal snag, about forty feet long, projecting from the staith, the butt of the tree being underneath it. From twenty-five to thirty feet from the staith he came across the stump of a tree that had been felled, standing up vertically, and projecting about eighteen inches above the horizontal snag, which was resting up against it. This was the snag which caused the damage to the *Westport*. If she had gone on the horizontal one, she would have forced it down, as there was

two feet of water under it. Their Lordships think that there was here evidence from which, if it was properly left to them, the jury might properly conclude that the Executive Government, by their servant the harbour master, had, before this accident, notice of a danger at this spot, such as to make it a want of reasonable care in them not, by their servants, to inquire what that danger was, and to warn a vessel in the position of the plaintiff's vessel of the existence of danger there. If such a warning had been given it would have been the fault of the plaintiff's servants if they let the vessel pass over that spot at low water. Their Lordships do not think it was necessary to go so far as to prove that the servants of the Government knew the precise nature of the danger, or whether the projecting snag was, as it turned out to be, an independent vertical snag, or, as the harbour master seems to have supposed, a branch or limb attached to the horizontal snag. The real question was, whether, if they had not neglected the duty which the law cast on them to take reasonable care, they would not have known of the existence of a danger against which they should give warning. Their Lordships have felt much embarrassed from not being told what directions were given to the jury. It may be that there was some misdirection, or that the right point was not presented to the jury, but that is not shown, and it lay on the appellants to show it. The findings of the jury on the eleventh and twelfth issues amount to a finding that there was negligent ignorance, and their Lordships are by no means prepared to say that there was not evidence upon which the jury might reasonably come to that conclusion. Even if such evidence had not existed, still there was evidence that the Executive Government had before the accident to the *Westport* sufficient notice of the danger to make it their duty to give warning of it, which was not done till after the accident. This was a breach of the duty to take reasonable care. It remains to notice one other question which was raised by the counsel for the appellant, namely, whether the negligence which occasioned the injury was within the provisions of the Crown Suits Act 1881. Sect. 37 of that Act provides that, "No claim or demand shall be made upon or against Her Majesty, under this part of this Act, unless the same shall be founded upon or arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced were a subject of Her Majesty: (1.) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied. (2.) A wrong or damage independent of contract, done or suffered by or under any such authority as aforesaid in, upon, or in connection with a public work as hereinafter defined. (3.) For the purposes of this provision 'public work' means any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by the Government of the colony, or constructed by such Government out of moneys appropriated by the General Assembly, and the revenues derived from which form part of the general revenue of the colony." In *Jolliffe v. The Wallasey Local Board* (L. Rep. 9 C. P. 62; 29 L. T. Rep. N. S. 582) it was held that an omission to do something which

ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action, and their Lordships think that the neglect in this case to take reasonable care is a wrong done by or under the authority of the Executive Government. They also think that the staithes are "a work of a like nature" within the meaning of sub-sect 3. Indeed, the staithes seem to be an adjunct to the railway which is used for carrying coals to be loaded on board the vessels in order to facilitate the loading, and, in the view their Lordships take of the case, the negligence is in connection with them. The Supreme Court say that their verdict might possibly not have been the same as that of the jury, but they could not say the finding was contrary to law. Their Lordships also might possibly not find the same verdict, but the question of negligence was one which the jury was to determine, and no sufficient ground has been shown for setting aside their verdict. Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Supreme Court, and to dismiss the appeal, and the costs thereof will be paid by the appellant.

Solicitors for the appellant, *J. and R. Gole.*

Solicitors for the respondent, *Baker and Nairne.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, Oct. 29.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

BRADFORD v. YOUNG. (a)

*Practice—Appeal—Staying payment out of court—R. S. C. 1883, Order LVIII., r. 16.*

On the further consideration of an action on the 8th Aug. 1884, *Pearson, J.* ordered that, subject to the payment of the costs of all parties, a fund in court should be paid out to the plaintiff.

On the 13th June one of the defendants had given notice of appeal from the judgment at the trial.

On the 11th Aug. *Pearson, J.* refused an application by the appellant that pending the appeal the distribution of the fund should be stayed, but suspended payment out till after the Long Vacation, to enable the applicant to appeal. On appeal from this order it appeared that the plaintiff had been abroad for two years, and that his address was not known.

Held, that, on the appellant giving security to make up to the plaintiff the difference between the present income and interest at 4 per cent. on the present market value of the fund in court, and to make good the difference, if any, between the highest market price of the stocks in which the fund was invested at any time before the appeal was heard and the price at the time of the appeal being heard, the payment out would be stayed.

PEARSON, J., by an order made on the 29th April 1884, declared that the domicile of Hugh

Falconer, the testator in the writ named, was at the time of his death in Scotland, and ordered a case to be settled for the opinion of the Court of Session in Scotland as to the interest taken by the testator's daughter, Jane Falconer, or those respectively entitled at her death, under the unsigned document admitted to probate in England on the 29th March 1828: (26 Ch. Div. 656.)

A case was accordingly settled by the judge, and on the 19th July 1884 the Court of Session found that neither Jane Falconer nor her representatives took any interest.

On the further consideration of the action on the 8th Aug. *Pearson, J.* directed that, subject to the payment of costs, as between solicitor and client, the fund in court should be transferred to the plaintiff.

On the 13th June 1884 H. Thornton, one of the defendants, gave notice of appeal from the order of the 29th April, and on the 11th Aug. he moved, on notice, that, pending the appeal, the distribution of the fund directed by the order of the 8th Aug. might be suspended.

*James Kaye* in support of the motion.—In *Brewer v. Yorks* (20 Ch. Div. 669) *Jessel, M.R.* said: "It is of course to stay the payment out of moneys" pending an appeal, and *Cotton* and *Lindley L.JJ.* concurred in the decision.

*Cozens-Hardy, Q.C.* and *Alexander Young* for the plaintiff.—There is no suggestion that the plaintiff is insolvent, and the money if paid out to him will be quite safe. It is not the practice to stay payment out as a matter of course merely because an appeal is pending. Some special circumstances must be shown to justify payment out. An appeal does not *per se* operate as a stay of execution: (*R. S. C. 1883, Order LXVIII., r. 16.*)

*Kaye* in reply.—The fund is large, and the questions of law involved are difficult. If the fund is paid out and the appellant is successful, it may be impossible for him to recover it.

PEARSON, J.—I have looked at *Brewer v. Yorks*; and, more particularly, at what was said by the Lords Justices in *Wilson v. Church* (41 L. T. Rep. N. S. 296; 12 Ch. Div. 454), in which their Lordships were not agreed, *Cotton* and *Brett, L.JJ.* being of opinion that the application for retaining the fund during the appeal ought to be granted, and *James, L.J.* dissenting. Not knowing precisely the facts of that case, I do not quite understand what was the exact ground of the dissent of *James, L.J.* I have also looked at an earlier case of *Walburg v. Ingilby* (1 M. & K. 61), and it seems to me to be by no means the settled rule of this court that the fund should be retained in court simply because there is an appeal. As *Lord Eldon* pointed out in *Huquelin v. Baseley* (15 Ves. 180), such a rule would "palsy the arm of justice." If an appeal were brought from an order granting an injunction, it might be said that the injunction should be suspended pending the appeal. That is certainly not the practice of the court. Under the circumstances, and regarding the time of the year and the state of the list of appeals, I think the proper course will be to suspend payment out till the 3rd Nov., so as to give the applicant an opportunity when the Court of Appeal sits at the end of October to apply to the Court of Appeal.

On the 29th Oct. the application was renewed in

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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the Court of Appeal. By an affidavit of a clerk to the applicant's solicitors, filed on the 27th Oct., it appeared that the applicant's solicitors had inquired of the solicitors for the plaintiff whether the plaintiff resided in England, and if so, where, and whether the plaintiff's solicitors could give any assurance which would render it unnecessary for the applicant to apply to the Court of Appeal. It also appeared by the affidavit that the plaintiff's solicitors did not answer this inquiry, and that the deponent had ascertained that the plaintiff no longer resided at the address given in his affidavit filed on paying in the money; that at the address in the writ the deponent was informed that the plaintiff had been abroad for nearly two years, and when last heard of was at Homburg. The deponent also stated that the plaintiff's address was not known at his club, and that his name was not in the Post Office Directory or the Army List (he was a General) for 1884.

*James Kaye*, for the applicant, referred to

*Brewer v. Yorks*, 20 Ch. Div. 669;

*Burdick v. Garrick*, 22 L. T. Rep. N. S. 502; L. Rep. 5 Ch. App. 453;

*E. S. C.* 1883, Order LVIII., r. 17.

*Cozens-Hardy*, Q.C. and *Alexander Young* for the plaintiff.—The court will not stay the payment out unless a strong case of special circumstances is made out.

*BAGGALLAY, L.J.*—If the applicant will give security to the satisfaction of the judge in chambers to make up to the plaintiff, pending the appeal, the difference between the income of the fund as invested and interest on the present market value of the fund at 4 per cent., and also to make good the difference between the highest market price of the stocks at any time before the hearing of the appeal and the market value (if less) at the date of such hearing, the payment out will be stayed. Of course, the cash will be invested in the meantime so as to produce income. The application will stand over to enable the applicant to consider whether he will accept these terms.

*BOWEN and FRY, L.JJ.* concurred.

Solicitors for the applicant, *Markby, Stewart, and Co.*

Solicitors for the plaintiff, *Walker, Martineau, and Co.*

Friday, Oct. 31.

(Before *BAGGALLAY, BOWEN, and FRY, L.JJ.*)

*Ex parte WALLACE; Re WALLACE. (a)*

*Bankruptcy—Petition—Signature by attorney—Bankruptcy Rules 1883, r. 125; Form 10.*

*A bankruptcy petition may be signed on behalf of the petitioning creditor by a person holding a power of attorney from him, if the terms of the power are wide enough.*

*Where a power of attorney authorised B. to commence and carry on, at law or in equity, all actions, suits, or other proceedings touching anything in which A. or his personal estate might be concerned:*

*Held, that the words included a power to sign a bankruptcy petition on behalf of A.*

*MR. J. J. WALLACE*, the debtor in this case, appealed from a receiving order made against

him by Mr. Registrar Brougham on the 17th Oct. 1884.

The order was made in a bankruptcy petition, presented by W. Richards, of Prince Edward's Island, and signed "William Richards, by his attorney Thomas Picton Richards."

The signature was attested by a witness, and the attestation clause was as follows: "Signed by the petitioner by his attorney, Thomas Picton Richards, in my presence."

It appeared that the power of attorney, which was dated the 8th Feb. 1879, empowered T. P. Richards, on behalf of his principal, "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I, or my ships, or other personal estate, may be in anywise concerned."

*F. Cooper Willis* for the appellant.—The receiving order is invalid, as the petition is not signed by the creditor himself. Rule 125 of the Bankruptcy Rules 1883 provides that a creditor's petition "shall be in Form No. 10 in the appendix, with such variations as circumstances may require." This form requires that the petition shall be signed by the petitioner, and the attestation clause is in these words: "Signed by the petitioner in my presence." There is no provision in the Act or rules enabling the petition to be signed by attorney. Even if a petition could be so signed, the words of this power are not sufficiently wide to include the presentation of a bankruptcy petition.

*R. Vaughan Williams*, for the petitioning creditor, was not called upon by the court.

*BAGGALLAY, L.J.*—I entertain no doubt whatever that the signature of the petition by the attorney of the petitioner was sufficient, provided that the power of attorney authorised such signature. I am satisfied that the words of this power are quite sufficient to authorise Thomas Picton Richards to sign the petition on behalf of his principal. The power of an attorney to act on behalf of his principal in bankruptcy matters has been undisputed ever since the decision of the Court of Appeal in *Ex parte Frampton; Re Frampton* (33 L. T. Rep. O. S. 341; 1 De G. F. & J. 263). In that case, under a general authority by one man to another to arrange and settle his affairs, it was held that the agent might instruct a solicitor to dispute an adjudication in bankruptcy. The present case, no doubt, carries the principle a step further, as it will decide that a document may be signed on behalf of the principal. But the signature was here essential to the doing of the act—the commencing of a proceeding touching something in which the principal or his personal estate was concerned—which was authorised.

*BOWEN, L.J.*—I have no doubt that *Baggallay, L.J.* is right in the view expressed by him. The power is wide enough in its terms to authorise the attorney to commence proceedings in bankruptcy on behalf of his principal by signing a petition.

*FRY, L.J.*—I am of the same opinion.

*Appeal dismissed.*

Solicitor for the appellant, *J. T. Watson.*

Solicitors for the respondent, *Hollams, Son, and Coward.*

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

[CT. OF APP.]

WILMOTT v. FREEHOLD HOUSE PROPERTY COMPANY.

[CT. OF APP.]

Wednesday, Nov. 12.

(Before BAGGALLAY and FRY, L.JJ.)

WILMOTT v. FREEHOLD HOUSE PROPERTY COMPANY. (a)

*Practice*—Writ of summons for recovery of land—Joinder of other claims without leave—Omission of claim to recover land from statement of claim—Objection by defence—Embarrassment—R. S. C. 1883; Order XVIII., r. 2; Order XX., r. 4; Order XIX., r. 27; Order XXV., r. 2.

The plaintiff, without obtaining the leave of the court, joined a claim for recovery of land with other claims.

By his statement of claim he altered his claim for relief by omitting the claim for recovery of land.

The defendant by his defence raised the objection that the writ of summons was issued without leave of the court.

Held (affirming the decision of Bacon, V.C.), that the defence ought not to be struck out as embarrassing.

*Semble* (1) that an objection that a writ of summons joining a claim to recover land with other claims has been issued without leave of the court, is properly pleaded in the defence; (2) that the plaintiff cannot cure the irregularity in his writ by omitting the claim for recovery of land from his statement of claim; (3) that to cure the irregularity the writ of summons must be amended; and (4) that such amendment cannot be made without the consent of the defendant.

THE plaintiff, without previously obtaining the leave of the court, by the indorsement of his writ of summons, claimed (1) specific performance of an agreement between the plaintiff and defendants, dated the 29th Sept. 1883; (2) to recover possession of the land therein mentioned and the messuages built thereon; (3) an injunction; (4) a receiver; (5) damages; (6) costs.

By his statement of claim the plaintiff set out the material parts of the agreement of the 29th Sept. 1883, by which the defendants agreed to advance moneys to enable the plaintiff to complete buildings on certain land belonging to the defendants, and to grant a lease of the land and buildings when the latter were completed.

The statement of claim further alleged that the plaintiff had so far complied with the agreement and made no default; but that the defendants had nevertheless entered and stopped the works, and refused the plaintiff and his workmen access to the lands, buildings, and plant; and the plaintiff claimed (1) specific performance of the agreement; (2) damages in addition to or substitution for specific performance; (3) an injunction to restrain the interference with the building operations; (4) a receiver; (5) costs.

In paragraph 1 of their defence the defendants set out the indorsement of the writ of summons. In paragraph 2 they stated that the plaintiff did not obtain the leave of the court to issue the writ of summons. They also alleged, in other paragraphs, that the plaintiff had broken the agreement, and that the defendants had entered under a power therein contained.

In Aug. 1884 the plaintiff moved before Bacon, V.C. for an order to strike out paragraphs 1 and 2 of the defence on the ground that they were embarrassing and unnecessary, and tending to

delay the fair trial of the action, but his Lordship dismissed the application with costs.

The plaintiff appealed.

*Hemming, Q.C. and Emden* for the appellant.—The defendants contend that one of the claims in the writ is for recovery of possession of land, and that under Order XVIII., r. 2, no other cause of action ought to have been joined without obtaining leave before the writ was issued. Assuming that the claims were improperly joined, what has occurred is a mere slip, and objection cannot properly be taken by the defence. It was thought unnecessary to amend the writ, inasmuch as, by rule 4 of Order XX., whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the writ. An objection to the propriety of service of the writ, which this is, cannot be raised by the defence:

*Preston v. Lamont*, 35 L. T. Rep. N. S. 341; 1 Ex. Div. 361.

[*FRY, L.J.*—It may be expedient to determine the point earlier, but can taking the objection by the defence be said to be embarrassing? If it is unnecessary the statement in the pleadings may be struck out under rule 27 of Order XIX. If the objection can be raised in another way, at an earlier stage, the defence is unnecessary. If the objection is good we ought to have leave to amend the writ; if not, the action ought to proceed and be tried on the merits. [*G. Henderson*, for the defendants.—We say no amendment can now be made: (*Pilcher v. Hinds*, 40 L. T. Rep. N. S. 832; 11 Ch. Div. 905.) *BAGGALLAY, L.J.*—The question could have been raised under rule 2 of Order XXV.] It is rather hazardous to proceed under that rule. [*FRY, L.J.*—Where there is a clear point of law it can be conveniently raised under that rule.] If there has been any irregularity, it has been waived. (a)

*Henderson*, for the defendants, was not called upon.

*BAGGALLAY, L.J.*—In my opinion the decision of the Vice-Chancellor was quite right, and, subject to the defendants consenting to the writ being amended, I think the appeal ought to be dismissed with costs. I think this is a case in which the plaintiff ought to have leave to amend, subject to the payment of costs.

*FRY, L.J.*—I agree. This is not a case in which the defence is embarrassing within the meaning of the rule. We dismiss the appeal with costs, subject to the defendants consenting to the amendment.

*Appeal dismissed with costs.*

Solicitor for the appellant, *R. Chapman*.

Solicitors for the defendants, *Best, Webb, and Templeton*.

(a) Compare *Mulkern v. Doerks*, 51 L. T. Rep. N. S. 422.

Friday, May 23.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

TREHERNE v. DALE. (a)

*Practice—Attachment—Indorsement on order—Notice of motion—R. S. C. 1883, Order XLI., r. 5; Order LII., r. 4.*

*An order made on the 28th Feb. 1884 directed the defendant to pay a sum into court by the 13th March. This order was not served before the 13th March, and an order was made on the 3rd April enlarging the time until four days after service of the two orders. The plaintiff served the two orders, putting no indorsement on the latter. The money not having been paid in, the plaintiff moved for an attachment "for your default in obeying the orders made herein on the 28th Feb. last and the 3rd April last."*

*Held, that, as the second order only extended the time for doing the act mentioned in the first order, it was sufficient to indorse the first order only:*

*Held, also, that the indorsement on the order of the 28th Feb. was sufficient in form, although not in the words given in Order XLI., r. 5, but in the form given in rule 1 of the order of the Court of Chancery of the 7th Jan. 1870:*

*Held, also, that the notice of motion, which was to attach "for default in obeying" the orders, sufficiently stated the grounds of the application within the meaning of Order LII., r. 4.*

*The affidavit in support of the application stated that the defendant had not borrowed the order for the purpose of paying in the money, or given notice of having paid the money in:*

*Held, that although the affidavit would probably have been held insufficient to support an attachment if the motion had been heard on affidavit of service, the defect was cured by the defendant's appearing and resisting the application on other grounds.*

*An order was made on the 28th Feb. 1884, that the defendant should, on or before the 13th March, pay into court to the credit of the action the sum of 474*l.* received by him as executor of William Gooch.*

*On the 3rd April 1884 the plaintiff moved for an attachment. The order had not been served till after the 13th March, and the Court held, therefore, that an attachment could not be ordered, but ordered "that the time for making the payment into court directed by the said order be enlarged until four days after service thereof and of this order."*

*On the 9th May the plaintiff served the defendant with the two orders. The earlier order was indorsed in the form required by rule 1 of the General Order of the Court of Chancery of the 7th Jan. 1870, as follows:*

*If you, the within-named Augustus Dale, neglect to obey this order by the time therein limited, you will be liable to have your property sequestered for the purpose of compelling you to obey the same order, and you may also be liable to be arrested and committed to prison.*

*The order of the 3rd April was served without any indorsement.*

*The defendant not having paid the money into court, the plaintiff on the 18th May served the defendant with notice of motion for an attachment for "his default in obeying the orders made herein on the 28th day of February last and the 3rd*

*day of April last." The application was supported by an affidavit of the plaintiff's solicitor of service of the orders, which proceeded to say, "the defendant has not since then applied for the loan of the order to pay in herein for the purpose of paying in the amount ordered to be paid in, nor has he given notice of having paid in the amount ordered."*

*The motion was heard by Kay, J. on the 22nd May, when the defendant appeared by counsel. He did not, however, allege that he had paid in the money, but raised certain objections which were subsequently renewed before the Court of Appeal, and also alleged that he had drawn out the money for the purpose of paying it to the plaintiff, and carried it in a black bag; that this bag had been taken away when the defendant was at lunch, by a person who left a similar bag in its place, and that the defendant had not recovered the money. It was urged that, as the money had not been misapplied, and the defendant was a poor man and had no means wherewith at once to replace it, the court, although the defendant was still liable for the money, would not order an attachment.*

*Kay, J. disbelieved this story, and ordered an attachment to issue.*

*The defendant appealed.*

*Oswald for the appellant.—The first objection is, that there was no indorsement at all on the order which stated the time within which the money was to be paid in. It ought to have been indorsed with the form given in rule 5 of Order XLI.*

*Allen, for the plaintiff, was not called upon.*

*BAGGALLAY, L.J.—I do not think that Order XLI., r. 5, of the rules of 1883 applies to the second order, which does not require the defendant to do any act, but only extends the time for doing it which was limited by the former order. The objection fails.*

*COTTON and LINDLEY, L.JJ. concurred.*

*Oswald for the appellant.—The second objection is, that the indorsement on the other order is irregular, inasmuch as it is in the form prescribed by the old order of the Court of Chancery instead of being in the form given in rule 5 of Order XLI. Another objection is, that the grounds of the application are not sufficiently stated in the notice of motion, as required by Order LII., r. 4. Moreover, there is not sufficient evidence that the money has not been paid into court; it is not alleged that any inquiry on the part of the plaintiff has been made at the Paymaster-General's office. If the defendant's story is true, there has been no wilful misapplication of the money, and the court, in its discretion, will refuse the attachment:*

*Holroyde v. Garnett, 46 L. T. Rep. N. S. 801; 20 Ch. Div. 532;*

*Marris v. Ingram, 41 L. T. Rep. N. S. 613; 13 Ch. Div. 338.*

*Allen, for the plaintiff, was stopped.*

*Oswald replied.*

*BAGGALLAY, L.J.—The defendant's second objection was, that the indorsement was not in a proper form, not being in the words given by Order XLI., r. 5, but in the old Chancery form. The rule, however, does not provide that the indorsement must be in the actual words there mentioned, but "in the words or to the effect following;" and in my opinion this indorsement*



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is to the effect mentioned in the rule. The third objection was, that the notice of motion did not sufficiently state the grounds on which an attachment was sought. I think that, having regard to the nature of the orders, the combined effect of which was to order payment into court of a specified sum within a specified time, the ground was sufficiently stated. The fourth objection, that there was no sufficient evidence of non-payment, is disposed of by the fact that the defendant appeared and did not dispute the fact of nonpayment. [His Lordship then discussed the story of the defendant as to the loss of the money, and proceeded:] If this story was shown to be true, I should say that, the defendant being a poor man, an attachment ought not to issue. But Kay, J. came to the conclusion that the story was not to be believed, and I see no sufficient reason for saying that he came to a wrong conclusion. The appeal must be dismissed.

COTTON, L.J.—The defendant has taken several technical objections to the order, none of which, in my opinion, are sustainable. I will only say a word as to the last, viz., that there was no sufficient evidence of nonpayment. If the order for an attachment had been made on affidavit of service, without any further evidence than was before the court, the objection would probably have been fatal. The defendant, however, appeared, and did not dispute the fact of non-payment, but argued on other grounds that an attachment ought not to issue. This removes the objection. As to the merits, the court has a discretion as to ordering an attachment, and if it had been shown that the money had been lost an attachment ought not to have issued, it being clear that, if it had been lost, the defendant was not in a position to immediately replace it. The question, then, is, whether Kay, J. was wrong in disbelieving the defendant's story of the loss. In my opinion, Kay, J. was right in disbelieving it.

LINDLEY, L.J.—I am not prepared to differ. Whether, if the case had come before me in the first instance, I should have ordered an attachment I do not know. I am not at all satisfied that the defendant's story is true, but, whether I should have felt so satisfied of its being untrue as to send the defendant to prison, I am not sure. I cannot, however, go so far as to say that Kay, J. was wrong in holding it to be untrue, and therefore I cannot come to the conclusion that his decision ought to be reversed.

*Appeal dismissed.*

Solicitor for the plaintiff, *Edmund H. Greenhill.*  
Solicitor for the defendant, *J. P. Ogle.*

June 17 and 18.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.,  
assisted by NAUTICAL ASSESSORS.)

THE BERYL. (a)

ON APPEAL FROM BUTT, J.

*Collision—Risk of collision—Crossing steamships—Course—Province of Trinity Masters—Regulations for Preventing Collisions at Sea, arts. 18, 22.*

*The object of the Regulations for Preventing*

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs.,  
Barristers-at-Law.

*Collisions at Sea is not merely to prevent actual collision, but also risk of collision, and therefore the regulations should be applied, not only when there is actual risk of collision, but also where the circumstances are such that it is probable that risk of collision may be involved.*

*The duty of a vessel to "keep her course" under art. 22 of the Regulations for Preventing Collisions at Sea is complied with if she keeps her heading, whilst checking her speed, because art. 22 covers direction only, and not speed.*

*Under art. 18 of the Regulations for Preventing Collisions at Sea, a steamship approaching another vessel so as to involve risk of collision, is always bound to slacken her speed, but her duty to stop and reverse her engines is governed by the words "if necessary."*

*Per Brett, M.R.: The duty to execute the manœuvres prescribed by the Regulations for Preventing Collisions at Sea does not arise from the mere fact of risk of collision, but only if such fact ought under the circumstances to be within the knowledge of those in command of the ship.*

*Per Brett, M.R.: The functions of the nautical assessors being to assist the judge by their advice, and not to control his decision, where the judge differs from his assessors on questions of nautical skill he is not bound by their opinion.*

*The steamships A. and B. were on courses crossing one another at right angles, the A. having the B. on her starboard side. When they had approached one another within a distance of from a quarter to half a mile, those on the B., seeing that those on the A. were taking no steps to keep out of their way, whistled and eased the engines. When within 300 yards of one another, those on the B., seeing that those on the A. were still taking no steps to keep out of their way, stopped and reversed their engines full speed astern, but the vessels came into collision. It was admitted that the A. was to blame, but contended that the B. was also to blame for not stopping and reversing sooner.*

*Held, that it was the duty of the B., under art. 18 of the Regulations for Preventing Collisions at Sea, to stop and reverse her engines, if necessary, to avoid risk of collision; that she had failed to do so in due time; and that she therefore was also to blame for the collision.*

THIS was an appeal by the plaintiffs in a damage action from a judgment of Butt, J., by which he had found the steamship *Abeona* alone to blame for a collision between that vessel and the steamship *Beryl*.

The collision occurred in the North Sea, at about 11.30 p.m. on the 10th Sept. 1883. The steamships were on courses crossing one another at about right angles, the *Abeona* having the *Beryl* on her starboard side. As they approached, those on the *Beryl*, seeing that the *Abeona* was taking no steps to keep out of the way, slackened her speed and blew their whistle at a distance of from a quarter to half a mile off. The *Beryl* continued at this slackened speed until within a distance of 300 yards, when the *Abeona* still taking no steps to keep out of the way, the engines of the *Beryl* were stopped and reversed full speed astern; but, notwithstanding this manœuvre, the vessels came into collision, the *Beryl* with her stem and port bow striking the starboard bow of the *Abeona*.

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The further facts of the case appear in the report of the proceedings in the court below: (5 Asp. Mar. Law Cas. 193; 49 L. T. Rep. N. S. 748; 9 P. Div. 4.)

The appellants admitted that the *Abeona* was to blame, but contended that the *Beryl* was also to blame.

Hall, Q.C. and Dr. Phillimore, for the owners of the *Abeona*, in support of the appeal.—The *Beryl* has infringed the 18th article of the regulations in not stopping and reversing her engines until at a distance of 300 yards from the *Abeona*. The article directs that a steamship, if approaching another ship so as to involve risk of collision, shall stop and reverse her engines if necessary. Here, however, the *Beryl* kept on after risk of collision had been involved, and after it had become necessary, within the meaning of the article, to stop and reverse. She therefore has infringed the article and should be held to blame:

*The Khedive*, 4 Asp. Mar. Law Cas. 360; 43 L. T.

Rep. N. S. 610; L. Rep. 5 App. Cas. 876;

*The Benares*, 5 Asp. Mar. Law Cas. 171; 45 L. T.

Rep. N. S. 127; 9 P. Div. 16.

Though it is true that she was bound by art. 22 to keep her course, yet art. 18 was also applicable, it always being the duty of a steamship to stop and reverse, if necessary, to avoid risk of collision. Moreover, art. 22 is concerned with heading only, and has nothing to do with speed. If, therefore, the *Beryl* had stopped and reversed earlier, while keeping the same heading, she would have obeyed the directions contained in both articles. An officer in command of a vessel has no right to blindly act upon the assumption that another will manoeuvre in accordance with the regulations, where the circumstances are such that there is considerable probability that the other vessel will neglect to do what is her duty.

Myburgh, Q.C. (with him Kennedy) for the respondents.—It is conceded that the *Beryl* slackened her speed at a distance of from a quarter to half a mile. That is in itself evidence of careful navigation, and was a compliance with the direction in art. 18 to slacken her speed. In consequence of the continuing neglect of the *Abeona* to keep out of the way, the slackening on the part of the *Beryl* was insufficient, and it became necessary to stop and reverse. In order that the officer in command of the *Beryl* might properly appreciate the state of the case and come to a right conclusion as to the proper manoeuvre, it was necessary that some reasonably short time should elapse between the order to slacken and the order to stop and reverse. It is submitted that, with the *Beryl* making eight knots an hour, the time that she would take to run the space between the distance of from a quarter to half a mile, and the 300 yards at which she admittedly stopped and reversed, is necessarily very short, and that therefore, under the circumstances, there has been a compliance with the rule. The officer in charge of the *Beryl* had a right to assume that the *Abeona* would have done her duty, and probably do it by going under his stern. For him to have stopped and reversed before it became absolutely necessary, might have been the very means of counteracting this manoeuvre, and might have brought about risk of collision. The circumstances were such that it could not have been present to the mind of the officer in charge

of the *Beryl* that there would be risk of collision until the vessels were in close proximity, and even then, had the *Abeona* done her duty, it is probable that no collision would have occurred.

BRETT, M.R.—I am very sorry in this case to have to come to the conclusion to which I feel bound to come. A great many things have been said during the arguments which I think have startled me that they should have been brought forward at this time. I refer to the observations made with regard to the construction of the regulations, which I, for my part, thought had been settled almost from the time the rules were drawn up. I take it that the basis of all these rules is that they are instructions to those in charge of ships as to what they ought to do, and the Legislature has not thought it enough to say, "We will give you rules which shall prevent a collision;" they have gone further and said that, for the safety of navigation, "We will give you rules which shall prevent risk of collision." It is, therefore, not enough for an officer in command of a ship to do only that which will prevent a collision. The Legislature lays down rules which shall regulate his conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even risk of collision. Therefore, the basis and foundation of all these rules are instructions to those in command of ships by which risk of collision is to be avoided. When one speaks of rules which are to regulate the conduct of men, the rules can only apply to those circumstances which must or ought to be known to the parties at the time. It is impossible to regulate the conduct of people as to unknown circumstances. When one is instructing people, it must be to instruct them as to what they ought to do under circumstances which are or ought to be before them. When one says that a man must slacken speed or stop and reverse in order to prevent risk of collision, it would be insensible to suppose that it would depend upon the mere fact of whether there was risk of collision, if the circumstances were such that he could not know there was risk of collision. It would be wicked folly to attempt to regulate a man's conduct with regard to circumstances which could not be known to him. I put some instances during the argument to show that this must be so. A vessel approaching another vessel ought to slacken her speed, if by going on there would be risk of collision. But suppose the night to be absolutely dark and the other vessel to be showing no lights, it would be absolutely wicked, under circumstances like these, where the officer could have no means of knowing that there was risk of collision, to hold his owners liable for a breach of the rule. If, however, the circumstances were such that he ought to have seen the other ship, then it is no excuse to say that in fact he did not see her. Take another case. If two vessels are approaching on courses which will cause them to meet on a high headland, so that until they are absolutely close they cannot see one another, how is one to regulate their conduct under these circumstances? It is absurd to suppose that it is possible to regulate their conduct with regard to what they cannot see and cannot know. Therefore the consideration must always be in these cases, were the circumstances such as ought to have brought it to the mind of the persons in charge that the rule was applicable? It is not whether the rule was in fact applicable, but were the circum-

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stances such that it ought to have been present to the mind of the officer in charge that the rule was applicable. That being so, we have, in this case, to apply that consideration to two separate rules, and to apply it under separate circumstances. The first rule is this: "If two ships under steam"—not two steamships therefore, but "two ships under steam," that is, with their steam up—"are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." If the circumstances of the two ships under steam are such that those in charge of them ought to see that risk of collision is involved, then the ship which has the other on her starboard side is bound to do something to keep out of the way of the other. The object of these regulations being to avoid risk of collision, a canon for their interpretation is that they are all applicable at a time when the risk of collision is to be avoided, not that they are applicable when the risk of collision is already fixed and determined. Therefore, they are all applicable some time before the risk of collision is finally fixed and determined. Hence we have always said that the right moment of time to be considered is the moment before the risk of collision is constituted. The words of the rule are not "If two ships under steam are crossing with a risk of collision," but "are crossing so as to involve risk of collision," that is, the moment before there was risk of collision. Here the duty of the *Abeona* was to follow whatever manœuvre she chose to select which would keep her out of the way of the other so as to avoid risk of collision. But then there is a reciprocal rule which applies to the conduct of the other ship, which is this: "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course." It was suggested that "keeping her course" meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. It is the first time I ever heard it suggested "keeping her course" means that she is to keep on at the same speed as before. It has nothing to do with the question of speed, but is concerned with the direction in which a vessel is going. Therefore, she was bound to keep her course. Now we come to another rule, the 18th, which does not in any way modify, clash with, or require to be construed at the same time as, the other rules. It is a wholly independent rule. It will apply, though certain of the other rules apply. In the case of two steamers approaching each other it applies to both of them. We have had a great deal of discussion about this rule, and it is very necessary to consider it carefully. It, in my opinion, like all the others, applies more particularly to the moment before the risk of collision is constituted and exists. It is at a time when the action of both steamers is such as to involve risk of collision. At that moment of time, if what they are doing involves risk of collision, they ought both to slacken their speed. It applies to each of them. But it may be that the condition of things just before the moment when the risk of collision is to be constituted is such that the slackening will not suffice to avoid the risk of collision, and it requires another manœuvre, viz., stopping and reversing. If then it is necessary to stop and reverse, they must do so, either one or the other or both. But this,

again, is an instruction as to the conduct of men, and it cannot be that they are to stop and reverse merely because it is proved afterwards that there was risk of collision; it must be if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that it was necessary to stop and reverse. That being the construction of the rules, we have to apply them to the present case. The application of these rules in the Court of Admiralty is made by a mixed tribunal. The judge has to try the case and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever. They are not responsible for it and have nothing to do with it. They are there for the purpose of assisting the judge by answering any questions as to nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a special knowledge of nautical affairs. They have nothing to do with the question whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of the evidence. But nautical questions may arise in the course of the case, and the judge is then entitled to ask the opinion of the assessors for his own guidance. They are, therefore, there to assist the judge in solving any question of nautical skill upon which he wants instruction. Therefore, before such a tribunal, the final question which has to be decided is a mixture of what is the law and what is the construction of these rules, which is a question solely for the judge. The judge is bound to give great weight to the opinion of his assessors; but at the same time, if he does not think their view right, he is not bound to follow it, but follows his own view. I think that on several occasions the opinion of Dr. Lushington differed with that of his assessors even as to questions of nautical skill, and unless the Court of Appeal thought his decision wrong, it stood. Still it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him. It must, however, be remembered that they are there to assist the judge and not to control. Now, applying these observations to the present case, it cannot be doubted that these vessels were approaching each other in a manner which made three of these regulations applicable. The 16th article was applicable. The *Abeona* was bound to get out of the way of the *Beryl*. The moment that rule applied to the *Abeona* the 22nd applied to the *Beryl*, namely, to keep her course. If both these vessels had done what they ought to have done, risk of collision would never have been constituted. But they went on until the 18th rule became applicable. The *Abeona* seems to have done everything that was wrong. She was a great screw collier, on the north-east coast, performing her voyage with the carelessness which is not uncommon amongst colliers. She was going at full speed, not looking to the right or left, and very likely with her helm lashed, and all her people asleep. Therefore, the whole question is, it being admitted that the *Abeona* was to blame, whether the *Beryl* broke any of the rules. What she did was this, she kept her course, and, seeing the *Abeona* was not doing her duty, she whistled.

This first whistle is immaterial, as it is not contended that she was bound to do anything more at that time. But, seeing the *Abeona* was still keeping on, she whistled again, and slackened her speed. At that moment, were the circumstances such as ought to have caused the officer in charge of the *Beryl* to perceive that the two vessels were so approaching as to involve risk of collision? They were at a distance of from a quarter to half a mile. At that time the officer in charge of the *Beryl* slackened his speed. Whether he was justified in only doing that seems to me to involve a question of nautical skill, and, assuming the vessels to have been half a mile apart, we have asked our assessors the following question: "At the time of the second whistle could the *Abeona*, without difficulty, have passed under the stern of the *Beryl*, or could she then otherwise, without difficulty, have avoided her?" They answer the question in the affirmative. Therefore, I think that at that time the officer in command of the *Beryl* was not put into such circumstances as ought to have made him come to the conclusion that it was necessary to stop and reverse. He had a right to assume that the *Abeona* would not go on obstinately neglecting her duty. According to his evidence, 300 yards is the greatest distance we can give him from the *Abeona* before he acted again. Now, the question is raised whether at any appreciable time before he did again act—assuming it to be 300 yards—the circumstances were such that he ought to have come to the conclusion that it had become necessary, in order to avoid risk of collision, to stop and reverse. In order to solve that question, which involves a matter of nautical skill, we have asked the gentlemen who assist us this question: "Was the officer of the *Beryl* justified, as a sailor, in supposing, until he was within 300 yards of the *Abeona*, that the *Abeona* would keep out of his way, and could do so without difficulty." They answer that question in the negative. Accordingly, the next inference of fact which I should draw, assuming that answer to be correct, is that he was not justified in waiting until the vessels were 300 yards apart before he stopped and reversed. He had come within the rule, the circumstances being such that he ought to have earlier come to the conclusion that it was necessary to stop and reverse. But, in order to avoid any difficulty, as to the form of the question, we have asked another question which seems to me absolutely to clench the matter: At 300 yards could the *Abeona*, by any manœuvre, have avoided risk of collision, unless the *Beryl* had, at the same time, stopped and reversed? They answer, No. It cannot be that, if what an officer is to do is to act so as to avoid risk of collision, he is to delay acting until the time when, unless he stops and reverses, it is impossible for the other vessel, by any manœuvre, to avoid risk of collision. Upon these answers, and—if it is worth while to say so—I confess I cannot myself see how they could answer otherwise, as I cannot conceive that these two vessels could approach on the courses on which they were to within 300 yards of each other without risk of collision. I absolutely and entirely agree with these findings of nautical fact, and, adding to those nautical facts the facts which are established by the evidence, I am sorry to say that I have been obliged to come to the conclusion that it had become earlier necessary, within the meaning of the rule, for the officer of

the *Beryl* to stop and reverse in order to avoid, not only collision, but risk of collision. If that be so, the result is that the *Beryl* is to blame as well as the other vessel, and the usual consequences must follow. I should have been glad if Butt, J. had, in his judgment, stated what the question was which he definitely and in terms left to his Trinity Masters. Had we known what it was that was left to them it would have greatly assisted us. Therefore, with great reluctance, the conduct of the *Abeona* having been as bad as it could be, and the officer of the *Beryl* having been put into a difficult position by the wrongful act of the *Abeona*, all that can be said is that he did not do that which the Act of Parliament declares and enacts he must do, and for this pardonable, excusable, and slight fault, I feel bound to decree that his owners must pay for that breach of the Act of Parliament. We, therefore, find both vessels to blame. There will be no costs here or in the court below.

BOWEN, L.J.—I am of the same opinion. I think that the judgment in this case is determined by and follows from the answers given us by our nautical assessors. The matter is governed by certain articles of the Regulations for Preventing Collisions at Sea. The articles are Nos. 16, 17, 18, and 22. Arts. 16, 17, and 22 are in the same tenor, and differ from 18. They are regulations which prescribe the course which a ship is to keep or abandon, according to circumstances. Art. 18 has to do with speed alone. The arts. 16, 17, and 22 prescribe the course that each of two ships meeting so as to involve risk of collision is to take. By art. 16, "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." By art. 17, "If two ships, one of which is a sailing vessel, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship." As the Master of the *Rolls* has pointed out, these articles are intended, not merely to prevent collision, but to prevent risk of collision. In my view, art. 16 may be expanded into, "if two ships under steam are crossing in such a way that if their respective courses are continued, there will be risk of collision, &c." Art. 17 may also be expanded in the same way. What, therefore, is to be avoided is risk of collision. Art. 22 is correlative to these two other articles, and enacts that, "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course." It has been suggested during the argument that keeping her course means not only keeping the same heading, but also maintaining the same speed. That argument seems to me to be untenable. In my view, the article is opposed to an alteration of heading, and has nothing to do with speed. It is art. 18 which has to do with speed. In my opinion that article means that a steamship when approaching another vessel so as to involve risk of collision must, at all events, slacken her speed; but it may be necessary that she should do more, viz., stop and reverse. That, I think, is the construction to be put upon the terms "if necessary." The meaning to be put upon these words, however, does not arise in this case, on account of the answers given by the gentlemen

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who assist us. They have told us that in their judgment the officer in command of the *Beryl* was not justified in supposing, down to the point of 300 yards distance from the *Abeona*, that the *Abeona* would keep out of his way, and could do so without difficulty. Although I think it follows from that answer that the *Beryl* was also to blame for this collision, they have further said that at 300 yards the *Abeona* by no manœuvre could have avoided risk of collision, unless the *Beryl* had at the same time stopped and reversed. That is an answer on an issue of fact which disposes of the case. The learned judge below has not in his judgment indicated the exact questions that he put to his assessors. But, bringing to this matter the best attention that I am capable of, I am unable to see any reason why the answers given us by the gentlemen who assist us are wrong. I think, therefore, that the judgment of the court below must be reversed.

FRY, L.J.—I am of the same opinion. The precise question which we have to determine is this: whether it became necessary for the *Beryl* to stop and reverse at an earlier time than she did. According to the evidence, it seems to have been proved that she stopped and reversed at a distance of 300 yards from the *Abeona*. Ought she to have stopped and reversed at an earlier time than that? I observe that the rule says that the steamship is to slacken her speed or stop and reverse if necessary. Now, these two vessels were approaching so as to involve risk of collision. It was, therefore, the duty of the *Beryl* to slacken her speed. That she did. The risk of collision however continued, and the direction in art. 18 is a continuing direction, and therefore it was the duty of the officer in command of the *Beryl* to decide every moment whether it had become necessary to stop and reverse. Now, the *Beryl* slackened her speed at a distance between a quarter and half a mile off, and she continued at that speed until within 300 yards. From the answers given us by our assessors it appears to me to be plain that the *Beryl* continued at her slackened speed for a longer time than she ought to have done. It appears to me that, under the circumstances, the view taken by our assessors is well founded. It has been argued that the necessity to stop and reverse is a necessity which is to be determined by the event and not by the judgment of a seaman. It is not now necessary to decide that question, because, if it is to be judged by the event, the collision followed, and therefore it was necessary; if by the judgment of a sailor, then we have the opinion of our assessors that a sailor ought, under the circumstances, to have earlier seen the necessity of stopping and reversing. Whichever interpretation of these words is correct, it follows that in this case the *Beryl* was in fault, and must therefore be held to blame for the collision.

*Appeal allowed.*

Solicitors for the plaintiffs, *Ingledeu and Ince*.

Solicitors for the defendants, *T. Cooper and Co.*

Saturday, June 28.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

THE WARKWORTH. (a)

ON APPEAL FROM BUTT, J.

*Limitation of liability — Collision — Defect in machinery — "Improper navigation" — Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), s. 54.*

*Where a ship is held liable for a collision caused by a defect in her machinery, and such defect is due, not to her master or crew, but to the negligence or default of other persons employed by the shipowner to repair the machinery on shore before the commencement of the voyage, and for the purposes of the voyage, the collision is occasioned by "improper navigation" within the meaning of sect. 54, sub-sect. 4, of the Merchant Shipping Act Amendment Act 1862, so as to entitle the owners to limit their liability under the provisions of that Act.*

*Per Brett, M.R.: All damage wrongfully done by one ship to another whilst the ship which does the damage is being navigated, and where the wrongful act of the ship which does the damage is due to the negligence of any person for whose negligence the owner is liable, is comprised within sect. 54 of the Merchant Shipping Act Amendment Act 1862, unless such negligence occurs with the privity of the owner.*

*Decision of Butt, J. (49 L. T. Rep. N. S. 715) confirmed.*

THIS was an appeal by the defendants from a decision of Butt, J., in an action for limitation of liability under the provisions of the Merchant Shipping Act Amendment Act 1862, s. 54, sub-s. 4.

The action was brought by the owners of the steamship *Warkworth* to limit their liability in respect of a collision between the *Warkworth* and the vessel *British Enterprise*, caused by a defect in the steam steering gear of the *Warkworth*. At the damage action arising out of this collision, Sir James Hannen had found the *Warkworth* solely to blame; on the ground that the defect in the steering gear was due to the negligence of persons other than the master and crew, for whom the owner was responsible.

Under these circumstances the defendants to the limitation of liability action pleaded that the collision had not been caused by the "improper navigation" of the *Warkworth*, and therefore denied the right of the plaintiffs to limit their liability. At the trial Butt, J. had held that the collision was caused by the "improper navigation" of the *Warkworth*, and had allowed her owners to limit their liability accordingly.

The further facts of the case are fully set out in the report of the proceedings in the court below (5 Asp. Mar. Law Cas. 194; 49 L. T. Rep. N. S. 715; 9 P. Div. 20).

Webster, Q.C. and Dr. Phillimore, for the defendants, in support of the appeal.

Finlay, Q.C. and Barnes, for the respondents, were not called upon.

The arguments were substantially the same as those urged in the court below.

The following authorities were cited in support of the appeal:

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

*Hayn v. Culliford*, 4 Asp. Mar. Cas. 128; 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182; 48 L. J. 372, Q. B.;

*Chapman v. Royal Netherlands Steam Navigation Company*, 4 Asp. Mar. Law Cas. 107; 40 L. T. Rep. N. S. 433; 4 P. Div. 157;

*Good v. London Steamship Owners' Protection Association*, L. Rep. 6 C. P. 563.

BRETT, M.R.—In this case the defendants' ship, at the time of the collision, was being navigated, she was making way through the water for the purpose of going from one place to another, and by reason of a defect in her steering gear she failed to avoid another vessel which was at anchor, and by her own motion in the water struck that other vessel and damaged her. The first question which arises, under these circumstances, is, was her owner liable for that collision? He could not be liable unless the act in question was the result of the negligence of some person for whose conduct he was liable. Supposing he had bought this ship from a firm of shipbuilders, and, by reason of a latent defect in her, this accident had happened, there would have been no negligence on the part of anyone for whom he was responsible; there would have been no liability, and he would have had no need to invoke the protection of this Act of Parliament. This Act is only necessary where there has been some accident caused by the negligence of persons for whom the owner is responsible. Therefore, it must be taken that this collision was the result of the negligence of someone for whose care and skill the owner was responsible. To say that this Act does not apply to negligence on shore is true, if the negligence has no result in what happens when the ship is being navigated. One must assume that the negligence if done on shore is carried on to the water and is effective on the ship when she is being navigated. The negligence in this case was the wrongful placing of a screw into a certain part of the steering gear. Therefore there was an act of negligence, and it was the act of a person for whose care and skill Sir James Hannen has held the owner responsible. Behind that finding we cannot go. If that had been all, and this defect had not been the *causa causans* of the collision, it would have been wholly immaterial; but Sir James Hannen has found it to have been the *causa causans* of the accident. It was not the *causa proxima*, which was the inability of the master to steer his ship so as to avoid this collision, and that inability was caused by the negligence of a servant of the owner.

The question, then, is whether in such circumstances the defendant is entitled to limit his liability under the Act. Though the negligence occurred before the vessel started, its effect was continuous and operative whilst the ship was on her voyage. Now, the Act says that the owner of any ship, whether British or foreign, is to be entitled to limit his liability where any loss or damage is, by reason of the improper navigation of his ship, caused to any other ship or boat, &c. I think you must read it in this way, "by reason of the improper navigation caused by anyone for whom he is responsible." Is this accident caused by the improper navigation of the ship? Surely running into another ship at anchor is not proper navigation? But then it is urged that the words "improper navigation" mean the negligence of the master or crew. There is nothing in the section so to limit it. In my view, the word im-

proper means wrongful. If a ship is being properly navigated she does not run into other vessels. Therefore I come to this, that the proposition I am going to read is certainly included in this statute. It is that all damage wrongfully done by a ship to another ship whilst the ship which does the damage is being navigated, and where the wrongful act of the ship which does damage is due to the negligence of any person for whom the owner is liable, is comprised within the Act. Here the negligence of the person for whose act the owner was liable was the *causa causans*, and, though not the *causa proxima*, yet in my view the accident was caused by improper or wrongful navigation. I therefore think that the decision of Butt, J. was correct, and that this appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. Mr. Webster and Dr. Phillimore have contended that "improper navigation" in the 54th section of the Merchant Shipping Act Amendment Act 1862, is confined to acts or omissions on the part of those on board the ship who are engaged in actually navigating her. It seems to me to be plain that the Legislature, in using the word improper, meant improper navigation by the owner of the ship. In my view the owner does improperly navigate the ship in the eye of the law, and in this I am fortified by the form of words used in the old declarations, if, owing to the negligence of some one for whom he is responsible, damage is caused by his ship. It seems to me that in such a case the ship is improperly navigated within the meaning of the section, whether the damage be caused by the negligence of the master and crew or of some other person for whom the owner is responsible. I do not think it possible to limit the meaning of the words to unskilful navigation by those on board the ship, but I think it means wrongful navigation as where an owner uses his ship under conditions where it ought not to be used. For these reasons I am of opinion that the judgment of the learned judge below ought to be affirmed.

FRY, L.J.—I am of the same opinion. Dr. Phillimore has referred us to the dictionary for the meaning of the word navigation. One of the definitions given there is that navigation is the science or art of conducting a ship from place to place through the water. If that be a true definition of the word navigation, it seems to me that it involves the supplying of proper materials to enable the ship to be properly conducted from place to place and also of skilful mariners capable of so conducting the ship. Skilful mariners, if the ship be not supplied with proper materials necessary for her locomotion, cannot, in the absence of such materials, efficiently and properly conduct her from place to place; so also, all necessary and proper materials are useless without skilful mariners. In my opinion, therefore, proper navigation includes two things—the supply of all necessary parts of a ship, and of mariners with skill and knowledge of their duties. If either of these are wanting, and a collision ensues, which is occasioned by the absence of both or either of these two, then we have a case of improper navigation. The words "improper navigation" may include other cases, but they certainly include the present. In conclusion, I may add that I think the following remarks of Butt, J. were well founded, and carry out my observations on this

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subject. They are as follows: "*Primâ facie* I do not see why the amount of relief should be limited to a case in which damage has occurred through the negligence of the master and crew, and why the Act should not apply to the negligence of persons, other than the master and crew, who are employed by the shipowner to attend to the ship in preparation for the voyage, as, for example, a marine engineer employed, while the ship is in port, to overhaul the machinery." For these considerations, I therefore think this appeal must fail.

*Appeal dismissed.*

Solicitors for the appellants, *Gregory, Rowcliffes and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Wednesday, Dec. 3.

(Before BRETT, M.R. and LINDLEY, L.J.)

WEBSTER v. MYER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice*—Default of appearance—No proceeding taken for a year—Entry of judgment—Notice of intention to proceed—R. S. C. 1883, Order XIII., r. 3; Order LXIV., r. 13.

By Order LXIV., r. 13: "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed."

Defendant had failed to appear to a writ indorsed for a liquidated demand, and no proceeding had been taken for more than a year after service of the writ.

Held, that the case came within Order LXIV., r. 13, and plaintiff could not enter final judgment under Order XIII., r. 3, but was bound to give defendant a month's notice of his intention to proceed.

THIS was an action to recover the amount of a solicitor's bill of costs.

The indorsement on the writ was as follows: "The plaintiff's claim is 280l. 9s. 9d. The following are the particulars—For fees for work done and money expended as a solicitor."

The writ was issued and served in the year 1881. The defendant did not appear.

In November 1884 the plaintiff applied to the officer of the court to enter judgment for default of appearance. The officer refused to enter judgment on the ground that more than a year had elapsed from the last proceeding, and therefore the plaintiff could not proceed without giving a month's notice to the defendant, under Order LXIV., r. 13, of his intention to do so.

An application was made to Field, J., at chambers, for an order that judgment be entered. This application was refused, and the Divisional Court (consisting of Mathew and Smith JJ.) affirmed such refusal.

*J. Holmes Poulter* now moved *ex parte*, by way of appeal, for an order to enter judgment.—The plaintiff is entitled under Order XIII., r. 3, to have judgment entered, and Order LXIV., r. 13, does not apply. When the application was made to Field, J. at chambers, he thought he was bound by his own decision in

*The Staffordshire Joint Stock Bank v. Weaver*, 76 L. T. 371; *Weekly Notes*, March 22, 1884, p. 78.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

That decision is not binding on this court, and is contrary to the former practice: see 1 Archbold's *Practice* 180, 13th edit., where the cases decided upon the corresponding rule of Hilary Term 1853 (r. 176), and upon the earlier rules, are collected:

*May v. Wooding*, 3 M. & S. 500;

*Newton v. Boodle*, 3 C. B. 795;

*Thompson v. Langridge*, 1 Ex. 351.

Default of appearance is a confession of the cause of action, and therefore the plaintiff is in the same position as if he had obtained a verdict, in which case it is clear from the authorities that the rule does not apply.

BRETT, M.R.—The question is, whether signing judgment is a "proceeding" within the meaning of Order LXIV., r. 13. If judgment is signed within a year of the last previous proceeding, then Order XIII., r. 3, applies, by which, where the writ is indorsed for a liquidated demand, and the defendant fails to appear, the plaintiff may enter final judgment. In order to be entitled to do that the plaintiff must show that the writ has been served. He would not have to move the court for judgment, but he would go to the office and show the officer of the court that he had served the writ. I cannot say that is not a step taken to obtain judgment, and therefore I think that what is done under Order XIII., r. 3, is a "proceeding" within the meaning of Order LXIV., r. 13. If by Order XIII., r. 3, process is necessary to obtain final judgment, it is a proceeding, and the party requiring judgment is to proceed, and the case comes within Order LXIV., r. 13. It is said that two cases, cited by Mr. Poulter, *May v. Wooding* (3 M. & S. 500) and *Newton v. Boodle* (3 C. B. 795), are authorities against this view; but those cases only decided that after verdict a somewhat similar rule was not applicable. It is not necessary to say whether we should agree with those decisions; if the rule and the circumstances were the same here, we might feel it difficult to dissent from them. But the question we have to decide depends entirely on the present rule. It is not necessary even to say how the point should be decided on this rule after verdict; possibly the cases may apply only to the rule under which they were decided, and I certainly think the cases are not to be carried beyond what the decisions cover. Therefore they can apply only where the question arises after verdict, and do not in any way govern the present case. For these reasons I think that the case is within the words of the rule, and that a month's notice is necessary.

LINDLEY, L.J.—I am of the same opinion, and I think that, if we were to hold otherwise, we should be repealing the rule. The case is not within the principle of the decisions which have been referred to.

*Application refused.*

Plaintiff in person, *William S. Webster*.



## HIGH COURT OF JUSTICE.

## CHANCERY DIVISION.

July 9 and 22.

(Before KAY, J.)

Re WARREN; WEEDON v. READING. (a)

*Executors — Compromise by — Payment of lesser sum in discharge of greater—Accord and satisfaction—23 & 24 Vict. c. 145, s. 30.*

The plaintiff and her sister claimed to be entitled to share in the distribution of the residuary estate of the testator, as being two of his first cousins on his mother's side living at his decease, amongst whom he had bequeathed his residuary estate equally. The distribution had been made among eight persons, who were then believed to be the only persons answering the description in the will. These persons declined to repay to the claimants any of the money which they had received.

After some time the claimants signed a letter addressed to the surviving executors in which they stated that they had a difficulty in procuring legal evidence of their relationship to the testator, and agreed to accept 50l. in full discharge of all their claims in consideration of such evidence being dispensed with.

Subsequently they each signed another document in which they acknowledged to have each received from the executors the sum of 10l. in discharge of all their claims, so far as the executors were concerned, retaining however the right to get what they could from the parties among whom the property had been divided. These two sums of 10l. the executors paid out of their own pockets.

The plaintiff now sought to make the surviving executor liable for the whole amount of her claim.

*Held*, that this was a claim which the executors had power to compromise under 23 & 24 Vict. c. 145, s. 30, which was not confined to mere money claims against the estate. The doctrine of *Cumber v. Wane* (1 Sm. L. C. 8th edit. p. 357), as to the payment of a lesser sum being no discharge for a greater, did not apply to such a case as this. The plaintiffs' claim therefore failed.

## ADJOURNED SUMMONS.

This was an originating summons for the administration of the real and personal estate of Francis Warren, taken out by Jane Weedon, who claimed to be entitled to a share in his residuary estate.

Francis Warren by his will dated the 11th July 1876, after expressing a desire that his executors should convert into money such portions of his estate as were not money, and giving certain legacies, gave and bequeathed all the rest and residue of his estate and effects to such of his first cousins on his late mother's side as might be living at the time of his decease, to be divided equally between them, share and share alike. And he appointed William Reading, Alfred Roberts, and John Warren to be executors of his will, and Messrs. Tanqueray-Williaume and Hanbury to be the solicitors thereto.

The testator died in Feb. 1878, and his will was shortly afterwards proved by all the executors.

The executors instituted inquiries as to who were the testator's first cousins on his late

mother's side living at his death. One of the executors, Alfred Roberts, was one of such persons himself, and with his assistance seven others were discovered.

The executors then paid the funeral and testamentary expenses, debts, and legacies, and divided the residue among these eight persons, each of them receiving 240l. 11s. 2d. This division took place on the 28th July 1878.

Alfred Roberts, the executor, died about eighteen months after the testator, insolvent.

In May 1880 the plaintiff called at the office of Messrs. Hanbury, Hutton, and Whitting, who were the successors in business of Messrs. Tanqueray-Williaume and Hanbury, and informed them that she and her sister Mrs. Jones were first cousins of the testator on his mother's side, and were entitled to share in the residuary estate. She was then informed of what the testator's property consisted, and how it had been divided.

Messrs. Hanbury, Hutton, and Whitting then communicated with the surviving executors, and also with the persons amongst whom the residue had been divided, with the object of seeing whether they would repay a portion of what they had received, so as to make up the shares of the new claimants. This they were unwilling to do. The claimants were informed of this, and some discussion took place between them and Messrs. Hanbury, Hutton, and Whitting, who were still acting as solicitors to the executors, as to the evidence necessary to prove their relationship with the testator, and ultimately they agreed to compromise their claim. Accordingly the following document was prepared by Messrs. Hanbury, Hutton, and Whitting:

London, June 14, 1880.—Gentlemen,—As we have a difficulty in procuring legal evidence of our relationship to the late Mr. Francis Warren, we agree to accept 50l. in full discharge of all claims and demands which we may have in respect of his residuary estate (if paid at once), in consideration of such evidence being dispensed with. And we shall be much obliged if you will endeavour to procure this amount for us from the parties among whom the property was divided, the same to belong to us when received in equal shares.

This document the executors took to the claimants, with the sum to be received left in blank. The amount of 50l. was inserted at the interview between them, and the letter signed by the plaintiff and Mrs. Jones and her husband.

Further endeavours were made to obtain from the persons amongst whom the residue had been divided repayment of some part of it, but they were unsuccessful.

The executors then offered to give the claimants 10l. each in respect of their claims. This offer was accepted, and a receipt prepared by Messrs. Hanbury, Hutton, and Whitting in the following form:

Received of Mr. William Reading and Mr. John Warren the sum of ten pounds (so far as they are concerned) in respect of the late Mr. Francis Warren's estate. I retaining the right to get whatever we can out of the parties among whom the property was divided.

This was stamped, and signed by the plaintiff on the 12th July 1880. A similar receipt was prepared for Mrs. Jones, and signed by her and her husband. These two sums of 10l. were paid to the claimants by the executors out of their own money.

Seven other persons besides the claimants had claimed to be entitled to share in the testator's

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

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estate. An action was brought by them against the executors, but it was compromised.

On the 17th March 1884 the plaintiff commenced these proceedings against Mr. Reading, his co-executor Warren being then dead.

*R. G. Glenn* for the plaintiff.—The payment of 10*l.* is no discharge of the larger sum which the plaintiff claims. There was no consideration for the compromise, as the plaintiff never really had any difficulty in showing her relationship to the testator. The executor is therefore still liable to make good to the plaintiff her share of the residue.

*Procter* for the defendant.—A transaction such as this would be within the powers given to executors by 23 & 24 Vict. c. 145, s. 30. (a) He referred to

*Lee v. Lancashire and Yorkshire Railway Company*, 25 L. T. Rep. N. S. 77; L. Rep. 6 Ch. App. 527.

*Glenn* in reply.—Sect. 30 of 23 & 24 Vict. c. 145 does not apply to a case such as this. It only refers to claims against the estate.

*KAY, J.*—The doctrine established by *Cumber v. Wane* (1 Sm. L. C. 8th edit. p. 357), that a larger sum of money cannot be discharged by the payment of a lesser sum, without more, has been attacked within recent times, but has survived, the Court of Appeal having formally recognised it, notwithstanding the doubts expressed concerning it. I think, therefore, that it must now be taken to be settled law. [His Lordship then stated the facts of the case, observing that he gathered from the letter of the 14th June 1880, which no doubt was prepared by the solicitors to the executors, but was not signed in their presence, that the claimants had some difficulty in making out their claim. He continued:] It is now said that there never was in fact any difficulty in making out their claim, though it is so stated in the document which the executors' solicitors prepared. However, I have in that document, signed under the circumstances which I have mentioned, a written admission by the claimants of their difficulty in procuring legal evidence in support of their claim, and moreover they have not as yet in fact proved their relationship. It appears, therefore, to me clear that in June 1880 they had such difficulty in establishing their claim that they were willing to abandon it for the sum of 50*l.*, if paid at once. This is a claim which the executors could compromise under the powers given to them by sect. 30 of 23 & 24 Vict. c. 145, which enables them "to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased." It was suggested that this section was not intended to apply to such a claim as the plaintiff's, but I can see no reason why it should not apply to a claim

(a) 23 & 24 Vict. c. 145, s. 30: "It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby."

of that nature as much as to a mere money claim against the estate. This was, in my opinion, a proper case for a compromise, and these claimants admitting their difficulty in proving their claim, the executors were right in exercising their power in the way in which they have. They out of their own pockets paid this lady 10*l.* in satisfaction of her claim so far as they were concerned, and obtained her acknowledgment to that effect, and she now takes these proceedings against the survivor of them with a view to getting from him the whole amount which she claims. The doctrine of *Cumber v. Wane* does not apply to such a case as this, and the executors have only done what, in my opinion, they had a perfect right to do. I accordingly dismiss this summons, with costs.

Solicitor for the plaintiff, *E. A. Swan*.

Solicitors for the defendant, *Hanbury, Hutton, and Whitting*.

Tuesday, July 22.

(Before KAY, J.)

LOCKWOOD v. SIKES. (a)

*Settlement—Life interest—Forfeiture on alienation—Subsequent settlement of life interest.*

*L.* was entitled under a voluntary settlement to a life interest in one-fourth part of certain funds, with remainder to his children who should attain twenty-one, or die under that age leaving issue, with remainder over. The settlement contained a proviso for the determination of his life interest, and the acceleration of the subsequent remainders, if he should alien, dispose of, mortgage, charge, or in anywise incur his life interest, or if by reason of his bankruptcy, insolvency, or otherwise the income of the funds could be no longer personally enjoyed by him, but would, but for that proviso, become vested in, or payable to any person or persons other than him.

By a subsequent settlement made on his marriage, *L.*, amongst other property, assigned to trustees the share to which he was entitled under the former settlement, upon trust to continue the trust funds in their then present investments, or upon the written request of *L.*, and after his death upon such request, or at such discretion as therein mentioned, to sell the same, and pay the income of the proceeds to *L.* during his life, and after his death, to his wife during her life, with remainder for the issue of the marriage as *L.* and his wife jointly, or the survivor should appoint, and in default for all the children of the marriage in equal shares, sons at twenty-one, daughters at twenty-one or marriage, and in default of such issue for *L.* absolutely.

The question arose whether the marriage settlement produced a forfeiture of *L.*'s life interest under the voluntary settlement.

Held, that no such forfeiture was produced, for the assignment contemplated by the forfeiture clause was one by reason of which the income of *L.*'s share would become payable to some person other than him, whereas by the marriage settlement the life interest was assigned to trustees for his benefit.

THIS was an action for the purpose of ascertaining whether the interest which the plaintiff took under a settlement executed in 1843 was forfeited

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

by reason of its being comprised in the settlement made on his marriage, and, if necessary, to obtain rectification of the marriage settlement.

By a voluntary settlement dated the 3rd Aug. 1843, and an indenture indorsed thereon dated the 4th Aug. 1843, certain lands and personal estate, the property of the plaintiff's father at his death, were assured to Martha Lockwood, the plaintiff's mother, and James Lockwood, his uncle, upon trust to sell the same, and to invest the net residue of the proceeds of such sale, and pay the interest thereof to the said Martha Lockwood during her life, and after her decease upon trust (subject as therein mentioned) as to one equal fourth part or share thereof to pay the annual proceeds thereof into the proper hands of Joshua Lockwood (a son of the said Martha Lockwood) during his life, subject to the proviso hereinafter contained for making void his life interest therein, with remainder to his children who should attain twenty-one, or die under that age leaving issue, and in default of such children the said one-fourth part should, after the decease of the survivor of the said Martha Lockwood and Joshua Lockwood, be held upon the trusts hereinafter declared of the other three-fourth parts for the benefit of the two other sons and the daughter of the said Martha Lockwood, namely, Ben Lockwood, the plaintiff, and Martha Ann Adelaide Lockwood. And the settlement contained the following proviso:

Provided nevertheless and it is hereby agreed and declared, that if the said Joshua Lockwood shall alien, dispose of, mortgage, charge, or in anywise incur his life interest in the said part or share or any part thereof, or if by reason of his bankruptcy, insolvency, or otherwise the annual income thereof can be no longer personally enjoyed by him, but the same or any part thereof shall, or, but for this present proviso, would have become vested in or payable to any person or persons other than him, the said Joshua Lockwood, then and in such case the trust hereinbefore declared for payment of all or so much of the said dividends, interest, and annual produce to him as shall have been so aliened, disposed of, mortgaged, charged, or incumbered as can be no longer personally enjoyed by him shall cease and determine, and the same dividends, interest, and annual produce shall during the remainder of his life be payable to the person or persons, and applicable to the purposes to whom and to which the same would for the time being have been payable or applicable to in case he, the said Joshua Lockwood, were dead.

The remaining three-fourth parts were settled upon the like trusts for the benefit of each of them, the said Ben Lockwood, the plaintiff, and M. A. A. Lockwood during his or her life, and after his or her decease, for his or her children, subject to the like proviso against alienation, and in the like manner in all respects as thereinbefore declared and contained for the benefit of the said Joshua Lockwood and his children concerning the first-mentioned one-fourth share, and with corresponding trusts over in default of children.

Martha Lockwood died in Dec. 1856.

By a settlement, dated the 3rd Nov. 1883, made on the plaintiff's marriage, he assigned to trustees, amongst other property, the several shares in the schedule thereto mentioned, and all other the property in the said schedule mentioned, and the proceeds thereof, upon trust for the plaintiff until the marriage, and afterwards upon trust, either to continue the said trust funds in their then present investments respectively, or upon the written request of the plaintiff, and after his

death upon such request, or at such discretion, as therein mentioned, to sell the said trust funds, or any part thereof, and to apply the net proceeds of sale in the purchase of any of the stocks, funds, or securities therein mentioned, and to pay the annual income thereof to the plaintiff during his life, and after his death, to his wife during her life, with remainder for the issue of the intended marriage as the plaintiff and his wife jointly, or as the survivor of them, should appoint, and in default of appointment, for all the children of the said intended marriage in equal shares, who, being a son, or sons, should attain twenty-one, or being a daughter, or daughters, should attain that age or marry, and in default of such issue, for the plaintiff absolutely. And the plaintiff appointed the trustees of his marriage settlement his attorneys to receive and recover the moneys and property to which he was entitled under the voluntary settlement.

The schedule to the marriage settlement contained, amongst other items, the following:

The share of, or to which the said James Alfred Lockwood (the plaintiff) is entitled under a certain indenture of settlement made by Martha Lockwood, the mother of the said James Alfred Lockwood.

This action was brought against the present trustees of the voluntary settlement, the trustees of the marriage settlement, and Ben Lockwood. The claim was for a declaration that, notwithstanding the execution by the plaintiff of the marriage settlement, he was entitled to receive the income of one equal fourth part of the funds, subject to the trusts of the voluntary settlement; and that, if necessary, the marriage settlement might be rectified by omitting the words referring to the plaintiff's interest under the voluntary settlement, it being alleged that it was executed by the respective parties thereto under a mistake, and in ignorance of the nature of such interest of the plaintiff.

The trustees of the voluntary settlement, and Ben Lockwood, put in statements of defence, not admitting that the marriage settlement was executed under a mistake, or in ignorance of the plaintiff's interest, and submitting the questions raised to the decision of the court.

*W. Pearson, Q.C. and Bissell* for the plaintiff.

*Kekewich, Q.C. and Vaughan Hawkins*, for the trustees of the voluntary settlement, contended that the marriage settlement produced a forfeiture of the plaintiff's life interest under the voluntary settlement. They referred to

*Hurst v. Hurst*, 46 L. T. Rep. N. S. 899; 21 Ch. Div. 278.

*Dunning* for Ben Lockwood.

*Berkeley Hallé* for the trustees of the marriage settlement.

KAY, J.—This case appears to me to be clear, notwithstanding the argument which has been addressed to me. [His Lordship then referred to the marriage settlement, and the item in the schedule thereto relating to the plaintiff's interest under the voluntary settlement. He continued:] The interest to which the plaintiff was entitled under that settlement was a life interest only. He was entitled to no capital sum under its provisions. This life interest then was assigned to the trustees, upon trust that they should either continue the trust funds in their then mode of investment, or upon the written request of the plaintiff,

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and after his death upon such request, or at such direction as therein mentioned, to sell the same. There is no power to sell the life interest, or convert the trust fund during the plaintiff's life, without his written request. He is still living, and has made no such request. What, then, are the trustees to do? It is said that no trust of the income has been declared, because the income to which the trusts do refer is the income of the proceeds of the sale of the trust funds. I cannot agree with that. I think the income referred to is the income of the thing which is assigned by the settlement, or of the proceeds of the conversion thereof, as the case may be. Suppose this were a sum of consols, and there were no trust for sale exercisable, would there be no trust of the life interest? There certainly would, in my opinion. In the same way, if the property were leaseholds, the income, until the plaintiff compelled a sale, would go to him, as also would it in the case of an annuity. Therefore, supposing this life interest to have been assigned to the trustees of this settlement, the intention was, I think, merely that the income should go to the husband until he otherwise directed. This life interest comes to the plaintiff under a deed by the provisions of which it is to a certain extent revocable. [His Lordship stated the effect of the voluntary settlement, and read the forfeiture clause therein, and continued:] It is argued that the assignment of the life interest by this settlement, under the trusts of which, as I have said, the income is to be paid to the plaintiff until he otherwise directs during his life, produced a forfeiture of that interest under the clause which I have just read. To me it appears that in the case of an assignment by which the plaintiff deprived himself of all benefit that would be so, but not otherwise. The words of the clause show that the assignment contemplated was one by reason of which the income would go to some person other than the plaintiff, or would cease to be personally enjoyed by him. Can this settlement, then, which assigns the life interest to trustees for the plaintiff's benefit, be said to operate as a forfeiture under such a clause as that? It is said that it does so operate, but I think that it does not, and that no forfeiture has occurred. In that case no rectification is required, but if it were I should, I think, grant it, as it is clear to me that the parties never intended to create a forfeiture of this life interest. Ben Lockwood's costs must be paid by the plaintiff. The trustees of the marriage settlement can take their costs out of their funds. I give no other costs.

Solicitors for the plaintiff, *Scott, Jarman, and Trass*.

Solicitors for the trustees of the voluntary settlement, *Jaques, Layton, and Jaques*.

Solicitors for Ben Lockwood, *Jaques, Layton, and Jaques*, agents for *Fenton, Owen, Hall, and White*, Huddersfield.

Solicitors for the trustees of the marriage settlement, *Scott, Jarman, and Trass*.

July 12 and 25.

(Before KAY, J.)

Re LULHAM; BRINTON v. LULHAM. (a)

*Voluntary settlement—Consideration—Assignment of leaseholds—Subsequent surrender and renewal—27 Eliz. c. 4—Renewal by settlor—Benefit of fiduciary relation.*

*An assignment by way of settlement of leasehold property, although it contains no covenant on the part of the assignee to pay the rent, or perform the covenants of the lease under which the property is held, is not a voluntary conveyance within the statute 27 Eliz. c. 4.*

*The doctrine of Price v. Jenkins (37 L. T. Rep. N. S. 51; 5 Ch. Div. 619) followed and observed upon.*

*A settlor of leasehold property, who remained in apparent possession and received the rents thereof, by an indenture subsequent to the settlement surrendered the remainder of the lease, and took a renewed term from the lessors, not disclosing the fact of the settlement.*

*Held, that he, and after his death his executors, were trustees of the renewed term for the persons entitled under the settlement, such renewed term having been practically obtained by virtue of the original lease.*

#### ADJOURNED SUMMONS.

This was a summons taken out in an action for the administration of the estate of Thomas Lulham deceased, for the purpose of obtaining a decision as to whether certain leasehold property, of which he was in apparent possession at his death, was part of his estate, or was subject to a settlement made by him in favour of his wife.

By an indenture of lease dated the 24th Jan. 1856, the Mayor, Aldermen, and Burgesses of Southampton, in consideration of a sum by way of fine, and of the rents and covenants thereafter reserved and contained on the part of the lessee, demised to Mary Winterbottom, then Mary Kelsey, widow, a certain messuage and premises, from the feast of St. Michael the Archangel then last past, for forty years, at the yearly rent of 5s. 6d., and subject to covenants for payment of the rent, and all rates and taxes, and to repair and maintain the premises, and yield them up in good repair at the end or sooner determination of the term.

By an indenture dated the 23rd May 1865, this lease was assigned to Thomas Lulham, and by deed dated the 23rd Dec. 1865, in consideration of natural love and affection, he assigned the same lease to trustees upon trust for his wife for her separate use, and to dispose of the same as she should by deed or will appoint, and in default of appointment for herself, her executors or administrators. The settlement contained a covenant by Thomas Lulham that he would execute and do every such assurance and thing for the further or more perfectly assuring the premises to the trustees or the survivor, his executors or administrators, their or his assigns, and enabling them or him to obtain possession of the same, as by them or him should be reasonably required.

By indenture dated the 16th March 1870, in consideration of the surrender of this lease, which was erroneously stated to be then legally vested in the said Thomas Lulham, and in con-

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sideration of 91l., and of the rents and covenants therein contained, the corporation granted a new lease to Thomas Lulham for forty years from Michaelmas then last past, subject to similar covenants.

Thomas Lulham remained in apparent possession of the property until his death, receiving the rents, and paying a weekly sum in respect thereof to his wife.

He died on the 1st March 1878, having by his will, dated the 30th Nov. 1876, appointed his widow, during her widowhood, and his sons Edwin Walter Lulham and Horace William Henry Lulham, and the Rev. Robert Hamilton, executors and trustees thereof.

This action was brought against the executors by the assignees, upon certain trusts, of a share of the testator's residuary estate.

The widow claimed to take the leaseholds under the settlement, and this summons was taken out by her and the defendant Horace Lulham, the surviving trustee of the settlement, asking for a direction that the executors of Thomas Lulham should execute a proper assurance of the premises comprised in the lease of the 16th March 1870, so that the same might become vested in the surviving trustee of the settlement; and that an account might be taken of any sums of money received or paid by the testator or his executors in respect of the property, and the rents and profits thereof, and that any balance which might be found due to the trustee of the settlement might be paid to him out of the testator's estate within seven days after the chief clerk's certificate of the result; and that the costs of that application might be paid out of the testator's estate.

The trustee and the widow were willing to ratify the surrender and adopt the lease.

*E. T. Holland* for the summons.—This was a settlement of leasehold property, in respect of which there was liability for rent and covenants. It was, therefore, for valuable consideration within the doctrine of *Price v. Jenkins* (37 L. T. Rep. N. S. 51; 5 Ch. Div. 619). That was a decision of the Court of Appeal. It has been distinguished in *Re Ridler*; *Ridler v. Ridler* (48 L. T. Rep. N. S. 396; 22 Ch. Div. 74), but that was a case under the statute 13 Eliz. c. 5. It was also distinguished by Bacon, V.C. in *Shurmur v. Sedgwick* (49 L. T. Rep. N. S. 156; 24 Ch. Div. 597) on the ground that in the case before him there was no alteration in the liability for the rents and covenants in the lease. Neither of these cases affect the authority of *Price v. Jenkins*. The renewed lease, too, should be taken to be subject to the settlement, for the settlor had made himself a sort of trustee for the persons interested under the settlement, and was in the same position as any ordinary trustee renewing in his own name a lease which was part of his trust estate:

*Keach v. Sandford*, 1 W. & T. L. C. 5th edit. p. 46.

He also referred to

*Caton v. Rideout*, 1 Mac. & G. 599.

*Hastings, Q.C.* and *Chadwyck Healey* for the plaintiffs.—Some doubt was expressed as to the decision in *Price v. Jenkins* in *Ex parte Hillman*; *Re Pumfrey* (40 L. T. Rep. N. S. 177; 10 Ch. Div. 622). The renewal of the lease was practically a purchase for value of the residue of the old lease, and the settlement was therefore defeated. These

applicants are volunteers, and the court will not assist them:

*Ellison v. Ellison*, 1 W. & T. L. C. 5th edit. p. 273; 6 Ves. 656.

[KAY, J. referred to *Hill v. The Bishop of Exeter*, 2 Taunt. 69.]

*Badcock* for the executors and trustees of the will other than the applicants.

*E. T. Holland* replied.

July 25.—KAY, J. stated the facts, and continued:—It is argued that the settlement was voluntary, and that the new lease was a purchase for value of what remained of the old one, and therefore the settlement must be treated as fraudulent and void under 27 Eliz. c. 4. Without giving any opinion whether the new lease was such a purchase, the first question is whether this settlement was voluntary, or for a valuable consideration. In *Price v. Jenkins* the Court of Appeal held that an assignment by way of settlement of leasehold property, which contained no covenant on the part of the assign to pay the rent or perform the covenants, was, nevertheless, an assignment for value, so that it could not be destroyed by a subsequent sale of the leaseholds by the settlor under 27 Eliz. c. 4, James, L.J. saying that the quantum of consideration was of no consequence. This was followed by the Chief Judge in Bankruptcy in *Ex parte Doble* (38 L. T. Rep. N. S. 183). In the later case of *Ex parte Hillman* it was held that such an assign was not a purchaser within the meaning of sect. 91 of the Bankruptcy Act 1869. The late Master of the Rolls there observed: "That a voluntary conveyance is fraudulent is entirely judge-made law. The later judge-made law of *Price v. Jenkins* corrected the former, so far as was possible at that time." James, L.J. observed: "*Price v. Jenkins* was a decision upon the statute 27 Eliz., and the object of it was to prevent a fraud." In the case of *Re Ridler*, both Bacon, V.C. and the late Master of the Rolls speak somewhat doubtfully of the decision in *Price v. Jenkins*, and hold that such a settlement would be voluntary as against creditors of the settlor under the earlier statute of 13 Eliz. c. 5. Cotton, L.J. agrees in this, but speaks of *Price v. Jenkins* as a binding authority. In *Re Marsh and Earl Granville* (48 L. T. Rep. N. S. 947; 24 Ch. Div. 11) Bowen, L.J. intimated an opinion that if there were in the same deed a conveyance of freeholds, the acceptance of the burden of the leasehold property would not be a consideration as to them. This is anything but a satisfactory state of the law, but it compels me to hold, against my own opinion, that this settlement, so far as regards the leaseholds comprised in it, was not voluntary. It therefore cannot be considered fraudulent or void against a subsequent purchaser under the statute of Elizabeth. The result is this, the persons claiming under the settlement are entitled to the interest in the leaseholds thereby conveyed—that is, for the residue of the term comprised in the lease of the 24th Jan. 1856, which, if not surrendered, would still have some years to run. There was a covenant in the settlement by Thomas Lulham for further assurance, and the effect of these authorities seems to be that, although the settlement as to the leaseholds must be treated as a settlement for value, so as not to be void under 27 Eliz. c. 4, yet that the settlement was for every other purpose a voluntary settle-

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ment, and consequently no judgment for specific performance of that covenant could be obtained. But of course there might be judgment for damages for breach of that covenant, whether voluntary or not, and, as it provides in terms that Thomas Lulham will do every assurance and thing for the further or more perfectly assuring the premises to the trustees, and enabling him or them to obtain possession of the same, I must hold that his estate, if entitled to the renewed lease, would be liable in damages, which must be measured by the loss which the widow would incur by being deprived of this property from the time of his death, and I must allow her, or the surviving trustee of the settlement, to carry in a proof against the estate of Thomas Lulham for the amount of such damages. But the question is raised whether the whole term of the new lease is not in fact bound by the settlement, so that the executors of the husband are trustees of it for the purposes of such settlement, and if that be so the points I have been considering would not arise. The husband was not a person interested under the settlement, nor was he a trustee of that settlement. If he had been a trustee, or even a tenant for life under it, he could not have renewed the lease for his own benefit, the principle being that the renewed lease, being attributable to the sort of tenant right which even a tenant for life might have in respect of the original lease, must follow that lease, and be subject to the same trusts, although no declaration of trust in writing of the new lease has been made. In *Pickering v. Vowles* (1 B. C. C. 197) Lord Thurlow said: "It has long been held that, where a trustee or an executor renews such an estate, it shall be for the use of the *cestui que trust*. The right of renewal has obtained the name of a tenant right. The rule has obtained with respect to a tenant for life, who has opportunity of renewal from being in possession, that he shall not obtain the reversion for his own use only. The court has, therefore, obliged him to stand seised as a trustee to the uses of the settlement." So, if he had been interested in the lease jointly with other persons, he would have been trustee of the renewed lease for the benefit of them all: (*Palmer v. Young*, 1 Vern. 276.) These authorities show that the trust which the court fastens upon the new lease is not confined to the renewal by a person who was at the time in a fiduciary position, but extends to other cases in which the renewal has been obtained by virtue of the original lease. In the present instance the renewal was undoubtedly so obtained. The corporation, when they granted it, did so in consideration of the surrender which the settlor purported to make, suppressing the fact of the existence of this settlement, to the trustees of which the lease had been assigned. After the settlement the husband continued in apparent possession of the property, and received the rents on behalf of his wife, or of the trustees of the settlement. In what character must he be treated as having had such possession? If he was a constructive trustee or agent, it is obvious that he must also be a trustee of the renewal which he obtained by means of that position. It is quite clear to me, from the evidence, that he intended the renewal to be for the benefit of his widow. That appears by the affidavits both of Elizabeth Lulham and of Horace Lulham, as well

as the affidavit of the widow. But there being no declaration in writing of a trust for her, it is argued that the Statute of Frauds disentitles her to recover. If the equity that a trustee cannot renew a lease of which he is trustee for his own benefit applies to this case, the absence of such a written declaration of trust as is required by the Statute of Frauds is not material. Whether that equity does apply is the question. I have come very decidedly to the conclusion that this question ought to be answered in favour of the widow's claim. There is no doubt that the renewal in this case was obtained by virtue of the tenant right in respect of the original lease. If the husband was not at the time in a fiduciary position, at any rate he obtained the renewed lease by reason of his actual possession of the property under the old one. That was not an adverse possession, but a permitted possession, and the case must be treated as though he were now present and claiming to hold the new lease against the persons interested under the settlement. Even if his position was not fiduciary, in my opinion he could not be allowed to maintain such a claim. But I think the true view of the case is that, at the time when he obtained this renewal, he was in fact in possession of the property, and receiving the rents of it as the agent of the trustees or of his wife, and that accordingly his position with respect to this property was really a fiduciary one, and that the case is stronger on that account in favour of the widow's claim. Accordingly, it seems to me that the executors of the husband must be treated as trustees of this renewed lease for the benefit of the widow. The ordinary rule is that the person claiming the benefit of the renewal should pay the fine and all outgoing; but I am convinced from the evidence that the husband intended to make a present of this to his wife in the present case. I am glad that the law enables me to surmount the difficulty occasioned by the Statute of Frauds, and to carry out the intention of benefit which the husband had in favour of his wife. With respect to the rents of this property received by Thomas Lulham in his lifetime, it appears that the husband and wife were living together, and that he paid part of such rents to his wife, and retained the rest without any claim or objection on her part. *Caton v. Rideout* applies to such a case as that, and settles that no claim can be maintained by the widow to the rent received by the husband in his lifetime.

An order was made as asked by the summons, so far as regards the assignment of the leaseholds, but, so far as it asked for an account of back rents, it was dismissed. The costs of the summons were ordered to be paid out of the testator's estate.

Solicitor for the applicants, *Joseph Harwood*, agent for *Haselwood*, Brighton.

Solicitors for the plaintiffs, *Steadman and Co.*  
Solicitors for the other executors and trustees, *Crouder, Ainslie, and Vizard*.

Aug. 5 and 11.

(Before CHITTY, J.)

ROLLS v. SCHOOL BOARD OF LONDON. (a)

*Public corporation—School Board—Compulsory purchase of lands—Exchange of the lands with a third party—Agreement prior to notice to treat—Damnum absque injuriâ—Ultra vires—Elementary Education Act 1870 (33 & 34 Vict. c. 75), ss. 19, 20, 22.*

The School Board had taken some land compulsorily under the Elementary Education Act 1870. The plaintiff, who had been served by the defendants with notice to treat for his land, afterwards discovered that they had already agreed to exchange a portion of the land included in the notice for other land, thereby securing to the board additional land and other advantages, instead of allowing him to reap those advantages which he would have done had he remained in possession of his land, and he moved that the defendants might be restrained from using the land otherwise than for educational purposes.

Heid, that the principal question was whether or not the land taken from the plaintiff, and which had been exchanged, was taken *bonâ fide* within sect. 19 of the Elementary Education Act 1870, for the purpose of providing sufficient school accommodation; that, as the scheme of exchange was one which the Educational Department had sanctioned, and as the board had not (like a railway company) acquired the land merely for their own profit, and as the land taken from him was used in an exchange advantageous to the schools, his views and schemes could not now be regarded; that, although he might have lost the chance of making a profitable bargain, such loss was no cause of action, but only a *damnum absque injuriâ*; and that his motion must fail.

This was a motion which raised the question of the power of school boards under the Elementary Education Act 1870 to devote to other than educational purposes land which they had taken under their compulsory powers. The plaintiff, Mr. John Allan Rolls, the tenant for life of a considerable estate at Camberwell, moved for an interim injunction to restrain the board, their agents, contractors, and servants, from putting in force any of their statutory powers with respect to the purchase or taking, and from purchasing or taking, and from continuing in possession, of land of the plaintiff in Coburg-road, Camberwell, included in a notice to treat served by the board on the plaintiff in the month of August 1883, except such part of the said land as the board properly required for the purpose of providing sufficient public school accommodation; and, in particular, from so taking and from continuing in possession of such part of the said land as the board proposed to convey to a neighbouring proprietor for the purpose of enabling him to construct a road thereon.

The defendants had given the plaintiff notice that they required to purchase and take for the purposes of the Elementary Education Act 1870, certain lands and hereditaments belonging to him.

The preliminary notice describing the object for which the plaintiff's land, together with land belonging to other owners, was proposed to be

taken had been duly published pursuant to subsect. 2 of sect. 20 of the above Act.

Sect. 20, sub-sect. (2):

The School Board, before putting in force any of the powers of the said Acts with respect to the purchase and taking of land otherwise than by agreement, shall, (a.) Publish during three consecutive weeks in the months of October and November, or either of them, a notice describing shortly the object for which the land is proposed to be taken, naming a place where a plan of the land proposed to be taken may be seen at all reasonable hours, and stating the quantity of land that they require; and shall further,

(b.) After such publication, serve a notice in manner mentioned in this section on every owner or reputed owner, lessee or reputed lessee, and occupier of such land, defining in each case the particular land intended to be taken, and requiring an answer stating whether the person so served assents, dissents, or is neuter in respect of taking such land.

Sect. 19 of the same Act provided as follows:

Every school board for the purpose of providing sufficient public school accommodation for their district, whether in obedience to any requisition or not, may provide, by building or otherwise, school-houses properly fitted up, and improve, enlarge, and fit up any school-house provided by them, and supply school apparatus, and everything necessary for the efficiency of the schools provided by them, and purchase, and take on lease any land, and any right over land, or may exercise any of such powers.

The object for which the land was proposed to be taken was stated on the notice to be

For the purposes of erecting on the said pieces or parcels of land houses in which public elementary schools may be carried on, and for the enlargement or improvement of existing school houses and premises already provided by the said School Board for London.

The School Board for London had also presented a petition under their seal to the Education Department, praying that an order might be made authorising the School Board to put in force the powers of their Acts with respect to the purchase and taking of lands otherwise than by agreement, so far as regarded the land mentioned in the petition, which included the plaintiff's land; and the Education Department having inquired into the matter, made the order prayed for, and the same was confirmed by the Education Provisional Act, London, October 1883.

Prior to the service of the notice to treat, and of the passing of the Confirmation Act above mentioned, the School Board had under their consideration a proposal, by a Mr. Bird, who was a neighbouring landowner, for exchanging a portion of land belonging to him for a strip of the plaintiff's land when the same should be acquired by the board. One of the conditions of such exchange was that Mr. Bird should form the land acquired by him from the board into a road and dedicate it to the public. This proposal was, subject to their obtaining the consent of the Education Department, adopted by the School Board.

*Macnaghten*, Q.C. and *Renshaw* in support of the motion.—The facts of this case are not in dispute, but an important principle is involved. School boards have no power to purchase land at all, except for the purpose of providing adequate school accommodation. In this respect their powers are different from those of railway companies, acting under the Lands Clauses Consolidation Acts. The School Board have no power to take land compulsorily except for the objects declared in their published notice, upon the faith of which Parliament confers that privilege upon



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them. The Legislature intended that landowners should only be compelled to part with their land for purposes strictly educational, which had been approved of and sanctioned by the Education Department. What the respondents have done is to sell my land and put money, which I might have made out of the sale, into their pockets. Mr. Bird was at liberty to make any arrangements he might wish to make with the School Board with reference to his own land, but the Legislature never intended that the School Board should be able to compel one man to give them up his land, so that they might make a profitable bargain with a third party. If the board had fairly stated in their petition to the Education Department what they intended to do with the land when they had acquired it, they would never have received the sanction of that department, and my clients would have opposed the transaction. The court will not allow the School Board to utilise our land, which they avowedly took for one object, for quite another purpose, and will restrain them by an injunction:

*Galloway v. Mayor and Commonalty of London*, 14 L. T. Rep. N. S. 865; L. Rep. 1 H. of L. 34;  
*Lord Carrington v. Wycombe Railway Company*, 15 L. T. Rep. N. S. 49; 18 L. T. Rep. N. S. 96;  
 L. Rep. 2 Eq. 825; 3 Ch. App. 377;  
*Traill v. Baring*, 10 L. T. Rep. N. S. 215; 4 De G. J. & Sm. 318;  
*Vans v. The Cockermouth and Keswick Railway Company*, 12 L. T. Rep. N. S. 821; 13 W. R. 1015;  
*Re Stockton and Darlington Railway Company*, 3 L. T. Rep. N. S. 131; 9 H. of L. Cas. 346.

*Romer, Q.C.* and *P. V. Smith* for the respondents.—The School Board has done all they were required to do by the Act of Parliament. They served the proper notice that they intended to take the plaintiff's land for educational purposes, and the Education Department has approved of all that they have done, and declared that the land ought to be taken, and approved of the price to be paid for it. Then it occurred to an agent that it would be advantageous to exchange a portion of that land for some other land for the benefit of the schools. [CHITTY, J.—Do you contend that you can take lands for the advantage of the schools, and not actually use them for the schools?] The land has become absolutely vested in us, and we may deal with it to the best advantage we can in the interests of the schools. Public school accommodation does not merely mean that a hard and fast line must be drawn, and that the land taken from a vendor is to be kept intact, and only used to be covered with schools and playgrounds. Sites must frequently be altered, and special provisions as to such alteration, and as to the exchange of such lands, are inserted in the Act of 1870. [CHITTY, J.—Is your case a different one from that of a railway company taking lands compulsorily?] Yes; because we were compelled to take the land for the public good, whereas a railway company only takes land for its own advantage. [CHITTY, J.—A railway company can sell superfluous land, but it cannot take superfluous land for the purpose of selling it.] If I have a power by Act of Parliament to sell for the interest of others there is nothing to prevent my doing so. No motives of self-interest can be imputed to a school board. It cannot be said that at the time we served our notice to treat on the plaintiff we knew we did not require the lands for educational purposes; and now that

the purchase has been completed the plaintiff cannot come to the court and complain because we (with the consent of the Education Department) propose to exchange part of the land purchased from him for land belonging to a neighbouring owner, when the exchange is obviously advantageous to the schools. We have now acquired a vested right in the lands, and are acting strictly within our rights:

*Errington v. Metropolitan District Railway Company*, 46 L. T. Rep. N. S. 443; 19 Ch. Div. 559.

*Macnaghten, Q.C.* in reply.—We do not say that the respondents have been guilty of *mala fides*. The only question to be decided is, have the School Board acted in such a way that they are entitled to retain the land against us? The respondents must not be allowed to make that profit out of this transaction, which clearly belongs to us. It cannot be right or legal that they should use their powers to get our land, and then hand it over to someone else.

CHITTY, J.—The question on this motion is whether the School Board for London is taking or has taken the plot of land in question *bona fide* for the purpose of providing sufficient public school accommodation for the district in question. It is settled that, where powers of taking land compulsorily are inferred for certain purposes, the promoters of the undertaking, who seek to put in force those powers, can only do so for the purposes for which they are authorised to take the land; and that they cannot lawfully take the land for what are generally termed collateral purposes foreign to their undertaking. This principle applies to a railway company, and also to a municipal body, who have power to take lands compulsorily for the purpose of improvements; but, as a railway company is chiefly seeking profit in the transaction, whereas, in the case of a municipal body, profit is not their object, in construing the Act of Parliament a greater liberality has been shown towards a public body such as a municipal corporation, than is shown to a railway company, which is looked upon more as a body of persons speculating for their own benefit. In the case before me no question arises as to the proceedings of the School Board down to the obtaining of the provisional order. They pursued the course that is prescribed by the 20th section of the Elementary Education Act 1870. They advertised in the months of October and December, describing the object for which the land was proposed to be taken, naming a place where the plans might be seen, and stating the quantity of land they required. They also served a notice on the plaintiff as well as on another owner showing the particular land intended to be taken, and then they proceeded to petition the Education Department, stating in the petition the land intended to be taken, and the purpose for which it was required. The Education Department inquired into the propriety of the proposed order, and, by the provisional order, which recites in substance what I have stated, the department (having received a report after the inquiry, and having considered the same) declare that it is proper, and thereby order accordingly, "that the board be authorised to put in force, with reference to the pieces of land, and rights over land, set forth in the schedule, the powers under the said Acts for the purchase and taking of lands otherwise than

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by agreement, or any of them;" and there is to that provisional order a short schedule, describing the piece of land, which is proposed to be taken from Mr. Rolls. The School Board therefore honestly desired to take this piece of land for the purpose of providing sufficient public school accommodation, and they satisfied the Education Department that the land was required for this purpose. But before the Act of Parliament was passed confirming the provisional order Mr. Bird, who is a neighbouring landowner, owning what may be termed with sufficient accuracy "back land," made a proposal to Mr. Young, who acts as the agent of the surveyor of the board in these matters, the effect of which was this: that if the land was acquired by the School Board they should give to Mr. Bird a strip of the land leading up from a public roadway, which would give him access to that roadway from his back land; but the road which was thus to be constructed on the land given was to be made a public road, and a road which would benefit the school-house, and the school playground which would be established there; and Mr. Bird proposed to give a portion of his backland larger in extent than the area of the proposed road. This was Mr. Bird's own proposal. The surveyor, according to his evidence, reported to the board, and the board, as he says, have adopted Mr. Bird's proposal, subject to the consent of the Education Department. Upon this evidence it is contended on behalf of the plaintiff, and I think, as the evidence stands, rightly contended, that the board adopted the proposal before the notice to treat was served, and I shall dispose of the case on that assumption. It appears to be the right one, and the right inference to draw from the evidence. Now, there is no agreement binding the board to carry this proposal of Mr. Bird's into effect; but it is clear, I think, that the board will be able to obtain the consent of the Education Department to the scheme of Mr. Bird. I turn to the 22nd section of the Elementary Education Act 1870, which enacts that "the provisions of the Charitable Trusts Act 1853 to 1869, which relate to the sale, leasing, and exchange of lands belonging to any charity, shall extend to the sale, leasing, and exchange of the whole or any part of any land, or school-house, belonging to a school board, which may not be required by such board," with this modification, "that the Education Department shall, for the purposes of this section, be deemed to be substituted in those Acts for the Charity Commissioners." I have no doubt that when (if ever) this matter is brought before the Education Department that department will not hear Mr. Rolls on the subject; because all that the department has to consider is, having regard to the section in the Charitable Trusts Act, whether the scheme will be beneficial to the School Board, and I have no doubt Mr. Rolls, the landowner, is not entitled to be heard. Under these circumstances can it be fairly said that the School Board are acquiring, or had acquired, the land in question for the purpose of providing sufficient public school accommodation for their district? Taking all the circumstances together I think that question must be answered in favour of the board. The board is not like a railway company that has surplus land, and is not only empowered to sell, without the consent of any other body, but is bound to dispose of the

surplus land. The board only takes land which is actually required for the purpose of providing public school accommodation for their district, and, as I have said, down to the time of obtaining the provisional order, not one word can be suggested against the board that they were not proceeding *bonâ fide*. Then the board are not bound at the present moment, in point of law, to give effect to Mr. Bird's proposed scheme, and the board have no power to dispose of this land, which is inalienable land, except with the sanction of the Education Department, and the land, which they propose to give Mr. Bird in exchange, will be utilised for a purpose beneficial to the school. The surveyor in his affidavit states: "Such modification of site will be highly advantageous as dispensing with the necessity of four entrances to the new school, one for boys and one for girls and infants on the east and west sides thereof. It is intended now that there shall be only two entrances, one for boys and the other for girls and infants on the new road on the north side thereof. The said modification of site will also give to the children better playgrounds, and is in all respects better adapted for the intended schools." It is plain, therefore, that the land, which has been given to Mr. Bird in exchange will not be applied for purposes foreign to the school, but will be used in such a manner as will be beneficial to the school itself. It seems to me that, putting all these circumstances together, the board is justified in what it has done. Assuming that the board had no such proposal before them as Mr. Bird made at the time when they served the notice to treat, the question would be free from all doubt, and then they would have been entitled, under the 22nd section of their Act, having acquired the land, to get the consent of the Education Department, if they could, to the proposed scheme. I see no valid reason why the School Board should not, with the sanction of the Education Department, sell any portion of the land which they are thus obtaining, on the terms of the land being made by the purchaser into a public or private road when the school will derive an advantage from such an arrangement. The case is not made worse against the School Board because the board are to receive some other land, some back land, in exchange. No doubt the result is incidentally disadvantageous to the plaintiff because he will lose the advantage which he has hitherto had of making a profitable bargain with Mr. Bird, as the owner of the back land. The plaintiff has for some time past been in negotiation with Mr. Bird upon this subject, and it is undoubted that he would have been able to command a large price from Mr. Bird on the sale of a sufficient portion of land to make a road; but these negotiations were altogether unknown to the board, and there is no pretence for saying that they have been using, or that they will (when this scheme is adopted, as I have very little doubt it will be by the Education Department) purposely use their powers with a view to deprive the plaintiff of the advantage he might have had. It seems to me this is an incidental disadvantage to the plaintiff. It is in point of law *damnum absque injuriâ*, although he will lose what, in other circumstances, would have been a profit, I think the board are entitled to do all they have done. The result is, I refuse the motion, and make the costs costs in the action.

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Re CHARLES DENHAM AND Co. LIMITED.

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Solicitors for the plaintiff, *Marksby, Wilde, and Burra.*

Solicitors for the respondents, *Gedge, Kirby, Millett, and Morse.*

Saturday, May 10.

(Before CHITTY, J.)

Re CHARLES DENHAM AND Co. LIMITED. (a)

*Company—Liquidation—Petition—Prosecution of directors—Application for petition to stand over—Discretion of the court—Companies Act 1862 (25 & 26 Vict. c. 89), s. 167.*

*An ex parte application by way of petition was made on behalf of a liquidator of a company for leave to prosecute one of its directors. On behalf of some of the creditors of the company, who claimed a right to appear in opposition to the petition, it was asked that the petition might stand over, so that necessary evidence in opposition to it might be filed; and it was submitted that the court could only adjudicate on this matter after hearing both sides. It appeared, however, that these creditors were nearly related to the directors who were to be prosecuted, and that if the petition were to be allowed to stand over justice might be frustrated, and that by the Companies Act 1862, s. 167, the discretion of the court was unshackled by any obligation of hearing evidence as to the propriety of a prosecution, and that it could direct a prosecution either on the application of any person interested in the winding-up, or proprio motu.*

*Held, that the whole matter was in the discretion of the court, and that, as the court in this instance, from its previous knowledge of the circumstances of the case, was satisfied that the opposition to the petition arose from a desire, not of saving money, but of saving a director, it would make an order giving the liquidator leave to prosecute.*

A COMPANY which traded under the name of Charles Denham and Co. Limited was ordered to be wound-up under the supervision of the court on the 26th June 1880. On the 26th Nov. 1883 Chitty, J. made an order declaring that Charles Denham and another person, who had both been directors of the company, were jointly and severally liable under the Companies Act 1862 (25 & 26 Vict. c. 89), s. 165, to pay the sum of 21,600*l.* in respect of certain breaches of trust of which he then found that they had been guilty in relation to the company: (*Re Charles Denham and Co. Limited*, 50 L. T. Rep. N. S. 523; 25 Ch. Div. 752.) The liquidator of the company now presented a petition for a direction by the court that he should institute a prosecution against Charles H. Denham, and for an order that the costs of the prosecution should be paid out of the assets of the company. An affidavit had been filed by the liquidator, in which it was stated that the debts due to the creditors of the company above 10*l.* amounted to 14,590*l.*, exclusive both of debts for which Charles H. Denham and his mortgagee had been admitted creditors (which debts were then claimed to be held by Mr. Wavell, the solicitor to Charles H. Denham), and of the amounts due to Charles H. Denham's mother-in-law and brother-in-law. The affidavit

also went on to state that creditors to the amount of 11,550*l.* had assented to the present application.

The petition, which had not been served on anyone, was presented under the 167th section of the Companies Act of 1862, which provided that where any order was made for winding-up a company by the court, or subject to the supervision of the court, if it appeared in the course of such winding-up that any past or present director had been guilty of any offence in relation to the company for which he was criminally responsible, the court might on the application of any person interested in such winding-up, or of its own motion, direct the official liquidators or the liquidators (as the case might be) to institute and conduct a prosecution or prosecutions for such offence, and might order the costs and expenses to be paid out of the assets of the company.

*Macnaghten, Q.C. and Baker* for the petitioner. —We have not served this petition on anyone, and we claim now to be heard *ex parte*.

*H. Burton Buckley* for Mr. Wavell.—My client claims to be a creditor for 14,000*l.*, and I ask leave to be heard on his behalf, and also on behalf of creditors for smaller sums, and I ask for the petition to stand over on the following grounds. I have an affidavit which I will file, and which raises a case entitling my clients, Mr. Wavell and the creditors for smaller amounts, to be heard, as it shows that a meeting attended by creditors to the amount of 19,000*l.* wish to oppose this petition. My client only obtained copies of the petitioner's evidence two days ago, and consequently I am not prepared to argue the case to-day on the merits.

CHITTY, J.—Mr. Macnaghten had better open the petition, and I shall then be better able to decide whether it shall stand over or not: (*Re Northern Counties Bank Limited*, 31 W. R. 546.)

*Macnaghten, Q.C.*, after stating the facts mentioned above, added that his instructions were that out of the creditors for whom Mr. Buckley appeared, one (Mr. Wavell) was the transferee of a debt for 14,000*l.* due to Charles H. Denham himself, and that out of the creditors for 14,590*l.* who supported the petition one was a creditor for a large amount, and the others were creditors for small sums. The court ought to be informed who were present at the meeting to which Mr. Buckley referred, who summoned it, and how it was constituted. The bulk of the opposition to the petition comes not from a desire to save the assets, but from a desire to save a director. If the petition be not at once acceded to there will be a great risk of justice being defeated.

CHITTY, J.—Can you inform us, Mr. Buckley, where that meeting was held?

*Buckley*.—Your Lordship will see from a paper which I have handed up the list of those present. The meeting was held at the office of Messrs. Wavell and Co., and only attended by three persons, all solicitors, of whom Mr. Wavell and the solicitor for the mother-in-law and brother-in-law of Charles H. Denham were two. The affidavit to which I have already referred states that Messrs. Wavell and Co. now represent creditors to the amount of about 20,000*l.*, of

(a) Reported by A. COYBARNER SIM, Esq., Barrister-at Law.

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whom creditors to the amount of over 19,000*l.* had passed a resolution, at the above meeting, in opposition to a prosecution at the expense of the assets. It is provided by the Companies Act 1862 that the court may as to all matters relating to the winding-up have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court. In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company. By sect. 151 of the same Act the court is enabled to restrict the powers of the official liquidator if it thinks fit, and by General Order 1862, r. 60, my clients are entitled at their own expense to attend the proceedings before the judge, and, upon payment of the costs occasioned thereby, to have notice of all such proceedings as they shall by written request desire to have notice of. I both ask that the petition may stand over, and also further submit that even on the evidence before the court no order ought to be made.

CHITTY, J.—The jurisdiction which is conferred on the court by the 167th section is one which the court may exercise on its own motion without any application being made. Now the court acting under the power conferred by this section does not in any way prejudice the alleged delinquent at his trial, but at the same time, to use the exact wording of the section, it must “appear to the court in the course of winding-up” that the person so proposed to be prosecuted, who may be a past or present director, manager, officer, or member of the company, has been guilty of the alleged offence for which he is criminally responsible. Because, if the court cannot form some conclusion, it would not be right to direct a prosecution. The vital part of the section is not whether there should be a prosecution or not, but whether the prosecution should be at the expense of the assets. Now I had a case before me not very long ago (*Re Northern Counties Bank Limited, ubi sup.*) in which an application similar to this was made by the liquidator, and in the result it appeared that the case against the alleged delinquent was not sufficiently made out, namely, that an offence had been committed, and I thought it right to give some notice to the creditors. In that case the creditors were very numerous, and were clearly losing something like 15*s.* in the pound, and the question was whether the remaining portion of about 5*s.* in the pound was to be spent in undertaking the prosecution, a prosecution which might not succeed. I thought it right that the creditors should be consulted, and when they were consulted it appeared that upwards of two-thirds opposed the application, and I considered it to be within my discretion not to direct a prosecution. Now the present case is a different one. I had the whole matter before me judicially, with reference to which it is sought to found the charge against the alleged delinquents, and I expressed in the case, which was then thoroughly argued before me, my clear

opinion with regard to that case. I might at the end of the judgment, had I thought fit to do so, by virtue of the power conferred by the 167th section, there and then of my own motion (to use the language of the section) have directed the liquidator to have instituted a prosecution. I should say that, as a rule, I do not think it is advisable for a judge to act in that way. It is better that there should be an application by the liquidator to have the discretionary powers of the 167th section brought into exercise. That has been done in the present case, and I should be justified by the construction of this section in ordering this petition to be served on anyone. The liquidator has presented this petition, and served it on no one, but certain gentlemen had notice of the petition, and have instructed counsel to appear and ask for two things: first, that it should stand over; and secondly, that if it is not ordered to stand over, that then, even on the evidence already brought forward by them, the petition should be dismissed. In a case of this kind I cannot help looking at the source from which the opposition comes, and it appears that the meeting of the creditors on which Mr. Buckley relies was held at the office of Messrs. Wavell and Co. Now I do not desire in any way to prejudice Messrs. Wavell and Co. beyond saying that, from what I have seen in the winding-up, I am aware of the connection between them and the alleged delinquent, and that the meeting held at the office was a meeting of three solicitors who appeared for various parties. Now at the present moment I am not able to say whether Mr. Macnaghten's statement is correct, that the 14,000*l.* which Mr. Wavell claims as a creditor is really a sum that has been transferred by the alleged delinquent to Mr. Wavell, but I do know the fact of the connection between Mr. Wavell and the alleged delinquent. I do not wish to imply that there was any connection which would bring Mr. Wavell into any condition approaching that of the alleged delinquent, and I do not make any implication against him beyond saying that he has such close connection with the alleged delinquent that he would desire his escape. Another solicitor appeared for the mother-in-law and brother-in-law of the alleged delinquent, and again I say with reference to them that I am satisfied the opposition comes not from any desire to save the assets, but from a desire to save the alleged delinquent. There are other creditors of whom I cannot make the same observation, but they are not creditors for any large amount, because the two principal creditors, whose debts go to make up the sum which Mr. Buckley states at 19,000*l.* altogether, consist principally of Mr. Wavell and the two connections of the alleged delinquent to whom I have referred. Under these circumstances ought I to allow the petition to stand over? Mr. Macnaghten has said (and I think there is force in what he has said) that if the petition stands over there will be further delay, and the result may be that justice may be defeated, and that in such a serious matter, if there is to be a prosecution, it ought to be set on foot at once. In deciding that the petition should not stand over I give great weight to that consideration. With regard to the assets, the creditors have received 5*s.* in the pound. No doubt there is good sense in saying that having lost a certain sum of money they ought not to be

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bound to throw away a further sum of money in prosecuting a man who ought to be prosecuted not at the expense of the assets, but at the expense of the State generally. But then there is no prosecution of that sort set on foot. I do not know that the public prosecutor has been communicated with, and it appears to me that, if I do not at once accede to the present petition, there will be a risk of justice being defeated. I think this is a strong case, because I have had the facts before me judicially, and I think it is one in which I ought to exercise my discretion by acceding as I do to the prayer of the petition.

*Buckley* asked his Lordship to say whether the order would state that the affidavits were read.

*CHITTY, J.*—The court may act on its own motion, and may also take assistance to a full or to a limited extent when acting, and I am entitled to allow the affidavits to be produced and read. If the affidavits have been read, I ought to so state it in the order, and I therefore answer you the question in the affirmative.

Solicitors for the petitioner, *Williamson, Hill, and Co.*, for *Foster, England*, and *Foster, Halifax*.

Solicitors for opposing creditors, *Gregory, Rowcliffes, and Co.*

Thursday, Nov. 20.

(Before PEARSON, J.)

LITCHFIELD v. JONES. (a)

*Practice—Discovery—Interrogatories—Order to answer by vivâ voce examination—Order XXXI., r. 11.*

*Under an order to further answer interrogatories by vivâ voce examination, only such answer can be required as would have been sufficient if originally given in writing.*

This was an application in the form of an adjourned summons on the part of the defendant that the taxation of costs in the action under order dated 26th April 1884 might be reviewed, and the objections thereto allowed, and that it might be referred to the taxing master to vary his certificate accordingly, and that the plaintiffs might be ordered to pay to the defendant his costs of the application, and in the meantime all proceedings might be stayed.

The action was brought by the widow and executrix of Robert William Litchfield, deceased, and the receiver of his outstanding personal estate, appointed in an administration action of *Jones v. Litchfield*, as plaintiffs, against Richard Jones as defendant, asking for an account of the dealings and transactions between Robert William Litchfield and Richard Jones, and other relief.

For some years previously to his death in February 1876 Robert William Litchfield practised as a solicitor at Newcastle-under-Lyme, the defendant acting as his town agent in London. For the purposes of the present action it was necessary to obtain details of their dealings in that relation, and consequently numerous interrogatories had been administered to the defendant, who had partially answered them, and after four separate orders had been successively obtained against him for "a further and better answer," an order was made on the 26th April

1884, under Order XXXI., r. 11, that the defendant should further answer by *vivâ voce* examination, to be taken before one of the examiners of the court, Nos. 29 and 31 of the interrogatories, and that he should pay to the plaintiffs their costs of and occasioned by the application for the order. The examination was accordingly taken before an examiner. It appeared from the printed deposition as filed that it extended to 151 folios, and lasted over three days. A great number of questions were put and frequently repeated to the defendant with reference to the agency matters in dispute, and much of the repetition and delay arose from his refusal and unwillingness to answer. For the purpose of instructing plaintiffs' counsel in the examination, copies were made of a mass of letters relating directly or otherwise to the matters in dispute, which copies amounted to 1630 folios, and a proportionate fee was given with the brief.

The plaintiffs' bill of costs was carried in at 197l. 16s. 3d., and was taxed at 132l. 7s. 2d., the taxing master allowing all the main charges which were made, the chief disallowances being for a second copy of the correspondence and certain attendances.

The interrogatories referred to in the order were as follows:

29. Is it not the fact that the defendant acted or was concerned, and whether or not as the agent of and on behalf of the said R. W. Litchfield in the following among other actions and matters, or some and which of them respectively mentioned or referred to in paragraph 25 of the statement of defence, viz., (1) *Wright v. Stocker and Stocker v. Wright*; (2) *Hych v. Pratt*; (3) *Hill v. Cooper*; (4) *Tiltener v. Bostock*; (5) *Walton v. Nicholson*; (6) *Fox v. Glover*; (7) *Litchfield v. Hulms*; (8) *North Staffordshire Brick and Tile Company v. Hodgkinson*; (10) *Ex parte Blood*; *Re The European, &c., Company*? Let the defendant state the persons or parties with their addresses for whom the said R. W. Litchfield, or the defendant as the agent or on behalf of the said R. W. Litchfield, acted in the said actions and matters respectively, the exact dates when such actions and matters were respectively pending, and other details and particulars of such actions and matters sufficient for purposes of identification, and let the defendant give particulars of all his receipts and payments as the agent of the said R. W. Litchfield in respect of each of the said actions and matters.

31. Is it the fact that the defendant has set out in the schedule to his statement of defence a full and true account of all receipts and payments of which the plaintiffs can claim discovery in this action? If nay, what items have been omitted therefrom, or wrongly or incorrectly inserted therein? Is it the fact that there is a balance of 133l. 14s. 7d., or any sum due to the defendant from the estate of the said R. W. Litchfield?

Order XXXI., r. 11, is in the following terms:

If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer or to consider further as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by *vivâ voce* examination as the judge may direct.

*Cozens-Hardy, Q.C.* and *Chadwyck Healy* for the applicant.

*Cookson, Q.C.* and *Seward Brice* for the respondent.

PEARSON, J.—To my mind there has been a most grievous mistake in this proceeding. The order is a very plain one, and is drawn in a proper form, and is so clear and so explicit that I should have thought no one could have mis-

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understood it. Interrogatories were administered to this defendant. He put in a great many insufficient answers, and eventually it was determined that the fourth answer to interrogatories 29 and 31 was still insufficient. That being so, this order was made: it was ordered that, "The defendant do further answer by *viva voce* examination, to be taken before one of the examiners of the court, Nos. 29 and 31 of the said interrogatories." I should have thought that it was as plain as could be, that all that could be required of him before the examiner was, that he should *viva voce* put in such an answer to those interrogatories as would have been sufficient if he had originally given it in writing, and that that was the only purpose of this order, and if anything further had been required, and if anything further could have been given, a very different order should have been made. But this order is in conformity with the old practice of the court, and it is the practice which existed as long as I can remember in the profession; and upon referring to the old text-book of Daniel, both the older edition and more modern edition, I find the same thing stated, that in the old days if an answer was insufficient, all that was required was this: the defendant was put into prison until upon interrogatories directed strictly and solely to so much of his answer as would be insufficient he had put in a sufficient answer, and if the answers that he did put in to those interrogatories after he had been committed were or were supposed to be insufficient, then the judge himself examined him so as to get a sufficient answer, but an answer simply directed to the points in which the former answer had been insufficient. That being so, to my great surprise, and I may say my horror, I find that in this case four days have been occupied before the examiner with a roving cross-examination of the defendant, no question hardly, as far as I can look through the depositions, being directed strictly and plainly to the questions which the defendant was bound to answer. All I can do now is, to declare that, according to the order of the 26th April 1884, the defendant was only required to answer by *viva voce* examination Nos. 29 and 31 of the said interrogatories, in the same manner and in the same extent as would have been a sufficient answer to those interrogatories if originally put in; and having made that declaration, I must send it back to the taxing master to review his taxation of costs entirely, with a declaration that he is only to award as costs of this examination such costs as would have been properly and reasonably allowed if that course had been pursued; and I must also add this, that I am of opinion that the costs of the correspondence must be disallowed *in toto*. They were not necessary in any way whatever. The copies of the correspondence were mere machinery for obtaining from the defendant an answer when he had put in a sufficient answer, and it was unnecessary to give counsel those instructions, which I daresay would have been exceedingly proper instructions if it had been his duty generally to cross-examine the defendant upon the matters which are the subjects of those two interrogatories. The matter must go back to the master. It appears that Mr. Jones has paid the 13*l.* 7*s.* 2*d.* under threat of an execution, and I order that sum to

be at once repaid. He must also have the costs of this summons.

Solicitor for the applicant, *R. Blackett Jones*.  
Solicitor for the respondent, *G. H. Carthew*.

### QUEEN'S BENCH DIVISION.

Thursday, June 28.

(Before STEPHEN and WILLIAMS, JJ.)

BARROW AND BROTHER v. DYSTER, NALDER, AND CO. (a)

*Principal and agent—Contract in writing—Incorporation of custom in—Evidence—Admissibility of—Broker—Bought note containing clause referring disputes to broker—Custom of personal liability of broker on non-disclosure of principal.*

*D. and Co., acting as brokers both for the buyers and sellers in the matter of the sale and purchase of a quantity of hides, signed a bought note to the effect that they had purchased the same on account of B. and Brother, the buyers, containing the following clause: "If any difference or dispute should arise under this contract, it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers."*

*In an action by B. and Brother against D. and Co. for breach of this contract, the plaintiffs tendered evidence of a custom of the City of London, by which, as they alleged, brokers failing to disclose the names of their principals within a reasonable time after the date of the contract become personally liable thereupon.*

*Held, on motion for new trial, that such evidence was rightly rejected, as the custom, if proved, would have been inconsistent with the clause of the bought note referring disputes arising thereunder to the selling brokers.*

THIS was a motion on behalf of the plaintiffs in the action for an order that the verdict and judgment entered for the defendants should be set aside, and a new trial had on the ground that the learned judge misdirected the jury, and improperly rejected certain evidence tendered by the plaintiffs.

The action was brought by S. Barrow and Brother, leather merchants in Southwark, against Dyster, Nalder, and Co., hide brokers, of London, to recover damages for breach of contract, the plaintiffs' case being alleged in the amended statement of claim to be as follows:

On or about Nov. 18, 1881, it was agreed in writing by and between the plaintiff and the defendants that the plaintiffs should buy and accept from the defendants, and the defendants should sell and deliver to the plaintiffs, a certain number of bales of dry China hides, each bale containing a certain number of hides of a certain average weight of a certain description, and of fair quality, or an allowance to be made to render them equal thereto, and were to be taken delivery of by the buyers in London, with all faults and defects and landing weights, with a deduction of actual tare only; payment to be made by the buyers to the selling brokers in cash without discount within twenty-eight days of date of final delivery over-side of

(a) Reported by J. SMITH, Esq., Barrister-at-Law.



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each respective parcel, and that if any difference or dispute should arise under the contract it was thereby mutually agreed between buyers and sellers that the same should be settled by the selling brokers (the defendants), whose decision in writing should be final and binding on both sellers and buyers.

By reason of the custom of the hide trade the defendants became and were personally liable to the plaintiffs upon the said agreement, owing to their not disclosing the names of their principals in the contract note, or within a reasonable time after the date thereof.

The plaintiffs paid to the defendants the price of the hides, amounting to 9277l. 18s. 5d., and were entitled to the performance of the agreement by the defendants; but the defendants did not deliver to the plaintiffs hides in accordance with the said agreement, but of inferior description, quality, and average weight, in bales not containing the agreed numbers, in bad condition, and unmerchantable; by reason of which premises the plaintiffs lost the price paid to the defendants, and the profits they would otherwise have made, and were put to expense and incurred loss in warehousing and trying to resell them.

Secondly, the plaintiffs also pleaded that they retained and employed the defendants as their agents for commission and reward to them in that behalf to buy the said hides of the quality and description and at the price and upon the terms mentioned, and that the defendants accepted the said retainer and employment, and in consideration thereof promised the plaintiffs to use due care, skill, and diligence in the said purchase; but that they, on the contrary, so negligently and improperly conducted themselves therein, that by their negligence and improper conduct the plaintiffs had delivered to them hides of inferior quality and description, and not in accordance with the said terms, whereby the plaintiffs sustained damage; and thirdly, the plaintiffs said that the defendants, by warranting certain hides to be of fair quality, sold the same to the plaintiffs, but, the said hides not being of fair quality but unmerchantable, the plaintiffs lost the price paid by them to the defendants for the said hides, or otherwise sustained loss.

The defendants in their statement of defence denied that any such agreement as that mentioned in the statement of claim was ever entered into between the plaintiffs and defendants, and said that on or about Nov. 18, 1881, a contract in writing was entered into between the plaintiffs and Messrs. Little and Co. (a firm, as subsequently appeared, carrying on business in Shanghai, with a partner in London), for the sale by the latter to the plaintiffs of 200 bales of hides such as mentioned in the statement of claim, such contract being entered into through the agency of the defendants, who acted as the brokers of the buyers and sellers respectively in making the same; that the hides were delivered to the plaintiffs, not by the defendants but by Messrs. Little and Co.; that the money was paid by the plaintiffs not to the defendants but to Messrs. Little and Co., being paid through the defendants, who received the amount and remitted it to Messrs. Little and Co.; that the plaintiffs never were entitled to the performance by the defendants of the said agreement, or to the delivery by the

defendants of the said hides; that if the plaintiffs were ever damnified, Messrs. Little and Co. were the only persons liable to the plaintiffs, and that the defendants were under no liability in respect thereof; and as to the custom alleged in the statement of claim, by reason of which the plaintiffs said the defendants became and were personally liable to the plaintiffs on the said agreement, owing to their not disclosing the names of the principals in the contract note or within a reasonable time after the date thereof, the defendants said, first, that there was no such custom of the hide trade, and, secondly, that before the contract, and at the date thereof, they did disclose the names of their principals; and that they never, by any such alleged custom or otherwise, became personally liable to the plaintiffs. The defendants admitted the retainer by the plaintiffs and Messrs. Little and Co. as their brokers to make the contract between them, and said that they did use due care, skill, and diligence in the said purchase, and acted *bonâ fide* and to the best of their judgment. And, lastly, the defendants denied that they sold the hides to the plaintiffs by warranting them to be of fair quality.

At the trial before Lopes, J. and a special jury, it appeared that the agreement in writing of Nov. 18, 1881, relied upon by the plaintiffs, consisted of a bought note which was, so far as material, as follows:

18th Nov.. 1881.—Messrs. S. Barrow and Bro.—We have this day bought for your account, 35 bales per *Menelaus*, 75 bales per *Anchises*, 90 bales per *Cyclops* = 200 bales dry China hides, each containing about 80 hides, shipping average 14lb. and 16lb. each, afloat by the above-named steamers from Shanghai to London, at 8d. per lb. cost, freight, and insurance f.b.a. The hides to be trimmed, not to contain any lime, cured, and to be of a fair quality, or an allowance to be made to render them equal thereto, and to be taken delivery of by the buyers in London, with all defects at landing weights, with a deduction of actual tare only.

In case the steamer or steamers be lost, or from unforeseen circumstances beyond the control of the seller, he should be unable to deliver the hides, or any portion of them, at the port of destination, the contract to be null and void so far as regards the undelivered portion only.

Payment to be made of the buyers to the selling brokers in cash, without discount, within twenty-eight days of final delivery over side of each respective vessel.

If any difference or dispute should arise under this contract, it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers.—Yours obediently, DYSTER, NALDER, and Co.

In the course of the hearing the plaintiffs tendered evidence of a custom of the hide trade, making the defendants personally liable to them on the bought note, by reason of their not having disclosed the names of their principals in the note, or within a reasonable time after the date hereof.

This evidence the learned judge refused to admit, on the ground that the custom alleged would, if proved, be inconsistent with the contract, and could not be incorporated therewith, inasmuch as the clause in the contract referring all differences or disputes arising under it to the selling brokers for settlement would, if the custom were admitted, make the brokers judges in their own cause; and further, on the ground that the contract on the face of it disclosed agency, and was made with the seller and not with the broker; and also that if the principal were a foreign principal that made



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no difference; and thereupon directed the jury to find a verdict for and entered judgment for the defendants.

The plaintiffs thereupon moved for an order that the verdict and judgment entered for the defendants should be set aside, and a new trial had on the ground that the learned judge misdirected the jury in telling them that the alleged custom, if proved, would be inconsistent with the contract, and could not be incorporated with it, and in directing them to find a verdict for the defendants, and in holding that the defendants were not liable to the plaintiffs for the fulfilment of the contract, even if the said custom were proved, and that the contract was made with the sellers and not with the defendants, and that if the defendants' principal was a foreign principal such fact was immaterial; and on the ground that the learned judge improperly rejected evidence tendered by the plaintiffs in support of the alleged custom, and improperly refused to leave the question of custom to the jury, and improperly directed a verdict and judgment to be entered for the defendants; and this was the motion which now came on for hearing.

R. T. Reid, Q.C. and Hollams for the plaintiffs.

The Attorney-General (Sir H. James, Q.C.), Murphy, Q.C., and Edwyn Jones, for the defendants, were not called on.

The arguments on behalf of the plaintiffs are fully commented on in the judgments delivered by the court, the following being the cases cited in the course thereof:

*Humfrey v. Dale*, 31 L. T. Rep. O. S. 328; 7 E. & B. 266; in error, E. B. & E. 1004;  
*Fleet and another v. Merton and another*, 26 L. T. Rep. N. S. 181; L. Rep. 7 Q.B. 126;  
*Hutchinson and others v. Tatham and another*, 29 L. T. Rep. N. S. 103; L. Rep. 8 C. P. 482;  
*Southwell v. Bowditch*, 34 L. T. Rep. N. S. 133; 35 L. T. Rep. N. S. 198; 1 C. P. Div. 100, 374;  
*Imperial Bank of London v. London and St. Katherine's Docks Company*, 36 L. T. Rep. N. S. 233; 5 Ch. Div. 195.

STEPHEN, J.—I should like to convince Mr. Reid that I have appreciated his argument. As I understand him, he says that in reality there were two different contracts made between the plaintiffs and the defendants. There was in the first place, he says, a contract of employment between the plaintiffs and the defendants as brokers, which bound the defendants to do their duty to the plaintiffs as brokers, and to exercise proper care and skill on their behalf. To this contract, he contends, there is by the custom of the city of London annexed an unwritten clause to the effect that, if the brokers do not within a reasonable time disclose the names of their principals, they themselves become personally liable upon any contract they make. In this case, he says, the contract made by the defendants has been broken, and the principal not disclosed, and therefore his clients ought to succeed against the defendants. And then, he said, the contract made between the plaintiffs and the defendants by the bought note of Nov. 18, 1881, was another and a second contract. Here it was that I thought I detected some inconsistency in the argument of the learned counsel, because he wanted to make the custom part of this second contract also, and to say—I feel considerable difficulty in putting it intelligibly because I do not feel impressed by the weight of

the argument at all—that the addition to the second contract of a clause inconsistent with the custom did not prevent the custom being incorporated with the first contract of employment, and that, notwithstanding the presence in the second contract of a clause referring any dispute between the buyers and sellers to the brokers, yet the first contract and the custom made the brokers principals unless they disclosed their principals within a proper time. I have tried to the best of my power to make out the argument, and that is it as far as I can make it out, but I am bound to say that, after doing the utmost to understand it and give it its full weight, I am not much impressed by it. I confess that to my mind, which does not readily lend itself to such extreme niceties as those on which the learned counsel relies, it appears that the bought note is the contract between the parties, and that the effect of the alleged custom upon that contract would be—if it were established—to incorporate into the contract a condition which would be inconsistent with the arbitration clause. And, that being so, I think that the presence of the arbitration clause shows the impossibility of introducing the custom, if it could be established, into the contract. But there was also another argument brought forward in favour of the plaintiffs which I did understand perfectly well. It was this: That, even if the bought note be taken as the contract, and the custom were established, and a clause to the effect of the custom were written into the bought note, even then, there would be no inconsistency, because upon the true interpretation of the contract as so framed its meaning and intention would be, that if the brokers disclosed the principals for whom they were selling, and any dispute should hereafter arise between the principals for whom they were selling and the principals for whom they were buying, that the brokers were to arbitrate between them and settle it, but that if the brokers did not disclose the principals for whom they were selling, then by the clause incorporating the custom as to the contract they themselves would become the principals, and that in that case it could not be intended that the arbitration clause should have any effect, as the only effect it could have would be to give them power to settle disputes between themselves and the buyers. I think that there might be a great deal to be said for this interpretation if the contract originally stood with the custom written into it; and even as it is, I do not doubt that much might be said by anyone skilful at drawing what I should feel inclined to call hairsplitting distinctions, but it is not the interpretation which I should put upon it, and it is not that, I think, which any man of ordinary understanding would put upon it. I do not see why we should be anxious to avoid the interpretation which to my mind arises from the plain language of the bought note. The words of the clause—I allude to the arbitration clause—are: "If any difference or dispute should arise under this contract it is hereby mutually agreed between sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing shall be final and binding on both sellers and buyers." It seems to me that by this clause the three parties, the buyers, sellers, and brokers, contract that the brokers are to be arbitrators in any dispute arising between the two former, and I think that the

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introduction into the contract of any custom which would make the brokers principals is inconsistent with this clause which says that they are themselves to interpret the contract, and that therefore my brother Lopes was right in refusing to admit evidence of such a custom. Then, I think, Mr. Hollams, in supplementing what Mr. Reid had said, founded his argument on certain cases, but I did not think that they came very near this case. They tended, I think, decidedly to show that there was a possibility in any case in which the contract did not contain such a term as the arbitration clause in this contract, that such a custom as was alleged here might be successfully set up, but I think that that is as far as they go. I think, therefore, upon the whole that my brother Lopes was quite right, and that this motion must be dismissed with costs.

WILLIAMS, J.—I am of the same opinion. The motion is for a new trial on the ground that the learned judge improperly rejected evidence tendered by the plaintiffs in support of an alleged custom, and misdirected the jury in telling them that the alleged custom, if proved, would be inconsistent with the contract, and could not be incorporated with it. The plaintiffs put forward their claim in three different ways. In the first place, they rely upon a contract between them and the defendants, and as part of that claim they allege a custom of the city of London by virtue of which, if brokers in the position in which the defendants were do not disclose their principals, they become personally liable on the contract. The contract on which they rely is a written agreement dated Nov. 18, 1881, on which it is said the defendants by not disclosing their principals have become personally liable for a breach which they allege to have taken place by reason of the delivery thereunder of hides of inferior quality. The second claim of the plaintiffs is founded on the alleged relation between them and the defendants of employers and agents, and as to this they plead in their statement of claim that they retained and employed the defendants as their agents for commission and reward to them in that behalf to buy the hides of the quality and description and at the price and upon the terms mentioned, and that the defendants accepted the said retainer and employment, and in consideration thereof promised the plaintiffs to use due care, skill, and diligence in the said purchase, but that they on the contrary so negligently and improperly conducted themselves therein that by their negligence and improper conduct the plaintiffs had delivered to them hides of inferior quality and description, and not in accordance with the said terms. Then, in the third place, they rest their claim on a breach of warranty, alleging that the defendants by warranting the hides to be of fair quality sold the same to them, but that the hides not being of fair quality but unmerchantable, they lost the price paid to the defendants for them. At the trial the plaintiffs put in the contract of Nov. 18, 1881, and then proceeded to offer evidence of this alleged custom, that if persons acting as brokers as the defendants were in this case neglect to disclose the names of their principals they become personally liable on the contract. This evidence of custom so put forward my brother Lopes rejected on the ground that it was inconsistent with the rest of the contract. Now I quite appreciate the argument brought

forward in support of the plaintiffs' case. It is a very ingenious argument, and to my mind it is quite clear. There were, says the learned counsel, three several contracts entered into by the various parties to these transactions. In the first place, the plaintiffs employed the defendants as brokers to buy certain hides for them; that is one contract. Then certain other parties employed the defendants as brokers to sell certain hides for them; that is another contract. Then the defendants being so employed, both by the buyers and by the sellers, conclude a third contract between the buyers and the sellers. And then, having in this manner got three contracts, the learned counsel proceeds to ask us to say that evidence of the custom ought to have been admitted for the purpose of introducing it, not into the last of these three contracts, in which unfortunately there is a clause with which the custom would not be consistent, but with the first contract between the buyers and the sellers, to which it ought without any doubt, he says, to be annexed for the purpose of annexing to the broker the responsibility of the selling principal, and binding him either to disclose such principal or take the responsibility on himself. This argument is, as I said, to my mind perfectly clear, but it is an argument which, as far as I can see, was neither put forward in the statement of claim nor at the trial. I am, therefore, content to rest my decision upon this simple ground, that my brother Lopes was quite right in rejecting evidence of a custom which, if established, would have been utterly contradictory to the contract into which it was then sought to introduce it.

*Motion dismissed with costs.*

Solicitors for the plaintiffs, *Hollams, Son, and Coward.*

Solicitors for the defendants, *Kearsey, Son, and Haughey.*

Tuesday, Nov. 25.

(Before Lord COLERIDGE, C.J., MATHEW and SMITH, JJ.)

AGNEW AND SONS v. USHER AND OTHERS. (a)

*Practice—Service of writ of summons out of the jurisdiction—Order XI., r. 1 (b) and (c)—Action to recover rent—Defendants domiciled or ordinarily resident in Scotland.*

*An action to recover rent is not an action "affecting lands" within the meaning of Order XI., r. 1 (b), and the plaintiff cannot obtain leave to serve the writ of summons upon a defendant domiciled or ordinarily resident in Scotland.*

MOTION to set aside the service of a writ which the plaintiff had obtained leave at chambers to serve upon the defendant, who was residing at Edinburgh.

The action was brought to recover 170*l.* for one quarter's rent of premises at Liverpool, the plaintiff being the executor of the lessor, and the defendants the assignees of the lessee.

By the rules of the Supreme Court 1883, Order XI., s. 1:

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever—

(a) The whole subject-matter of the action is land

(a) Reported by H. D. BONSRY, Esq., Barrister-at-Law.

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situate within the jurisdiction (with or without rents or profits); or

(b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

(c) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

*French* for the defendants.—This case comes within sub-sect. (c) of Order XI., because it is an action founded on a breach of contract within the jurisdiction, which ought to be performed within the jurisdiction, and the defendants are domiciled and resident in Scotland.

*Barnes* for the plaintiffs.—I rely on sub-sect. (b) of Order XI. This is "a liability affecting land or hereditaments situate within the jurisdiction." The case of *Senders v. Anderson* (12 Q. B. Div. 50) was referred to.

Lord COLERIDGE, C.J.—It appears to me that by a little stretching of words you may bring the same matter, or contract, within both sub-sect. (b) and sub-sect. (c). I think this is clearly within the meaning of sub-sect. (c); but I admit that is not conclusive, because it might also be within sub-sect. (b). Upon the best consideration I can give to the case it appears to me that you must stretch the meaning of the words a great deal to bring it within sub-sect. (b), but that you need not stretch them at all, but apply them in their strictest sense, to bring the case within sub-sect. (c). The first rule of the order deals with those cases where the subject-matter of the action is land within the jurisdiction, and it may be that a great inconvenience would arise if in such cases an action was brought in Scotland or Ireland where a decree affecting English land could not be enforced, or at any rate not without great circuitry of action. As a general rule there is good reason that actions of ejectment and of the like kind where the property is English land should be brought in England. Then comes sub-sect. (b), and it seems a more reasonable construction to limit it to any legal proceeding in which the status of the land is affected. I do not pretend to give a complete or exhaustive account of proceedings affecting land within the meaning of the sub-section, but an action to enforce this contract is not, I think, a liability affecting land within the jurisdiction. If I found that I could not give a reasonable construction to sub-sect. (b) without including an action to recover rent, I would include it, but I am not pressed to do that, because in sub-sect. (c) are to be found words which exactly describe a contract for the payment of rent. The defendants are tenants, and it is an action "founded on a breach, within the jurisdiction, of a contract which ought to be performed within the jurisdiction," but which nevertheless is not one of those cases in which the writ may be served on a person domiciled or ordinarily resident in Scotland or Ireland. If this had been an action on a guarantee to pay rent, I fail to see, according to Mr. Barnes' argument, that it would not be an action affecting land as much as the present action, and I do not think that you could strain the words of the section to bring an action against the guarantor. Therefore we have an action clearly within sub-

sect. (c), and clearly within the mischief intended to be prevented by sub-sect. (b). I am of opinion that the service of the writ must be set aside.

MATHEW, J.—I am of the same opinion, and for the reasons given by my Lord.

SMITH, J.—There is great difficulty in this case, and I entirely agree with what my Lord has said, but I wish to add this, that sub-sect. (b) must be limited to those cases where the action is to construe, rectify, set aside, or specifically enforce any act, deed, will, or contract, and in this case the plaintiffs are not seeking to do any one of these things.

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*, for *Harvey, Alsop, and Stevens*, Liverpool.

Solicitors for the defendants, *Wynne and Son*, for *Evans, Locket, and Co.*, Liverpool.

## House of Lords.

March 14 and 17, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords WATSON and FITZGERALD.)

BRIERLEY HILL LOCAL BOARD v. PEARSALL. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND..

*Public Health Act 1875* (38 & 39 Vict. c. 55) sect. 308—*Compensation for damage—Procedure—Arbitration—Dispute as to liability.*

*The arbitration clauses of the Public Health Act should receive the same interpretation as those of the Lands Clauses Act.*

*By sect. 308 of the Public Health Act 1875, where any person sustains any damage by reason of the exercise of any of the powers of the Act, the local authority shall make compensation, "and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration."*

*Held (affirming the judgment of the court below), that, although the local authority bonâ fide dispute their liability, the arbitrator has, nevertheless, jurisdiction under the section to make his award as to the fact of damage and the amount of compensation.*

*The question of liability should be raised in an action on the award.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Fry, L.J.J.), reported in 11 Q. B. Div. 735, and 40 L. T. Rep. N. S. 486, reversing a judgment of Bowen, L.J. in an action tried before him without a jury at the Gloucester Summer Assizes 1882.

The action was brought against the appellants, as the urban sanitary authority of Brierley Hill, under the Public Health Act 1875, to recover an amount awarded by an arbitrator under sect. 308 of the Act as compensation to the respondent for damages for interference with the access to his house in consequence of alterations made in the level of a street under the powers of the Act.

The local board disputed their liability, and attended the reference under protest, contending that the question of liability must be decided before the compensation could be assessed.

Bowen, L.J. decided in their favour, but his decision was reversed as above mentioned.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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*Jelf, Q.C.* and *Kettle* appeared for the appellants, and contended that wherever the liability to make compensation is *bonâ fide* disputed, and the amount is not ascertained, the arbitration clauses of the Public Health Act do not apply, and there is no jurisdiction in the arbitrator; secondly, where the liability is *bonâ fide* disputed, and the arbitrator cannot fix the amount of compensation without deciding the question of liability, the clauses do not apply; thirdly, the award is bad on the face of it if the arbitrator has taken upon him to decide the question of liability. Either of these propositions is sufficient to support the case of the appellants, for there is no question that there was a *bonâ fide* dispute here as to the liability of the local board. To extend the principle of the Lands Clauses Act to the Public Health Act would cause much difficulty and inconvenience.

The following cases were cited in the course of the argument:

*Reg. v Metropolitan Commissioners of Sewers*, 1 E. & B. 694;

*Bradby v. Southampton Local Board*, 4 E. & B. 1014;

*Reg. v. Burslem Local Board*, 1 E. & B. 1077;

*Burgess v. Northwich Local Board*, 37 L. T. Rep. N. S.

355; 44 L. T. Rep. N. S. 154; 6 Q. B. Div. 264;

*Bradford Local Board v. Hopwood*, 6 W. E. 818;

*London and North-Western Railway Company v. Smith*, 1 Mac. & G. 216.

*Boanquet, Q.C.* and *A. T. Lawrence*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: In this case there really appears to me to be nothing in favour of the claim made by the appellants except for some observations which were made in two of the authorities to which we have been referred, namely, in the case of *Reg. v. Metropolitan Commissioners of Sewers* (1 E. & B. 694) and in the case of *Reg. v. Burslem Local Board* (1 E. & B. 1077). But for those observations I should think that it was impossible to distinguish the clause in the Public Health Act from the clause in the Lands Clauses Consolidation Act, upon which, as has been very fairly and properly admitted, there has been a series of decisions which have practically put an end to every question of this kind. The Lands Clauses Consolidation Act, in sect 68, begins with the words, "If any party shall be entitled to any compensation" under the Act, either for lands taken or for lands injuriously affected, and provides that in that case a certain course shall be followed. That course, shortly stated, is this: If either party wishes to have the amount of compensation determined by arbitration he may have it so done, in precisely the same way as under the Public Health Act; that is to say, if the parties cannot agree upon the nomination of one or more arbitrators there may be two arbitrators, one to be nominated by each party; but if the person claiming compensation nominates an arbitrator and the other party fails to nominate one on his side, then the single arbitrator nominated by the party making the claim is to be in the same position as if both parties had agreed to a sole arbitrator. That is exactly the mode of arbitration provided by the Public Health Act. So far there is no difference whatever between the two

Acts; and if the differences which there are in the phraseology are to be regarded as of any importance, I confess it seems to me that the argument in favour of the view presented by the appellants here would be stronger upon the phraseology of the Lands Clauses Act than it is upon the phraseology of the Public Health Act of 1875; because sect. 68 of the Lands Clauses Consolidation Act begins with the words, "If any party shall be entitled to any compensation," and it might be plausibly said that the proof of the title to compensation is a condition precedent to all the things which are to be done in order to ascertain the compensation to which the party is entitled; whereas here the Legislature has said, "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration." Well, here at all events the right to compensation is introduced by reference not to a matter of law, the title to compensation, but to a matter of fact, the sustaining of damage, which matter of fact is most distinctly put within the power of the arbitrators as well as the question of amount. Therefore it strikes me that this clause is worded in a manner more unfavourable to the argument of the appellants than the Lands Clauses Act. No doubt there is this difference, pointed out on behalf of the appellants by their able counsel, that the Lands Clauses Act does not say that full compensation shall be made, and then go on to determine the way in which it is to be ascertained, but it treats the way in which it is to be ascertained as the mode of making compensation where the title to it does exist. Well, I agree that it is so; and if here any other mode of ascertaining the compensation had been provided except that which is found in the immediate context of the same clause, or if no mode at all had been provided, the observation would have had some force; but a mode is provided, which is by arbitration; and the arbitration is to be upon "any dispute as to the fact of damage or amount of compensation." Now, on ordinary principles of construction, laying aside entirely the prior authorities, I should have thought that it was plain there, that two things were meant at all events to be the subject of inquiry by the arbitrators: the first, "the fact of damage;" the second, the "amount of compensation" when damage there was. What is meant by "damage?" On common principles of construction it surely must mean that damage described in the words which immediately precede, and in respect of which alone compensation is to be made. "Damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default." Those words are introduced as the foundation of the inquiry into the fact of damage, the fact of such damage as gives a right to compensation. That matter of fact no doubt cannot be ascertained without dealing with the actual state of facts, whatever it may be found to be; and that actual state of facts may possibly raise questions of law as to what is or what is not done properly "in the exercise of any of the powers of the Act," and also as to what is and what is not a default on the

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part of the claimant. But the inquiry does not cease to be an inquiry into the facts though the facts may raise questions of law. If the arbitrator goes into the inquiry, as he ought, as a question of fact, and if he deals with the facts as he finds them, but deals with them in a wrong view of those facts according to law, then no doubt his award will not be final. If an action is brought upon it and it appears that he has been mistaken in the view of the law which has governed his view of the facts, there will be a verdict for the defendants upon the award; but if he has not miscarried, the award certainly cannot be worse for his stating upon the face of it that he finds that state of facts into which by the express terms of the law he is bound to inquire, and which alone could give any right to compensation. If, therefore, the case were entirely free from all authority, I should say that, under the terms of this clause in this Act, it was plain that, without paralysing altogether the whole provisions of the Legislature for the compensation of a person who had suffered damage, the course of proceeding must be by arbitration, and then by bringing an action upon the award. That is the proper course; and what the learned judge has found (and as far as I can understand he had reasonable ground for finding it) is, that as a matter of fact, and as a matter of law also, the damage was sustained "by reason of the exercise of the powers of the Act." Well, I really do not know that under those circumstances your Lordships need go at much length into the examination of the authorities, some of which may probably have been determined at a time when the general law under the Lands Clauses Act was not so well settled as it is now. If we look at the series of cases beginning with the *East and West India Dock Company v. Gutter* (3 Mac. & G. 155) before Lord Truro, which practically, though not in so many words, overruled the case of *London and North-Western Railway Company v. Smith* (1 Mac. & G. 216) before Lord Cottenham; if we begin with that case, and follow the subsequent series of authorities, we find it perfectly settled that, when an arbitration is insisted upon under the Lands Clauses Act, the company has no right to say that the arbitrator cannot go into the questions of which he is the proper judge because the company, plausibly or not, denies the right; and, on the other hand, that the company will not be prejudiced, if it has good legal ground for denying all liability, because the award will not be conclusive—an action may be brought upon it, and if it turns out that the law is in favour of the company, the company will have the benefit of it. That is perfectly settled under the Lands Clauses Act, and no question of this kind can be raised about it. The cases which have been mentioned, *Reg. v. Metropolitan Commissioners of Sewers* (*ubi sup.*) and *Reg. v. Burslem Local Board* (*ubi sup.*), were not upon an Act containing this clause, or showing so unequivocally as this does that something more than the mere question of the amount of compensation is to be determined. I rather prefer not expressing any opinion which I may have formed upon those cases. There is a good deal of difficulty, but I do not want unnecessarily to enter into a criticism of judgments upon a different Act of Parliament. They are undoubtedly decisions of judges of very high authority; but I am bound to say as much as

this, that, as I read those judgments, and what passed in the case of *Bradby v. Southampton Local Board* (4 E. & B. 1014), they seem to say that the mere denial of liability by the company is enough to suspend the right to proceed by way of arbitration. That (unless it turns upon differences in the particular terms of the different statutes) is inconsistent with what has since been determined in the case of *Burgess v. Northwich Local Board* (37 L. T. Rep. N.S. 355; 44 L. T. Rep. N.S. 154; 6 Q. B. Div. 264), the whole proceeding in that case showing that, even where there was matter to be inquired into (as in that case there was), matter of law affecting the right and the liability, the court made that inquiry in an action brought upon the award, and did not find the award had merely because that inquiry was one which it was necessary and proper to make. In that case it is perfectly clear that the award would have been sustained if the state of facts had been found to be such as Bowen, L.J. found them to be in the present case. Now, that really is all which I feel it necessary to say. The conclusion to which I come is, that the Court of Appeal has been entirely right, and that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON.—My Lords: I am entirely of the same opinion. Comparing the 306th section of the Public Health Act 1875 with the 68th section of the Lands Clauses Act 1845 I see no reason whatever for coming to the conclusion that a claimant under the one clause can be entitled to a remedy which is denied to a claimant under the other. The practice under the Act of 1845 has been authoritatively settled. I do not think that the same thing can be said of the practice following upon the Act of 1875. There are some decisions as to the procedure under the clauses of its predecessor, the Public Health Act of 1848; but even there there is no conclusive series of authorities. I find that in 1860, in the case referred to by the Lord Chancellor, of *Burgess v. The Northwich Local Board* (*ubi sup.*), and previously in 1874, in the case of *Uiley v. The Todmorden Local Board* (31 L. T. Rep. N.S. 445), the procedure taken by the plaintiff was precisely that adopted by the respondent in the present case, and the court maintained the right of the plaintiff to recover in an action brought upon an award, although the decisions to which they came in the two cases were different; in the one case they sustained and in the other they set aside the award, but they said that in their opinion such a course of proceeding was perfectly right. Then I quite agree with the finding of Bowen, L.J. that the acts of the local board in this case were acts in exercise of their statutory powers under the Act of 1875. That finding has not been seriously impeached. All due weight was given to it, apparently without objection, by the Court of Appeal, and I think that it must have a similar effect upon your Lordships. I therefore agree with the Lord Chancellor that the judgment under appeal ought to be affirmed with costs.

LORD FITZGERALD.—My Lords: The only difficulty which I have felt is in differing from the considered judgment of Bowen, L.J. I am, however, of opinion that the decision of the Court of Appeal was correct on the interpretation of the statute, and that even if the argument *ab incontin-*

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nient is applicable the balance of convenience preponderates in favour of that decision. It would certainly not be desirable or for the public interests that the received interpretation of the 68th section of the Lands Clauses Act and the long-settled practice thereunder, should be departed from in the construction of the 308th section of the Public Health Act 1875. The two statutes are general enactments, each affecting the whole kingdom, and ought as to their arbitration clauses to receive the same interpretation unless the differing language of the enactments forbids it. In my opinion there is no such difference of language or of subject as requires a different interpretation to be put on sect. 308 of the Public Health Act from that which has been established as the meaning of sect. 68 of the Lands Clauses Act. Looking at the case as wholly governed by sect. 308 of the Public Health Act, it seems to me to be clear that it was open to the respondent (the plaintiff) to pursue the course of having the fact of damage and the amount of compensation settled in the first instance by arbitration. In establishing his case under that section the plaintiff had to sustain four propositions, viz., first, that he had sustained damage; secondly, that such damage had been occasioned by reason of the exercise by the local authority of the powers of the Act; thirdly, that such damage arose in relation to some matter as to which he was not himself in default; and, fourthly, the amount of compensation to which he was properly entitled. Any dispute as to propositions one and four is to be settled by arbitration. The fact of damage comes first in the section and is the foundation of all the rest. In the execution of his duties it is difficult to see how the arbitrator can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not himself in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants in point of law would not be binding and would be inoperative. If the damage complained of has been occasioned apparently by reason of the exercise of the powers of the Act, the arbitrator proceeds to assess the amount of compensation limited to such damage, and leaving it open to the defendants, if they think fit, to contest their liability to the amount awarded on any grounds that may be open to them. The course pursued here seems to me to be a convenient one; the statute does not forbid it, nor is there anything to be found in its language which indicates that it should not be open to the party who alleges that he is injured to elect to have the compensation which he claims assessed in the first instance in the manner prescribed by the statute.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *Byrne and Lucas*, for *Homfray and Holberton*, Brierley Hill.

Solicitors for the respondent, *Mackeson, Taylor, and Arnould*, for *Joseph Higgs*, Prierley Hill.

## Judicial Committee of the Privy Council.

June 12 and 13, 1884.

(Present: The Right Hons. Lord WATSON, Sir BARNES PEACOCK, Sir ROBERT COLLIER, and Sir RICHARD COUCH.)

DYSON v. GODFRAY. (a)

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

*Law of Jersey—Set-off—Compensation—Liquid debt.*

*By the law of Jersey a claim for set-off, or "compensation," is admissible in the case of a "liquid" debt; that is, an admitted debt, or a debt capable of being readily proved, but not otherwise.*

*Judgment of the court below reversed.*

This was an appeal from a judgment of the Royal Court of Jersey dismissing a claim for "compensation," or set-off, made by the appellant in an action brought against him by the respondent, as administrator of one Helliwell deceased, arising out of a building contract.

The facts of the case appear fully from the judgment of their Lordships, in which also the authorities relied upon are referred to.

*Forbes*, Q.C. and *C. Dodd* appeared for the appellant.

*Wills*, Q.C. and *R. Vaughan Williams* for the respondent.

At the conclusion of the arguments their Lordships' judgment was delivered by

Sir ROBERT COLLIER.—The circumstances under which this case arises may be shortly stated thus: On the 18th Sept. 1880 Mr. Dyson, the defendant, entered into a contract with Mr. Godfray, Greffier of the States of Jersey, on behalf of the States Market Committee, for the purpose of executing and completing all the "iron foundries, painters', glaziers' patent work mentioned in certain specifications and general conditions," and so on. There follow various provisions usual in contracts of this kind; among others, that the payments shall be made according to the certificate of the architect, and that extras are to be allowed and deductions are to be made only according to his certificate, and that part payment is to be made in the first place of 75 per cent., and subsequently of what remains. It concludes in these terms: "And it is hereby further agreed that seven days will be allowed from the date hereof in order that the contractor may examine the plans and specifications, to test the accuracy of the list of quantities; and any errors discovered therein, and communicated in writing to the architect within that time, will be rectified, and be added to or deducted from the amount of the contract price, as the case may be, but no additions or deductions will be made in respect of such errors after the expiration of the said seven days; such additions or deductions to be made by the architect, whose decision shall be final." It appears that, some time before this, what may be called a bill of quantities was delivered to Mr. Dyson, and the only material items in it are "1500 feet of Helliwell's patent glazing round base of tower," and "21,200 feet superficial Helliwell's patent glazing to main

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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roof and of roof of tower." Mr. Dyson put his price on these quantities, 187*l.* 10*s.* and 185*s.*, and he made his tender upon that footing, which tender was accepted, and led to the contract which has been first referred to. Fourteen days were given for the discovery and rectification of errors. The next transaction which it is necessary to refer to is a sub-contract entered into between Mr. Dyson and Mr. Helliwell, the architect, who had a patent in respect of glazing work, on the 20th Aug. 1881, which is in these terms: "In consideration of your executing the roof glazed work, &c., as stated in my contract for these works, and at the sums named in my contract, I agree to pay to you the sums named in such contract, and amounting to 2042*l.* 10*s.*, immediately after I have received it from the Markets Committee, or such sums as I may receive from them." On the 17th Nov. 1882, which is the next date of importance to be found in this very meagre record, a certificate is given to this effect: "New Markets, St. Heliers, Jersey. Mr. J. Dyson's account. Amount of contract, including glazing roofs and painting, 4229*l.*; extras on deductions, 9*l.* 1*s.* 3*d.*," making 4238*l.* 13*s.* 3*d.* "Cash on account," 3250*l.*; deductions for less value in gates, 20*l.*, making 3270*l.*, leaving a balance of 968*l.* 13*s.* 3*d.* due. On the 6th Dec. of that year an order was made in accordance with this certificate upon the treasurer to pay this money within ten days from that date to Dyson, being, as it is stated, the balance remaining due to him upon the contract; and it will be observed that under this certificate the whole excess of the extras over deductions was 9*l.* 13*s.* 3*d.* The plaintiff attached this sum in the hands of the treasurer for a debt which he alleged to be due to him; claiming 495*l.* 10*s.*, being the balance of the sum of 2042*l.* 10*s.* which Helliwell was to be paid under his contract, and brought this suit to recover it. Thereupon the defendant obtained its release upon giving security. He states in his case that he received 4218*l.* 19*s.* 1*d.*, which is the very sum he is entitled to under the certificate of the 17th Nov. 1882. Mr. Dyson defends himself against this action on two grounds. Firstly, that in the bill of quantities, which has been before referred to, there was a material mistake—an over-statement of the quantities which would amount, according to the prices given, to a sum of 3011*l.* 4*s.* 7*d.* and he says that, instead of being indebted to Helliwell in 495*l.* 10*s.*, he is only indebted to him in 194*l.* 5*s.* 4*d.* He contends that he is liable to pay Helliwell, not a lump sum for the whole of the work executed, but at the rate of so much per foot; and, consequently, that he is entitled to a deduction for each foot less than the number specified. It is to be observed that, although he has fourteen days according to the bill of quantities, and seven days further according to the contract, to point out any errors in the quantities, he discovers no errors until two or three days after the certificate of Nov. 1882, when he employs another architect to make the measurements, whose measurements differ from the measurements of Mr. Helliwell. Their Lordships do not find in the record any such allegation as was made in the case presented to them on the part of the appellant, of fraud on the part of Helliwell, nor is there any direct allegation even of mistake; but, be that as it may, they are of opinion that the court was

substantially right in the view which they appear to have taken, namely, that the plaintiff accepting the sum of 968*l.* as the balance of his account, that sum was applicable to the sub-contract with Helliwell, to whom he was bound to pay the sum due under it, and that, if there was a mistake, it was for the Market Committee in Jersey to avail themselves of it, if they thought fit or were able so to do. Mr. Dyson repudiates no portion of the sum as not due under the contract, but lays claim to the whole of it under pretence of a charge for extras for which there is no foundation, inasmuch as the only extras certified for and recoverable amount to 9*l.* 13*s.* 3*d.* These being the facts of the case, it appears to their Lordships that the court was right in holding that the defendant could not contest the claim of Helliwell to the balance of 495*l.* But another question of more difficulty arises. The defendant claims what we should call a set-off, but which perhaps is more properly called, according to the civil law, a claim for compensation, and he puts it in this way: "En effet, le dit Sieur Dyson a fait au dit Sieur Helliwell des fournitures pour la reconstruction du marché à lard pour une somme liquide et admise au montant;" the whole sum amounts to 368*l.* 18*s.* 7*d.* As far as their Lordships are able to see from this record, the courts of Jersey have taken no notice whatever of this demand beyond dismissing it. They do not appear to have applied their minds to it in the slightest degree in order to ascertain whether the claim was liquid or illiquid, or whether it was true or false. It has been argued on the part of the plaintiff that, according to the law of Jersey, no claim whatever for compensation is admissible; and it was said that such had been once the law of Normandy. Undoubtedly the law of Jersey was founded originally upon the law of Normandy, and such may have been the law of Normandy 600 or 700 years ago; but their Lordships think it is unnecessary to go back to so ancient a date. On referring to Basnage, a book frequently quoted in Jersey as an authority (as appears from the report of the commissioners), it is said, that although originally what are called letters from the Chancellerie were necessary in order to enable a defendant to set up a claim by way of compensation, yet that in his time this claim could be made "*ipso jure*, nonobstant le transport et au préjudice du créancier arretant, avant la déclaration de compenser." This view is confirmed by Terrien, who has been referred to in more than one case before this board as some authority with respect to Normandy and Jersey law; and it is also in accordance with the book upon Jersey law by De Geyt, which, as far as their Lordships are aware, is the most authoritative work on Jersey law, published comparatively recently as a compilation of all the law relating to the administration of justice in the island, but written some hundred years ago. According to these authorities, a claim by way of compensation is admissible when it is for a demand which is termed liquid. Perhaps the best definition of what may be called a liquid demand is found in Pothier, "Obligations," 1st vol., part 3, chapter 4, paragraph 628: "Il faut 3<sup>o</sup> que la dette qu'on oppose en compensation soit liquide. Une dette est liquide lorsqu'il est constant qu'il est dû, et combien il est dû, *cum certum est an et quantum debeatur*. Une dette contestée n'est donc



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pas liquide, il ne peut être opposée en compensation, à moins que celui, qui l'oppose, n'en ait la preuve à la main, et ne soit en état de la justifier promptement et sommairement." The courts of Jersey ought to have ascertained whether this was a liquid demand in that sense. If they had found that it was a demand made for the purpose of delaying payment of the sum sought in the action, that would be a good ground for dismissing it. On the other hand, if they thought that the objections to it were frivolous, that would be a ground for dismissing the objections. Again, if they came to the conclusion that instead of being an admitted debt, or a debt capable of being readily proved, it raised a question which would give rise to serious litigation, it would not properly come under the head of a liquid demand. But all these questions must be considered by the court; and inasmuch as they have not applied their minds to them, their Lordships think that the case should go back to the Royal Court of Jersey for the purpose of dealing with this set-off in the manner which has been indicated. Under these circumstances their Lordships will humbly advise her Majesty that it ought to be declared that James Dyson is justly indebted to Thomas William Helliwell in the sum of 495*l.* 10*s.* sued for, but that the decree or order of the Royal Court of Jersey, of the 29th May 1883, appealed from, ought to be reversed to the extent of 369*l.* 8*s.* 7*d.* of the said principal sum of 495*l.* 10*s.*, and that the said decree or order ought to be reversed in so far as it rejects the plea of compensation set up by the appellant; and that the cause ought to be remitted to the Royal Court of Jersey to consider and determine whether the appellant's counter claims to the amount of 369*l.* 8*s.* 7*d.* are in whole or in part liquid debts, or debts "incontestées ou du moins incontestables," as alleged by the appellant, and to proceed further in the cause as may seem just. There will be no costs of this appeal.

Solicitors for the appellant, *Williamson, Esq., and Co.*

Solicitors for the respondent, *Van Sanden, Cumming, and Armitage, for Mills and Bibby, Huddersfield.*

June 13, 17, and July 12, 1884.

(Present: The Right Hons. Lord WATSON, Sir BARNES PEACOCK, Sir ROBERT COLLIER, and Sir RICHARD COUCH.)

THE COMMISSIONER FOR RAILWAYS v. TOOHEY. (a)  
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Law of New South Wales—Use of steam locomotives on tramways—Stat. 22 Vict. No. 19—Stat. 43 Vict. No. 25.*

*By the Tramways Extension Act 1880 of New South Wales (43 Vict. No. 25), sect. 3, the Commissioner of Railways was authorised to maintain and work a tramway constructed under a repealed Act of 1878, and to exercise all the powers and authorities conferred upon him by that Act and the Act 22 Vict. No. 19 incorporated therewith. The latter Act (the Government Railways Act) by sect. 100 made it lawful, under proper regulations, "to use and employ locomotive*

*engines or other moving power, and carriages and waggonas to be drawn or propelled thereby;" and by sect 141 the word "railway" shall be construed to extend to any tramway constructed or worked under the provisions of the Act.*

*Held (reversing the judgment of the court below), that it was lawful to use a "steam motor" upon a street tramway worked under sect. 3 of the Tramways Act of 1880.*

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Martin, C.J., Windeyer and Innes, J.J.) making absolute a rule for a new trial in an action brought by the respondent against the appellant, on the ground of misdirection, and that the verdict was against the weight of evidence. The facts of the case appear sufficiently from the judgment of their Lordships.

*Davey, Q.C., Rigby, Q.C., and J. D. Wood,* who appeared for the appellant, contended that the Tramways Act of 1880 authorised the employment of steam as a motive power on the street tramway where the accident happened, and therefore there was no misdirection; further, on the question of negligence, the weight of evidence was in favour of the defendant, and the verdict was right.

*E. Clarke, Q.C. and C. G. Ellis,* for the respondent, were requested to confine their argument to the legality of the use of steam-engines on the tramway, as to which they argued that they were illegal and a nuisance, unless expressly sanctioned by legislative enactment, which was not the case here. They cited

*Jones v. Festiniog Railway Company, L. Rep. 3 Q. B. 783; 18 L. T. Rep. N. S. 902.*

*Davey, Q.C.* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 12.—Their Lordships gave judgment as follows:—This appeal is in a suit brought by the respondent, as administratrix of Michael Toohey, in the Supreme Court of New South Wales, against the appellant for negligence in driving and managing what is called in the declaration a tram motor, and a train of tram carriages attached thereto, upon and along a public street in the city of Sydney, called Elizabeth-street, and thereby causing the death of Michael Toohey. The defendant pleaded not guilty, upon which the plaintiff took issue. At the trial before Faucett, J. the jury found a verdict for the defendant. A rule for a new trial was moved for on the grounds, (1) that the verdict was against evidence and the weight of evidence; (2) that Faucett, J. should not have directed the jury that the defendant had a legal right to run steam motors upon the tramway lines. There is no note of the summing-up to the jury, but it seems to have been admitted that this direction was given. On the argument of the rule, a count was added to the declaration by leave of the court, which stated that the defendant wrongfully drove and caused to be driven along a certain highway in the city of Sydney a certain dangerous machine, to wit, a certain steam motor or engine, and the said Michael Toohey, whilst lawfully using the said highway with his horse and cart, was struck and knocked down by the said steam-engine of the defendant being so driven as aforesaid, and his death was caused as

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stated in the first count. The Supreme Court, consisting of three judges, after hearing counsel, ordered a new trial on both grounds. The Commissioner for Railways has appealed to Her Majesty in Council on the grounds that the employment of steam as a motive power was not unlawful, and that on the question of negligence the weight of evidence was in his favour. As the former question was the first argued before their Lordships, they will dispose of it first. The tramroad upon which the steam motor was being driven at the time of the accident was authorised to be constructed by an Act of the Legislature of New South Wales (42 Vict. No. 18), passed in 1879. By the third section of that Act, the Commissioner of Railways was charged with the construction and completion of this tramroad, and was to have all such powers and authorities created by the Act, 22 Vict. No. 19, as were necessary for fully carrying into effect the purposes of the Act, and then followed a provision similar to that in the fifth section of the Act which follows. By another Act passed in 1880 (43 Vict. No. 25), and called the Tramways Extension Act 1880, the Act of 1879 was repealed. And by the second section it was enacted that tramways for conveying passengers and their luggage and other goods and merchandise should be constructed as soon as conveniently might be along the several routes set forth in the first and third schedules thereto, as well as along any other route or routes within the city of Sydney and the suburbs thereof which might be approved by the Governor with the advice of the Executive Council. The fifth section is as follows: "The Commissioner for Railways shall be charged with the construction, completion, and maintenance of all tramways constructed or maintained under this Act, and shall have power to enforce tolls or charges for the carriage of passengers, luggage, and goods by and along any such tramway, and shall have and may exercise all such powers and authorities created by the Act, 22 Vict. No. 19, as are necessary for fully carrying into effect the purposes of this Act, and shall be subject to all the like rules, regulations, liabilities, and obligations in relation thereto as he is subject to in respect of railways by the said Act, so far as the same are applicable to such purposes; and except as herein expressly enacted all other the provisions of the said Act applicable to the construction, completion, maintenance, conduct, and working of and to the imposing of tolls or charges for the conveyance of passengers, goods, or chattels, and generally to the regulation of the lines of railway to be constructed thereunder, shall so far as applicable as aforesaid apply to the construction, completion, management, maintenance, conduct, working, imposition of charges for and regulation of the tramways to be constructed under this Act." Although the words "maintained under this Act" occur in the early part of this section, the concluding words show that it was intended to apply to the tramways described in the first and third schedules which were to be constructed under that Act. The construction of this fifth section is not free from difficulty. The words in the latter part, "so far as applicable as aforesaid," seem to refer to the previous words "necessary for fully carrying into effect the purposes of this Act." And if it is considered, looking at the second section, that the purposes of the Act were not merely the

construction and maintenance of the tramway, but the conveying passengers and their luggage and other goods and merchandise, the latter part of the section may reasonably be construed as applying to the means of traction. But the section which is applicable to the tramway in Elizabeth-street is the third. That tramway is described in the second schedule, and the third section enacts that the tramway described in the second schedule, and all buildings, offices, and works connected therewith constructed under the authority of the repealed Act, shall be maintained and worked by the commissioner under the authority of that Act, who for that purpose shall and may exercise all the powers and authorities and incur all the obligations respectively conferred and imposed upon him by that Act and the Act incorporated therewith with reference to tramways to be constructed thereunder. The Act incorporated by the fourteenth section is the 22 Vict. No. 19. Sect. 100 of that Act makes it lawful for the commissioner, under and subject to such orders, restrictions, and regulations as shall from time to time be made by the Governor, with the advice of the Executive Council, to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railways all such passengers and goods as shall be offered for that purpose, and to make such charges in respect thereof as may from time to time be determined upon by the Governor, with the advice of the Executive Council. And by sect. 141 the word "railway" shall be construed to extend to any tramway constructed or worked under the provisions of the Act. Their Lordships think there can be no doubt that by locomotive engines in this Act engines worked by steam were intended; and with reference to their use on tramways, it is not unimportant that sect. 115 gives to the commissioner, subject to the approval of the Governor and Executive Council, power to make regulations for, among other purposes, regulating the mode by which and the speed at which carriages using the railways are to be moved or propelled. In their Lordships' opinion, the provision in the third section of the Tramways Extension Act 1880, that for the purpose of working the tramway described in the second schedule the commissioner should and might exercise all the powers and authorities conferred upon him by the 22 Vict. No. 19, with reference to tramways to be constructed under it, made it lawful for him to use the steam motor upon the tramway in Elizabeth-street. In the order of the Supreme Court for the new trial, the direction is stated generally "that the defendant had a legal right to run steam motors upon the tramway lines," and it would seem from the reasons of the judges that it was thought necessary to decide the question as to the tramways in the first and third schedules as well as the second. If, however, the direction is right as to the tramway in question in this action, the verdict cannot be set aside for misdirection. It is not necessary for their Lordships to come to any decision as to the use of steam motors upon the other tramways, but they may say they think the fifth section, though the construction of it may not be free from doubt, is sufficient to make the use of them legal. Although the use of the steam motor upon the tramway was lawful, the commissioner would be liable for an injury

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caused by the negligent use of it, and their Lordships agree with the Supreme Court in thinking that the verdict as to this was against the weight of the evidence. [Their Lordships went through the evidence and continued:] The weight of evidence was greatly in the plaintiff's favour, and there was no apparent reason for discrediting her witnesses. The appellant has failed to show that the order for a new trial ought to be reversed, and their Lordships will humbly advise Her Majesty that it should be amended by omitting the second ground. The costs of the appeal will be paid by the appellant, as the order is fully supported by the first ground on which it was granted.

Solicitors for the appellant, *John Mackrell, Maton and Co.*

Solicitors for the respondent, *Donnithorne and Ever.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Friday, June 13, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte CLARK; Re CLARK. (a)*

*Bankruptcy—Scheme of arrangement—Debtors' discharge—Committee of inspection—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), sect. 18.*

*Certain debtors having presented a bankruptcy petition, a scheme of arrangement under the provisions of sect. 18 of the Bankruptcy Act 1883 was duly assented to by the creditors, which provided for the appointment (inter alia) of a trustee and a committee of inspection, and also that "the debtors shall be discharged when the committee of inspection shall so resolve."*

*Held, that the date of the discharge being left to the discretion of the committee of inspection the scheme was not reasonable and ought not to be approved of by the court, though the debtors concurred in asking for its approval.*

THIS was an appeal from a decision of Mr. Registrar Murray, refusing to give the approval of the court under sect. 18 of the Bankruptcy Act 1883 to a scheme of arrangement which had been duly accepted and confirmed by the creditors.

The debtors, Clarissa and George Clark, who had carried on business in partnership as bookbinders, presented a bankruptcy petition under the Bankruptcy Act 1883.

At the first meeting of creditors a scheme of arrangement was proposed by the debtors and was accepted by the creditors by a special resolution, as provided by sub-sect. 1 of sect. 18. This was confirmed by a resolution passed at a subsequent meeting of the creditors, as provided by sub-sect. 2 of sect. 18, the meeting being held after the public examination of the debtors had been concluded, as provided by sub-sect. 3 of sect. 18. The debtors then applied to the court for an order approving of the scheme and the official receiver, as provided by sub-sect. 5 of sect. 18, made a report to the court.

The scheme of arrangement amongst other things provided:

(1) That Mr. A. James be appointed trustee under the scheme to administer the debtors' property and manage their business, at such remuneration as the committee of inspection might fix; (3) That Mr. W. Spier, Mr. A. W. Bentley, and Mr. J. Iobenzhauser (three of the principal creditors), be appointed a committee of inspection, for the purpose of superintending the administration of the debtors' property and the management of their business by the trustee; (4) All the property of the debtors divisible amongst their creditors shall vest in the trustee; (5) The trustee shall carry on and manage the business of the debtors under the direction and superintendence of the committee of inspection for such time as may be determined by the committee; (6) The trustee shall, if the committee of inspection at any time so direct, cease to carry on and manage the said business, and shall sell or otherwise dispose of the same, and the said property or any part thereof, in such manner and on such terms as the committee of inspection may from time to time direct; (9) The debtors shall, and will, aid to the utmost of their power the realisation of their property and the carrying on or sale of their business, and the distribution of the proceeds among their creditors, and shall be discharged when the committee of inspection shall so resolve.

The official receiver in his report to the court stated that, having regard to section 28 of the Act, he had no reason to believe that the debtors had committed any misdemeanour under the Act, or part 2 of the Debtors Act 1869, and that no facts had come to his knowledge which induced him to believe that the debtors had committed any of the offences referred to in sub-sect. 3; but he submitted to the court that, under the Bankruptcy Act 1883, the creditors had no power to suspend or grant the discharge of the debtor, and that such power ought not to be conferred upon the committee of inspection.

The application was heard on the 21st May, when the registrar refused to approve of the scheme, being of opinion that the provision with reference to the discharge of the debtors was not authorised by the Act, that it was *ultra vires* the creditors, and that it was therefore not reasonable.

The debtors appealed.

*Sidney Woolf* for the appellants.—There is nothing in the Act to prevent the debtors and their creditors agreeing that the debtors' after-acquired property shall be applied in payment of their debts, and this is really the effect of postponing the discharge. Sect. 18 of the Bankruptcy Act 1883 is in very general terms. There is nothing to show what the scheme of arrangement shall or shall not contain, it must be reasonable and calculated to benefit the general body of the creditors. Is it *ultra vires* for the creditors to agree with the debtor that, instead of being adjudged a bankrupt, he shall hand over to them all his property present and future, until such time as they shall think fit to grant him his discharge? If they can do this, why can they not delegate the fixing of the time of the discharge to the committee of inspection? This cannot be unreasonable if the debtor consents to it. [BAGGALLAY, L.J.—Does not the provision take away from the court the determination of the question of the discharge?] The creditors could resolve that the debtors should have a discharge at once. The power given to the court by sub-sect. 6, to consider the conduct of the debtors, is not interfered with. The official receiver has not said anything against the conduct of the debtors. It was not the inten-

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

tion of this Act to take away from the creditors the power which they had in a liquidation by arrangement under the Act of 1869, of saying whether they would retain control over the debtor's after-acquired property. If the word "release" had been used instead of "discharge" there could have been no objection to the provision. Under the provisions of rule 163, on the approval of the scheme by the court, the power of the court is at an end. The scheme might provide for a meeting of the creditors at some future time to consider the debtor's discharge, and why may they not delegate that decision to the committee of inspection? [CORROX, L.J.—I doubt whether the creditors can delegate the power of determining any question as to the property or the discharge of the debtor, so as to bind absent or dissentient creditors.] If the creditors are bound to give the debtor an immediate discharge, then any property which he would be entitled to in the future, as on the death of his father, could not be available under a scheme of arrangement. The power of the creditors is unlimited, except that the court can withhold its approval, and the creditors must therefore be able to delegate that power to three respectable members of their body. The decision of *Ex parte Hope* (38 L. T. Rep. N. S. 762; 9 Ch. Div. 398) does not apply to this case, as sect. 125 of the Bankruptcy Act 1869 gave an express power to the creditors to grant the discharge. He also referred to Bankruptcy Act 1883, sect. 18, sub-sects. 1 to 13 and 28, and sect. 44.

*Bigham, Q.C. and Chalmers*, for the official receiver.—It was intended under this Act that the debtor should get his discharge either in bankruptcy or by means of a scheme approved of by the court, and that as soon as the scheme was approved it should, *ipso facto*, operate as a discharge. It was never intended that the power given to the court, of granting a discharge, should be remitted to an irresponsible body, who could hold a rod over the debtor for the rest of his life. They might decline to grant him his discharge until they had received 20s. in the pound and an exorbitant rate of interest, and insist on his services until that was paid. Sect. 18 prescribes a certain procedure which is intended to put an end to the creditors' rights and make the debtor a free man. The power given to the court in a bankruptcy to suspend the operation of an order of discharge, or to grant it on conditions as to future earnings or after-acquired property, applies in bankruptcy only. Here the scheme might provide that a certain part of the future property of the debtors (probably the whole would be unreasonable) should pass to a trustee for the creditors. When the scheme is approved it puts an end to the proceedings, and therefore sect. 44 does not help the appellants, as there is no property which will vest in the trustee. A composition scheme involves the discharge of the debtor, as under sub-sect. 6 of sect. 18 the court is required, when approving of a scheme, to consider the same things as on an application for a discharge in a bankruptcy.

*Sidney Woolf* in reply.

BAGGALLAY, L.J. (after stating the facts and referring to the provisions of clauses 5 and 6 of the scheme of arrangement) continued:—The official receiver in his report drew the attention of the court to the provision of clause 9, which left the

granting of the discharge of the debtors entirely in the discretion of the committee of inspection, and submitted that this provision was contrary to the general scope of the Act, and that such a power ought not to be conferred on the committee of inspection. Now, sect. 18 of the Act contains no reference to any discharge of the debtor in the case of a composition or scheme of arrangement being accepted by the creditors. The provisions as to the discharge in the case of bankruptcy are contained in sect. 28, and sub-sect. 13 of sect. 18 says that part 3 of the Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto as if the trustee were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication," included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and an order approving the composition or scheme. Sect. 28 is not in part 3 of the Act, but sect. 44 is, and it appears to me that sub-sect. (i.) of sect. 44 read by the aid of sub-sect. 13 of sect. 18 amounts in the case of a scheme of arrangement to this: that the property of the debtor divisible among his creditors shall comprise "all such property as may belong to or be vested in the debtor at the date of the order approving of the scheme, or may be acquired by or devolve on him before his discharge." It appears to me that it contemplates that the discharge may possibly occur at a period subsequent to the commencement of the scheme, and that any property coming to the debtor before that period will be available for distribution among the creditors. That, as it seems to me, is the only way in which the discharge of the debtor was at all in the contemplation of the Legislature with reference to sect. 18. Then what is the effect of the approval of the scheme by the court? Sub-sect. 8 of sect. 18 says that the scheme accepted and approved "shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy;" and that is extended by rule 163, which says that "when a composition or scheme is sanctioned, the official receiver shall forthwith put the debtor or (as the case may be) the trustee under the composition or scheme into possession of the debtor's property. The court shall also rescind the receiving order." Therefore, as it seems to me, the proceedings in bankruptcy come to an end when once the court has approved of the scheme, and this, of course, ought to be taken into consideration before the approval of the court is given. Sub-sect. 10 of sect. 18 provides for the enforcing of a composition or scheme by the court, but except for that the bankruptcy proceedings are at an end and the receiving order is to be discharged. It is therefore very important that the court should see what is the precise nature of the scheme before it gives its approval. In the present case, as I understand it, no objection is taken to the provisions of the scheme, except with regard to the power which is given to the committee of inspection over the release or discharge of the debtors. I am not now prepared to say what would be the effect of a scheme of arrangement if it contained no provision as to the time when a discharge should be given to the debtor. Speaking off-hand, I am disposed to think that the approval of the scheme by the court would be equivalent to the discharge of the

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debtor. It is not necessary that I should express any opinion what the result would be if some fixed time was appointed for the discharge of the debtor, or if it was made to depend on some act to be done by the debtor himself when he should obtain his discharge. My present opinion is that the court would not consider such a provision unreasonable. But here the granting of the discharge is simply left in the discretion of the committee of inspection. It appears to me that this is a provision of an unreasonable character, and I think the registrar was right in deciding that the delegation of such a power to the committee of inspection ought not to be sanctioned by the court. On this ground, therefore, I am of opinion that the appeal ought to be dismissed.

COTTON, L.J.—I am of the same opinion. The question is whether the scheme is a reasonable one, and I am of opinion that no scheme would be reasonable which was not such as was contemplated by the Act, or which was contrary to the intention of the Legislature as expressed in the Act, though there might of course be other grounds for holding that a scheme was unreasonable. The objection to the scheme in the present case is that the discharge of the debtor is left in the discretion of the committee of inspection. It is said that this is merely a provision for giving the after-acquired property of the debtors to the creditors. That, however, is not what is objected to. I am of opinion that a provision that the debtor should assign his after-acquired property to a trustee for the benefit of his creditors would be unobjectionable. It is not necessary to express any opinion whether a clause providing for the discharge of the debtor, either at a fixed time or upon the happening of some event depending on some act of the debtor himself, would be reasonable. But sub-sect. 6 of sect. 18 provides that in determining whether it shall approve a scheme of arrangement the court is to take into consideration those matters which are mentioned in sect. 28, and which it has to consider upon the hearing of an application for the discharge of a bankrupt. The court is to take the same matters into consideration upon an application for the approval of a scheme of arrangement, and upon an application for a discharge in a bankruptcy. It is not that the order approving the scheme is of itself necessarily equivalent to an order of discharge, but the court is to have in its hands the control of the question whether the debtor is a person who ought to have a discharge. Under this scheme it is quite possible that without any fault of the debtors they may never get a discharge at all. It is made to depend, not on the discretion of the court, but on that of persons to whom the Act has given no such discretion. Sect. 18, I think, contemplates that the creditors shall give the debtor his discharge either immediately or at some defined time, subject, of course, to the approval of the court. That, in my opinion, is the meaning of sect. 18. If the creditors think that such a scheme ought to be coupled with some provisions for making the debtors' after-acquired property available for distribution among them, in my opinion they can do so. But it is not, in my opinion, within the purview of sect. 18 that there should be no provision for the discharge of the debtor, but that the decision should be delegated to other parties, so that it is quite possible that the debtor may

never have a discharge at all. I think this is not such a scheme as is contemplated by sect. 18, the intention of which, in my opinion, was that the creditors themselves at the meeting should decide as to the discharge of the debtor.

LINDLEY, L.J.—I am of the same opinion. The case is one of importance, it is a test case. Before the court approves of a scheme of arrangement it must see what the scheme is, and understand how it will work, for the scheme, if approved, will bind all the creditors. One of the provisions of this scheme is that the debtors are not to be discharged until the committee of inspection shall think fit. What is the effect of that? I am very much perplexed by it. The scheme hands over to the committee of inspection the determination of the time at which the debtors shall be discharged. So long as the discharge is in suspense the position both of the debtors and of the creditors is uncertain and embarrassing. It appears to me that this is not consistent with the general scheme of the Act. It is said that the only effect is to hand over the debtors' after-acquired property to the creditors. I think that might be done much better in another way. To my mind the provision is very embarrassing and it is opposed to the general scope of sect. 18.

*Appeal dismissed.*

The official receiver not objecting, it was ordered that all the costs should be paid out of the assets.

Solicitors for the debtors, *Gush, Phillips, and Walters.*

Solicitor for the official receiver, *W. W. Aldridge.*

Friday, June 20, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

REG. v. EDWARDS (Justice) AND EASTERN AND MIDLAND RAILWAY COMPANY. (a)

*Lands Clauses Act 1845—Railways Clauses Act 1845—Jervis's Act—Compensation—Settlement by two justices of the amount—Time—8 & 9 Vict. c. 18 ss. 22 and 24—8 & 9 Vict. c. 20, s. 140—11 & 12 Vict. c. 43, s. 11.*

*The determination by justices under sect. 24 of the Lands Clauses Act 1845 of the amount of compensation to be paid by a railway company to a landowner whose lands have been injuriously affected by the construction of the railway is not an order for the payment of money within 11 & 12 Vict. c. 43, s. 1, and therefore sect. 11 of that Act does not apply, and the justices have jurisdiction although the complaint be not made within six months after the land has been so injuriously affected.*

*Re Edmundson (17 Q. B. 67) overruled.*

THIS was an appeal by George Henry Morse from an order of Lord Coleridge, C.J. and Cave, J., making absolute a rule for a *certiorari* to quash the adjudication of certain justices for the county of Norfolk, by which adjudication the appellant was awarded a sum of 50*l.* as compensation for the injuriously affecting of his lands by the Eastern and Midland Railway Company. The adjudication by the justices was made on the 15th Jan. 1884, upon a claim for 50*l.* made on the 1st Jan. of the same year, and at that time the

line of railway had then been finished more than two years. On the hearing of the case before the justices the objection was taken that the application was too late, and the case of *Re Edmundson* (17 Q. B. 67) was cited as an authority.

The justices, however, heard the case, and awarded 50*l.* to the appellant as compensation.

The railway company applied to the Queen's Bench Division for a writ of *certiorari* to bring up and quash the adjudication, and that court, holding itself bound by the case of *Re Edmundson* (*ubi sup.*), made the rule absolute, on the ground that six months had elapsed from the injurious affecting, and that therefore, according to the authority of *Re Edmundson*, the justices had no jurisdiction.

Mr. Morse appealed.

Sects. 22 and 24 of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18) are as follows:

22. If no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed fifty pounds, the same shall be settled by two justices.

24. It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation by this or the special Act, or any Act incorporated therewith authorized to be settled by two justices, to summon the other party to appear before two justices, at a time and place to be named in the summons, and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the summons, it shall be lawful for such justices to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, and the costs of every such inquiry shall be in the discretion of such justices, and they shall settle the amount thereof.

By 8 & 9 Vict. c. 18, s. 140, it is provided that:

In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices; . . . &c.

By sect. 1 of Jervis's Act (11 & 12 Vict. c. 43), it is provided that:

. . . In all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, then . . . it shall be lawful for such justice . . . to issue his summons . . . &c.

By sect. 11 of the same Act it is provided:

That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

*French and Synnott* for the appellant.—Jervis's Act does not apply. The "settlement by two justices" under sect. 22 of the Lands Clauses Consolidation Act is not a "conviction or order" within Jervis's Act, neither is it an "order for the payment of money" within that Act. It is a mere assessment of damages, and the practice has always been to enforce this assessment by bringing an action upon it. It cannot be enforced in

any other way, and any question of title can only be decided in the action upon the award. The justices therefore "order" nothing, they merely "estimate." *Re Edmundson* (17 Q. B. 67) was wrongly decided. That case was distinguished in *Reg. v. Hannay* (31 L. T. Rep. N. S. 702). They also cited

*Reg. v. Coombe*, 52 L. J. 67, M. C.

*R. S. Wright* for the respondent.—The justices are to "hear and determine," they call witnesses, and those witnesses are sworn, and the determination of the justices is a judicial act. If it is a judicial act it follows that it is an "order" within Jervis's Act, for that Act is exhaustive. It was passed after the Lands and Railways Clauses Acts, and was intended to include them. *Re Edmundson* (*ubi sup.*) was rightly decided. He also cited

*Morant v. Taylor*, 34 L. T. Rep. N. S. 139; 1

*Ex. Div.* 188;

*Streetman v. Guest*, 18 L. T. Rep. N. S. 52; L. Rep.

3 Q. B. 262.

BARR, M.R.—I remain of the opinion at which I arrived after reading the cases to which we have been referred, of *Re Edmundson* (*ubi sup.*) and *Reg. v. Hannay* (*ubi sup.*). I could have supposed the decision of either of those cases to be right, but I cannot see how both of them can be right. Moreover, I think it is plain that the learned judges who took part in the decision of *Reg. v. Hannay* did not really intend to support by their judgment the earlier case of *Re Edmundson*. The case of *Re Edmundson* was one of those cases which, having been decided by a court of concurrent jurisdiction, must not, according to the comity of our practice, be overruled by the learned judges who decided *Reg. v. Hannay*, and if the latter case had been subject to appeal I have no doubt they would have decided it in accordance with *Re Edmundson*, and left it to the Court of Appeal to overrule that authority. But there being no appeal, and not agreeing with the authority of *Re Edmundson*, the learned judges distinguished that case from the one they were considering in *Reg. v. Hannay*, and the distinction is certainly a very fine one. We therefore are now left in this position, that we have the case of *Re Edmundson* decided in one way many years ago, and the case of *Reg. v. Hannay*, which I think is really not distinguishable from the earlier case, decided in the opposite way also some years ago, and we are now left to choose between them. Now we always hesitate very much in the Court of Appeal about overruling a case which has been supposed to be good law for a number of years, especially when parties may constantly have altered their position upon the assumption that the law thus laid down was good; but this decision which we are now considering is only a decision as to the particular jurisdiction of a court, and I see no reason in this case to say that the case must stand as it is after this lapse of time, if in fact we do not agree with it. The question therefore is, do we agree with *Re Edmundson*, for there can be no doubt that it directly governs the present case? This is a claim made by a landowner against a railway company in respect of his land being injuriously affected by the company's works, and it is a claim made under sect. 6 of the Railways Clauses Consolidation Act 1845. I will not say whether or not this claim might be made under sect. 16 of



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that Act, it is enough that for the purpose in hand, namely, the obtaining of compensation, the claim comes under sect. 6 of that Act. Now sect. 6 of that Act refers us to the Lands Clauses Consolidation Act 1845, and turning to sects. 22 and 24 of that Act we have to inquire how such a claim when made is to be determined. I think it is plain that it is to be determined by two different tribunals. Two questions may arise upon such a claim: first, the title of the person who makes it to maintain it in respect of the lands; and secondly, the amount of compensation to be paid to such person, if the claim is maintainable by him. Now it cannot be said that any authority is given to the magistrates by the statute to determine the first of these questions, namely, that of title. Are we to imply any such authority? It is contrary to every idea of English law in dealing with magistrates, and yet here we are virtually asked to imply that such an authority is given by an Act of Parliament which does not in fact say anything about it. I can see no reason for any such implication. Therefore, the whole question involved in the dispute must be tried by two tribunals, and the only part of it with which the magistrates have to deal is the amount of compensation payable, if anything be payable at all. Sect. 24 of the Lands Clauses Consolidation Act 1845 is as follows: "It shall be lawful for any justice, upon the application of either party with respect to any question of disputed compensation . . . to summon, &c. . . . and it shall be lawful for such justices to hear and determine such question." What question? The amount of the disputed compensation and that alone. That is a part only of the dispute between the parties, and not the whole question. Then is such a determination of the justices, of the amount to be paid, an order within sect. 140 of the Railways Clauses Consolidation Act 1845? That section is dealing with cases where costs, damages, or expenses have been directed to be paid, and it gives justices, by whom the same have been ordered to be paid, power to issue their warrant to enforce payment. Can it be said that such a determination as we have been considering is an order to pay? Obviously not, because the question of title still remains open, and while that is so the whole question is not determined, and the company cannot be ordered to pay. Therefore, I come to this conclusion, that if you say what is done under sect. 24 of the Lands Clauses Consolidation Act is an order, it is still not within sect. 140 of the Railways Clauses Consolidation Act unless it be an order to pay. It is clearly not an order to pay, and I do not think it is an order at all; it is a mere assessment—a mere ascertainment of the amount of compensation to be paid, if any at all be due. I think such a determination of magistrates as is made under sect. 24 is not an order at all, it is not within sect. 140 of the Railways Clauses Act, and is not within Jervis's Act. Therefore, I think that the case of *Re Edmundson*, which was decided as *Bowen*, L.J. suggested during argument, in the early years of these Acts, and before the courts knew as much of the working of them as we know now, was wrongly decided, and the case of *Reg. v. Hannay*, which I think cannot be distinguished, was rightly decided, and therefore I think the judgment of the court below, who considered themselves bound against

their own opinion by the earlier case, must be reversed, and the case of *Re Edmundson* must be overruled.

BOWEN, L.J.—I am of the same opinion. The first matter that is clear is that the case of *Re Edmundson* is exactly in point, and that there is no distinction between that case and the present. The question which arises is whether a decision of justices made under the Lands Clauses Consolidation Act sect. 24 is an order within Jervis's Act. The case of *Re Edmundson* decided that it was. I agree that we ought to hesitate before we overrule a decision of such long standing. It is true, as the Master of the Rolls has said, that the point decided in that case is not a point on which parties have altered their position upon the assumption that that case was good law, but still it has stood for some years. In that case, however, there was no appeal, and the decision has been doubted every time that it has come before the courts. The judges who decided *Reg. v. Hannay* differed from it, and Mellor, J. differed from it in the case of *Reg. v. Coombe*. And now we are asked as a Court of Appeal to overrule it. The basis of the reasoning on which it was supported, was that the court thought that a proceeding for compensation under sects. 22 and 24 of the Lands Clauses Act 1845 was a proceeding for redress, and that the award was in the nature of relief given, and was an award of damages within sect. 140 of the Railways Clauses Act 1845. Now is that view tenable? All the justices are to do when reference is made to them under these sections of the Lands Clauses Act 1845, is to settle the amount, and to hear and determine the disputed question of the amount of compensation. Behind that inquiry any question of title still remains undecided and open. Can it then be said that this assessment of the amount of a hypothetical compensation, which may or may not be payable according to the decision of ulterior questions, is an order for damages within sect. 140 of the Railways Clauses Act 1845? I think not. It seems to me that the decision of the justices is not an order at all. How can that be an order which neither expressly nor impliedly orders anything to be done, and imposes on penalty for disobedience? I think that the case *Re Edmundson* cannot be supported, and must be overruled, and that this appeal must be allowed.

FRY, L.J.—I am of the same opinion. I concur entirely in the reluctance which has been expressed to overrule a case decided so long ago, and, if that case had been regularly followed, my hesitation would have been increased, but looking at the circumstances, which have been fully dealt with by the Master of the Rolls, I think we are bound to consider whether *Re Edmundson* is right or wrong. In my opinion it is plainly wrong. All the learned judges in that case seem to have come to the conclusion that the determination and the ascertainment of the quantum of compensation was an order, and was treated as such by sect. 140 of the Railways Clauses Act. But that section deals with "damages directed to be paid." It seems to me to be plain that by the mere assessment of the quantum nothing is "directed to be paid." This is the limit of the magistrates' power. In point of form there is no order to pay, and surely there is none in



substance; for a further question, namely, that of title, may arise, and until that is decided the amount ascertained is not payable, and perhaps may never become payable. I think that *Re Edmundson* was wrongly decided, and that this appeal must be allowed.

*Appeal allowed.*

Solicitor for appellant, *A. R. Oldham.*

Solicitors for respondent, *Mathews and Browne.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Monday, Oct. 27, 1884.*

(Before NORTH, J.)

HEFFENSTALL v. HOSE. (a)

*Vendor and purchaser—Conditions of sale—Want of title—Right of vendor to rescind.*

*Trustees of the will of H., who died in 1858, contracted to sell to the plaintiff freehold premises containing 5 acres. The conditions of sale provided that if the purchaser took any objection or made any requisition which the vendors were unable or unwilling to remove or comply with the vendors might rescind. The abstract showed a conveyance to the testator in 1855 of about 3½ acres of the property. The other 1½ acres had been inclosed by the testator himself and had ever since been held with the property, and no other title was shown. There was no want of bona fides on the part of the vendors. The purchaser required and insisted on further evidence as to the 1½ acres.*

*Held, that the vendors were entitled to rescind under the conditions.*

THIS was an action in which the plaintiff claimed against the defendants specific performance with an abatement of the purchase money, in respect of an agreement by the defendants to sell to the plaintiff, Heffenstall, certain freehold premises in Lincolnshire; the abatement being claimed in respect of part of the property as to which the defendants were unable to show any but a possessory title.

On the 3rd Oct. 1882 the defendants, who were the trustees of the will of Thomas Hose, put up for sale by auction the property in question, which consisted of a messuage and land situate on the coast of Lincolnshire, the eastern boundary being certain land called delph land, beyond which were sandhills protecting the property from the sea. The whole property, which consisted of about 5 acres, was put up in seven lots subject to conditions of sale, the fourth condition being as follows:

If any purchaser should take any objection or make any requisition which the vendors are unable or unwilling to remove or comply with, and should not withdraw the same after being required so to do, the vendors may, by notice in writing delivered to such purchaser or his solicitors, and notwithstanding any intermediate negotiation, rescind the contract for sale, and the vendors are within one week after such notice to repay to the purchaser whose contract is rescinded his deposit money, which is to be accepted by him in satisfaction of all claims on any account whatever, and the purchaser is to return forthwith all abstracts and papers in his possession belonging to the vendors.

The plaintiff Heffenstall became the purchaser

of all the seven lots at the price of £1450, and thereon paid a deposit of £290.

On delivery to the purchaser of the abstract of title it appeared that the conveyance to the testator in 1855, which was the root of title, showed a title to only about 3½ acres of the lands sold. The testator had died in 1858. As regarded the other 1½ acres, they appeared to have been originally acquired by the testator by inclosing part of the adjoining delph land, and these 1½ acres had ever since been held along with the 3½ acres conveyed in 1855. The defendants had been appointed trustees in 1881. The purchasers having required the vendors to show a title to the 1½ acres, several sets of requisitions and answers passed, the purchaser requiring steps to be taken by the vendors which would involve considerable expense and trouble on the part of the vendors. Correspondence ensued, and ultimately the defendants gave notice to rescind under the fourth condition of sale. The plaintiff therefore brought this action, which now came on for trial.

*Barber, Q.C. and Russell Roberts* for the plaintiffs.—The vendors contracted to sell the whole 5 acres as if they had a good title to them. The part as to which they cannot make a title is so large a portion of the whole that it cannot be said that that which they are able to sell is the same thing as that contracted for. Such a condition cannot avail where no title at all is shown:

*Boorman v. Hyland*, 39 L. T. Rep. N. S. 90; 8 Ch. Div. 588.

They also cited

*Mason v. Fletcher*, 23 L. T. Rep. N. S. 277: L. Rep. 6 Ch. 91;

*Barker v. Cox*, 35 L. T. Rep. N. S. 662; 4 Ch. Div. 464.

*Karslake, Q.C., Lovett Henn, and Richard Neville*, for the defendants, were not called upon.

NORTH, J.—This is an action by the purchaser for specific performance of a contract relating to a piece of land in Lincolnshire near the sea, containing seven lots. The grounds on which I am going to decide it relate to the first six lots; the seventh is a very small one, unimportant for the present purpose, and I therefore leave it out of consideration altogether. Now those six lots are just within a sandhill, shown on the plan annexed to the particulars, protecting this land and other adjoining land from the German Ocean. It appears that there was a conveyance to the testator Hose in 1855, and the property conveyed to him then was described as bounded by or abutting upon what is called the delph land, which appears to be the portion of land immediately within the sandhill from which, centuries ago in all probability, the materials were got for the purpose of making the bank, and from time to time keeping it up. Thomas Hose bought the property in 1855. The property conveyed to him was 3a. 1r. 36p. The title to that is beyond all question, and is not in dispute. He died in 1858, that is to say three years after he got the property, and it appears that during those three years he proceeded to inclose the 1½ acres or a little more which were necessary to be added to the land he had bought to make up the property now put up for sale. This was inclosed and apparently treated as part of the property. In 1882 this property was put up for sale, and the property sold was divided into lots. The dimen-

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sions of the lots are given, and amount, as I have said, to a little more than 5 acres altogether. In the course of investigation as to title the point is raised that the conveyance, which was the root of the title to these lots, shows a title to the  $\frac{3}{4}$  acres only, and evidence of the title of the vendors to the remaining  $1\frac{1}{4}$  acres is called for. Several sets of requisitions are sent in and answered, and considerable correspondence ultimately takes place between the parties, but the result is this: The trustees, who are the vendors of the property, find they are unable to show a title to these  $1\frac{1}{4}$  acres and they exercise the power, which is conferred upon them by the fourth condition, of rescinding. The words are these, as general as can be: [His Lordship read the condition and continued:] Three sets of requisitions were delivered and answered. After considerable negotiations and correspondence had taken place, notice is given to the purchaser that if the requisition is not withdrawn the vendors will exercise their right to rescind. The requisition is not withdrawn, thereupon they do exercise their right and were prepared at once to tender—it is said, I think, that they actually did tender—the deposit. The only objection I regard is whether they were entitled to do that or not. The defence raises several other objections to the plaintiff's right to succeed, which I put on one side, because it seems to me there is this simple question which, if I decide against the plaintiff, will dispose of the case, and, the facts not being in dispute, it seems to me ripe for discussion, and I must decide it against him, because I cannot see any reason why it can be said that the right conferred by the condition is to be taken away from the persons who have stipulated for it in the conditions of sale. The state of things contemplated there has occurred. Requisition has been made and has been pressed relating to the title to these  $1\frac{1}{4}$  acres. The vendors are unable or unwilling to comply with it. As far as I can see they are unable as well as unwilling, because, as far as I can judge, the land is delph land—that is to say, land which belonged to persons outside the property of Thomas Hose, the purchaser, and which was not conveyed to him. It is obvious how the defendants have purported to sell the whole. The present vendors are trustees, appointed only in the year 1881, the testator having died in 1858, and having inclosed this property, making the whole of the 5 acres apparently one entire property, in his lifetime, more than twenty years before they were appointed trustees. It is a case in which, without any neglect or default on their part that I can see—it is not suggested there was want of good faith or want of proper conduct—but under certain circumstances, they have put up for sale what the testator's trustees have enjoyed the use of for upwards of twenty years, as their testator had done before, and which was apparently theirs. But on the investigation of title it turns out that as to a part they cannot make a good title to the fee simple, and thereupon this objection is taken. It seems to me exactly one of those cases with respect to which this condition is properly inserted. The inquiries which they would have to make, the steps they would have to take to make the title good are shown on the requisition that has been read to me—the second requisition of the second set. That shows they are asked to take a good deal of trouble and incur a good deal of

expense for the purpose of removing this. This condition is inserted for the purpose of enabling them, if they think fit, to avoid such trouble and expense by rescinding the contract, and though, of course, they could not do it arbitrarily or wantonly—they could not deliberately put up for sale that which they knew they could not sell—this seems to me to be expressly one of the cases in which this condition, which has been inserted, can be properly exercised by them. The case of *Mawson v. Fletcher* (*ubi sup.*) seems to me to be very much in point, and one which I should act upon. Then another case was referred to, *Bowman v. Hyland* (*ubi sup.*), a decision of Hall, V.C., in which the marginal note to the report is as follows: "A condition in a contract for sale that if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to show any title whatever." That means when he shows no title whatever to any part of the property. I do not find that that is so here. In the present case the defendants have shown a good title, with respect to which no objection is made, to the  $\frac{3}{4}$  acres. It appears to me that this is a case in which on this first point I must decide against the plaintiff, the facts I have relied upon being admitted by the plaintiff's counsel, and there not being any dispute on them. The result is, that the notice of rescission having been given the action for specific performance fails, and I must dismiss it with costs.

Solicitor for plaintiffs, *Frith Needham*, for Cann and Son, Nottingham.

Solicitors for defendants, *Saxelby and Faulkner*.

Tuesday, Oct. 28, 1884.

(Before NORTH, J.)

LEE v. DUNSFORD. (a)

*Foreclosure action—Rules of Court, Form 5, Appendix C.—Immediate judgment—Form of order.*

*In a foreclosure action, when the statement of claim followed Form 5, Appendix C., the defendant did not appear at the trial, and the plaintiff proved his debt and interest orally. The Court gave judgment for payment within ten days of principal, interest, and costs. Account to be taken and, in default of payment of certified amount within six months from certificate, foreclosure.*

THIS was a foreclosure action by the mortgagees of leaseholds. The statement of claim followed the form 5, Appendix C. of the rules. The action now came on for trial, when, the defendants not appearing, the plaintiff proved orally the amount due for principal (500*l.*) and interest at 6*l.* per cent. up to the day of trial.

*T. Bibton* for the plaintiff, referred to

*Farrer v. Lacy, Hartland, and Co.*, 25 Ch. Div. 636; and asked for an immediate order for payment.

NORTH, J.—You do not ask by your pleadings for an immediate order for personal payment, but as the claim is in the form prescribed by the rules I think you are entitled to it. The witness who has proved the amount due has omitted to deduct

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income tax from interest, but I will direct the registrar to compute interest on the principal, allowing for the tax.

The judgment so far as material was as follows: Order that the defendant within ten days after the service of this order do pay to the plaintiff 500*l.*, the principal sum due to her under the mortgage, together with 41*l.* 10*s.* 7*d.* for interest thereon, less income tax, up to the date of this judgment. Account to be taken of what is due to the plaintiff under her mortgage and for her costs, regard being had in taking the account to what, if anything, the plaintiff may have received under the judgment. Defendant paying certified amount within six months after the certificate, plaintiff to reassign the mortgaged premises; in default of defendant paying to the plaintiff the amount so certified by the time aforesaid defendant to be foreclosed. Liberty to apply.

Solicitor for plaintiff, *Edward Lee*.

March 1 and 22, 1884.

(Before PEARSON, J.)

UPTON v. BROWN. (a)

*Trusts—Business property—Successive life tenancies—Loss during first life tenancy—Subsequent profit—Apportionment.*

*When a business property is settled upon successive life tenancies, and is carried on by a receiver and manager during one life tenancy at a loss, and during the subsequent life tenancy at a profit, the losses incurred during the first life tenancy must be made good out of the profits of the subsequent life tenancy.*

THIS was an application by the legal personal representative of George Upton, an infant, deceased, for an order to wind-up the action of *Upton v. Brown*, by providing for the payment of costs, and the application of certain funds in court.

The action was commenced in 1875 for the execution of the trusts of a marriage settlement, dated the 4th Nov. 1873, and which comprised, among other property, the business of an eating-house keeper.

Under the trusts of the settlement, Sarah Upton was entitled to the income of the settled property until her death. Upon that event, which happened on the 24th Oct. 1875, the income became the property of George Upton, the infant. The capital of the estate, subject to the life interests, belonged to the latter. George Upton died on the 8th Aug. 1877, at the age of fourteen years, and thereupon the income vested in the trustee in bankruptcy of G. D. Robinson for the life of the latter person.

On the 2nd Nov. 1875 an order was made in the action appointing S. Brown, who was one of the trustees of the settlement, to be receiver and manager of the business until sale or further order.

S. Brown died in March 1878, and shortly afterwards his co-defendant and co-trustee was appointed receiver and manager in his place.

It appeared that during the life interest of

George Upton the business was carried on by S. Brown at a loss, and upon the chief clerk's certificate a sum of 573*l.* 7*s.* 8*d.* in respect thereof was found due to his representatives. Since Aug. 1877 the business had been carried on at a profit.

Upon the present petition the question was raised whether the loss of 573*l.* 7*s.* 8*d.* should be made good out of capital, or out of the profits earned in the business since Aug. 1877.

Sir *Arthur Watson* for the legal personal representative of the infant, George Upton.—The loss should be made good out of income; that is to say, the loss incurred during the lifetime of the infant should be made good out of the profits subsequently earned.

*J. Maurice Lloyd* for G. D. Robinson's trustee.—The loss must be borne by the capital. The infant would have had the benefit of any profit made during his lifetime; his estate therefore should bear the loss.

*Warmington, Q.C.* for the plaintiffs in the action, and the representative of Samuel Brown.

*Coltman* for the present receiver in the action.

PEARSON, J.—The point which arises in this case is a new one. The question is, whether the loss which was incurred by the receiver in carrying on the business during the life of the first tenant for life, who received no profit, is to be made good out of capital, or out of the profit which has arisen during the second and now existing tenancy for life. I think it ought to be made good out of that profit, and for this reason. Suppose, instead of there being losses, the receiver had contracted debts in carrying on the business during the life of the first tenant for life, they would have been treated as having been contracted on behalf of the business generally, and must have been paid out of future profits, if there had been any. I think, therefore, that this loss must be treated as if it had been a debt incurred by the receiver, and, there being subsequent profits available to pay them, they must be paid in the same way.

Solicitors: *Shum, Crossman, and Co.*; *Hicks and Arnold*; *R. Ballard*; *S. D. Hamilton*.

June 26, 27, and July 1, 1884.

(Before PEARSON, J.)

STANDING v. BOWRING. (a)

*Stock—Transfer into joint names of transferor and another—Intention to benefit.*

*M. S., who was a widow in 1880, in that year transferred stock, which had been acquired by her as the survivor of her husband, into the joint names of herself and R. B., who was a relative of her husband, and to whom she and her husband had stood sponsors at baptism.*

*M. S., at the time of making the transfer, expressed her desire and intention of benefiting R. B., but she did not at the time inform him of the transfer, and she continued to receive the income.*

*M. S. having subsequently married a second husband, sought to establish that the transfer into the joint names had been made only for the purpose of placing the fund in trust for herself.*

*Held, that the presumption of an intention to benefit*

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## STANDING v. BOWRING.

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*R. B. in the event of his being the survivor of M. S. was not negatived by the evidence, and R. B. could not be compelled to transfer the stock to M. S.*

THE plaintiff, Mary Alner Standing, who had married for the second time in Dec. 1882, claimed a declaration against the defendant Robert Alner Bowring that she was absolutely entitled, for her separate use, to a fund of 6000*l.* Consolidated Bank Annuities standing in the joint names of herself and the defendant, also a declaration that he was a trustee of the fund for herself, and an order to compel him to concur in transferring the fund to herself or as she should direct.

The plaintiff further claimed costs against the defendant.

The plaintiff, in the month of Nov. 1880, being then a widow, and of the age of eighty-six years, transferred the fund to which she had become entitled in 1861, as the survivor of herself and her first husband, into the joint names of the defendant and herself.

The defendant was a relative of the plaintiff's first husband, and was the godson of the plaintiff herself, as well as of her said husband, and it appeared that the plaintiff had, before making the transfer, expressed her intention of thereby conferring a benefit upon the defendant upon her own death, and in particular so informed her stockbroker.

She did not, however, inform the defendant of what she had done. She continued to receive the dividends, and treated the fund as her own separate property.

In Dec. 1882 the plaintiff was married for the second time, and shortly afterwards set up the contention that she had caused the transfer to be made for purposes of safe custody only, and that the defendant's name was inserted as that of a trustee. The defendant contended that the plaintiff's intention had been to secure to him the benefit of the fund in the event of his surviving her; that she had, since the transfer, frequently stated that to be the case; and that she had, by the transfer, effectually carried out that intention. He admitted the plaintiff's life estate, but claimed to be entitled to the whole benefit of the fund upon the death of the plaintiff.

Before the action was commenced the parties engaged in a correspondence on the subject of the transfer, in which the above contentions were raised, and in which the defendant absolutely declined to execute a re-transfer of the fund to the plaintiff.

*Cozens-Hardy, Q.C. and Chadwyck Healey* for the plaintiff.—The defendant is merely a trustee for the plaintiff. She never informed him of the transfer at the time of making it. He is not a relation of the plaintiff. No presumption arises of her intention to benefit him. He did not stand in the position of a child of the plaintiff or her husband. That circumstance distinguishes the case from

*Bonnet v. Bonnet*, 40 L. T. Rep. N. S. 373; 10 Ch. Div. 474.

The onus is on the defendant to prove the intention of giving him a benefit:

*Fowkes v. Pascoe*, 32 L. T. Rep. N. S. 545; L. Rep. 10 Ch. 343.

The admission that the defendant is a trustee for

the plaintiff's life is inconsistent with his contention. There is no contract previous to the alleged voluntary settlement, and consequently in this case no *constat* as to the intention of the settlor. The court will therefore set it aside if the transfer did amount to a voluntary settlement.

They were stopped by the Court.

*H. A. Giffard, Q.C. and Dunning* for the defendant.—The plaintiff has no title in any case. She was married to her present husband before the Married Women's Property Act 1882 came into operation. The intention of the plaintiff was evident. Having herself become entitled to the fund by survivorship, she made a similar arrangement for the benefit of the defendant. The evidence and correspondence show the affectionate care of the plaintiff and her first husband for the welfare of the defendant. The real reasons for the plaintiff's change of feeling were to be found in the defendant's business relations, and upon her second marriage, she made up her mind to get the fund back into her own name if possible. The relation of sponsor and godson is to be considered as affording evidence of probable intention to benefit. It is immaterial that the transfer was not at the time communicated to the beneficiary.

*Murphy, Q.C.*, for the defendant Standing, the present husband of the plaintiff, stated that his client did not dispute the plaintiff's title to the fund.

*Cozens-Hardy* replied.

PEARSON, J. stated the result of the evidence and proceeded:—It is quite clear that, when Mrs. Standing transferred this sum of 6000*l.* Consols into the joint names of herself and Mr. Bowring, she had well considered what she was doing. This course was not adopted by her without full consideration, and it was not till after some months from the time when she first mentioned the subject to her stockbroker that she eventually decided upon placing the money in the joint names. This money had belonged to her first husband, and he had transferred it into the names of himself and his wife, so that it became the property of his widow by survivorship. The defendant Mr. Bowring was, it appears, the godson of Mrs. Standing and of her first husband, and it is evident that they both of them took great interest in him, and I have no doubt that when she made this transfer in 1880 she intended that it should enure to the benefit of the defendant if he should survive her, and that she intended to reserve the dividend upon the fund during her life. After the transfer, however, the defendant entered into a business partnership with a Welshman, and this she disapproved of, and she wrote to her stockbroker, Mr. Dalton, telling him that in consequence of this partnership she had determined "to revoke his name out of the Bank of England on the 6000*l.*," as she considered him an undeserving man, and she had made up her mind to give away the money by her will. She therefore requested Mr. Dalton to do away with her intended gift to Mr. Bowring. If this had been the case of a simple transfer of stock into the names of the plaintiff and another person, it might have been difficult to say that it was not a trust for the plaintiff, but upon the whole of the evidence in this case it is impossible for this court to interfere with what the plaintiff has deliberately done and

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to compel the defendant to re-transfer the stock to the plaintiff absolutely. The action must therefore be dismissed with costs.

Solicitors: *Sandom, Kersey, and Knight; Bell, Brodrick, and Gray.*

Monday, June 30, 1884.

(Before PEARSON, J.)

Re NORRIS; ALLEN v. NORRIS. (a)

Trustees—Power to appoint—"Continuing" trustee  
—Solicitor—Administration by the court.

*A trustee who has made up his mind to retire is not a "continuing" trustee, so as to be a necessary party to the appointment of a new trustee under a power given to the surviving or continuing trustee or trustees.*

Re *Glenny v. Hartley* (50 L. T. Rep. N. S. 79; 25 Ch. Div. 611) distinguished.

*Travis v. Illingworth* (12 L. T. Rep. N. S. 135; 3 Jur. N. S. 313) followed.

*Where trusts are being administered by the court a solicitor who is the partner in business of the continuing trustee, and is acting both for the trustees and for some of the beneficiaries, is, by reason of his position alone, an improper person to be appointed trustee, and his appointment will not be sanctioned by the court.*

This was an application by way of summons that Chas. J. Allen might be added as a co-plaintiff with Joshua J. Allen in the above action, and that his appointment as co-trustee with Joshua J. Allen of the will of Adam Norris, deceased, might be approved by the court.

The facts were as follows: The action was brought for the administration of the real and personal estate of a testator, Adam Norris, the plaintiffs being Joshua J. Allen and George Midwood, the trustees since 1856 of Adam Norris' will, and the defendants being certain of the beneficiaries. Joshua J. Allen was senior partner in the firm who acted as solicitors for the plaintiffs in the action as well as for the majority of the beneficiaries under the will.

Judgment was given in the action on April 7, 1883, and it was thereby provided that, in answering accounts and inquiries, the chief clerk was to be at liberty to adopt any of the proceedings in an action of *Boyd v. Allen*, which had been instituted for the partition or sale of the estate of a beneficiary under the will of Adam Norris.

In the interval between the date of the judgment in *Allen v. Norris* and Feb. 1884, George Midwood became desirous of retiring from the trusts of the will, and Joshua J. Allen, as the continuing trustee, by deed dated Dec. 26, 1883, and in view of a proposed sale of the freehold portions of the trust estate, appointed his son and partner Chas. J. Allen to be a trustee in the place of George Midwood. The power in the will under which Joshua J. Allen purported to act was contained in the following clause:

And lastly I declare that if any of the trustees hereby appointed or to be appointed as hereinafter mentioned shall die or decline, or refuse or become unwilling or incompetent to act in the trusts of this my will before the same shall be fully executed, then and as often as the same shall happen it shall be lawful for my said daughters and the survivors and survivor of them during their or

his lives or life, and that notwithstanding coverture, and after the decease of the survivor of them my said daughters, it shall be lawful for the surviving or continuing trustee or trustees, or the executors or administrators of the last surviving or continuing trustee, by any deed or deeds to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or declining or refusing or becoming unwilling or incompetent to act as aforesaid, and to do all acts necessary for effectuating such appointment as occasion may require, and every trustee so to be appointed shall have all the powers and discretions of the trustee or trustees in whose place he shall be substituted.

John Boyd, one of the beneficiaries under the will, being interested in four-fifteenths of the real estate, and having liberty to attend the proceedings in *Allen v. Norris*, objected to the appointment, and the present summons was accordingly taken out by Joshua J. Allen and George Midwood.

John Boyd was plaintiff in the action of *Boyd v. Allen*, and had obtained the conduct of the proceedings in *Allen v. Norris*.

*Everitt, Q.C.* and *E. B. Cooper* for the summons.

*W. W. Karslake, Q.C.* and *E. S. Ford* for John Boyd.—The appointment of Charles J. Allen was invalid; it was informal, for according to recent decisions it was necessary that George Midwood should have joined in executing the deed of appointment. He was a "continuing" trustee until he has executed the deed of appointment:

Re *Glenny and Hartley*, 50 L. T. Rep. N. S. 79; 25 Ch. Div. 611.

The decision of *Kindersley, V.C.* in *Travis v. Illingworth* (12 L. T. Rep. N. S. 135; 2 Dr. & Sm. 344) has not been followed. In *Nicholson v. Wright* (29 L. T. Rep. O. S. 52; 3 Jur. N. S. 313) there never were any trustees in existence. It has been held that, if there be two trustees, and a power of appointing new trustees be given to "the surviving or continuing trustees or trustee," they cannot both "retire" at the same time, but there must be two successive appointments:

*Stones v. Routon*, 17 Beav. 308.

Apart from the question of informality, the appointment of a solicitor, the partner of the continuing trustee, and a member of the firm of solicitors having the conduct of the action and acting for the trustees as well as the majority of the beneficiaries, will not be approved by the court:

*Wheelwright v. Walker*, 48 L. T. Rep. N. S. 70; 23 Ch. Div. 752;

Re *Orde*, 49 L. T. Rep. N. S. 430; 24 Ch. Div. 271;

Re *Kemp's Settled Estates*, 49 L. T. Rep. N. S. 231; 24 Ch. Div. 485.

Joshua J. Allen must be called upon to make a fresh nomination:

Re *Gadd; Eastwood v. Clark*, 48 L. T. Rep. N. S. 395; 23 Ch. Div. 134.

*Everitt, Q.C.* replied.

PEARSON, J.—There are two actions in this case, one an action for the administration of the estate of a gentleman named Norris, and the other an action for partition of the estate of a beneficiary under his will. The plaintiff in the latter action is Mr. Boyd, and Mr. Boyd has now the conduct of both actions. There are two trustees under the will of Mr. Norris, Mr. Midwood and Mr. Joshua J. Allen. Mr. Midwood is desirous of retiring. Mr. Joshua J. Allen has the power of giving the continuing trustee the right to appoint, and Mr. Joshua J. Allen has appointed Mr. Chas.

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Re NORRIS; ALLEN v. NORRIS.

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J. Allen his co-trustee. Mr. Chas. J. Allen is a solicitor and in partnership with his father, and therefore, as his father was and is, so Mr. Chas. J. Allen is, one of the solicitors for the beneficiaries. An objection is taken to the appointment of Mr. Chas. J. Allen which resolves itself into two objections. It appears that the deed of appointment is one which, as it has been drawn, makes Mr. Joshua J. Allen alone the appointor of the new trustee. Mr. Midwood, as I understand, is made a party to that deed, but he does not join in the appointment of Mr. Chas. J. Allen, and it is objected that his appointment is therefore bad. In the next place it is said that Mr. Chas. J. Allen, being a partner with his father, and one of the solicitors of some of the beneficiaries, the appointment is contrary to the practice of the court, and upon that ground the court ought not to sanction it. It is not argued, nor could it be argued after the decisions of the Court of Appeal, that, because the clauses have been inserted, therefore power to appoint should not remain in Mr. Joshua J. Allen, but it is said that, inasmuch as those clauses have been inserted, the appointment must be made subject to the sanction of the court, and that is not disputed by those who represent Mr. Chas. J. Allen. No objection has been taken, nor, so far as I know, could any objection be properly taken, to Mr. Chas. J. Allen as a trustee, and, if he had been an independent person, no objection would have been taken to his appointment, and, in any observations that may fall from me, I hope it will be distinctly understood that I take no objection personally to Mr. Chas. J. Allen. The only matter I have to consider is, what is the practice of the court, and what ought I to do acting according to the usual practice of the court, having regard to the particular circumstances of this case. Now there has been a considerable controversy between the parties with reference to the sale of the property which is about to be sold, and *prima facie* the trustees have the power of sale. *Prima facie* under the rules of the court the trustees have the conduct of the sale. No doubt it is quite within the power of the court, acting according to its discretion, to take back the conduct of the sale from the trustees, and give it to some other person, but, according to the rules of the court, if there be nothing to induce the court to make any alteration in the practice laid down by those rules as to the course to be ordinarily followed, the trustees in that case would have the conduct of the sale. I must proceed to consider both the objections. In the first place, has or has not Mr. Chas. J. Allen been properly appointed by Mr. Joshua J. Allen alone, Mr. Midwood, as I gather from the terms of the deed, being accessible and being capable, therefore, of joining in the appointment? Now Mr. Karlake has properly impressed upon me the very recent decision of Bacon, V.C., and I have so much respect for the Vice-Chancellor's experience and knowledge in these matters, that, if that were the only decision in the case, I should hesitate very long before I expressed a contrary opinion to his, and even now, when I propose to express a contrary opinion to the doctrine which counsel have extracted from the Vice-Chancellor's judgment, I beg to say most distinctly that, looking at the terms of the power in this case, I am very far from suggesting or venturing to hint that the Vice-Chancellor's judgment in that case was not

perfectly right and in conformity with the terms of that particular power. When I am asked to deduce from the Vice-Chancellor's judgment a general construction that where the power is in the ordinary form it is necessary for the retiring trustee to join with the continuing trustee in the appointment of a new trustee in his place, I beg to express my dissent as strongly as I can from that conclusion, and I am very glad to find that the opinion which I entertain, and have entertained for a great many years, and as to which I confess I should have had no doubt whatever but for the manner in which counsel has pressed upon me the decision of Bacon, V.C. in *Glenny v. Hartley* (*ubi sup.*), that the doctrine enunciated by Kindersley, V.C. in *Travis v. Illingworth* (*ubi sup.*) was, at the time when that judgment was pronounced, and had been for many years previously, the recognised opinion of all the profession. Now, in *Glenny v. Hartley* (*ubi sup.*) the terms were somewhat peculiar, and I think it was on the peculiarity of those terms that the Vice-Chancellor must have come to the conclusion which he did, for I think it would be impossible for any judge to read the terms of that power without perceiving that it was not exactly in common form, and I think that, if that was not absolutely certain from the judgment which the Vice-Chancellor delivered, there was very strong reason indeed for saying that in that case the proper persons to appoint were the continuing and the retiring trustees, or, as it was in that case, the two retiring trustees. There were two trustees, and both of them desired to retire, and thereupon they appointed new trustees in their place. It was objected on the part of some purchasers that the appointment was bad. The Vice-Chancellor said that it was good. No doubt he differed from Kindersley, V.C.'s decision in *Travis v. Illingworth* (*ubi sup.*), but the power in that case, stating it shortly, was this: "It shall be lawful for the surviving or continuing trustees or trustee of these presents, or the heirs, executors, or administrators of the last surviving trustee, by any deed or deeds under their or his hand and seal, with the consent in writing of Glenny, the intended husband, and the intended wife, during their respective lives, and after their decease with the like consent of the survivor, in the event of any trustees or trustee dying or going to reside beyond the seas, or declining or becoming incapable to act, to discharge such trustees or trustee from the trusts thereby declared, and all obligation and responsibility in respect thereof, and to appoint new trustees or a new trustee, and they shall be invested with the same powers and authorities as if the trusts herein contained had been expressly reposed in them by these presents, and upon every such appointment the trust hereditaments and premises shall be transferred accordingly." Now, had it stopped there, it would have been very nearly in the ordinary form used in all cases of settlements; but it goes on in these words: "Provided nevertheless that nothing herein contained shall authorise the discharge of the only continuing trustees or trustee for the time being without the substitution of another trustee or trustees, so that there may be at least one trustee to carry on the trusts of these presents." Reading that clause, it does seem to me to indicate that it was intended in that case that, if there was only

one trustee, and that trustee desired to retire, he might appoint another trustee in his place, and retire accordingly. If that be the proper construction of that power, I can see no reason why, if there were two trustees, and those two trustees desired to retire, they might not do that which one trustee might also do. Under those circumstances I think that Bacon, V.C. had very strong reason indeed for coming to the conclusion which he did, that the appointment was good. But that, to my mind, does not meet the ordinary case under the ordinary power. Although Mr. Karslake says that this last proviso puts nothing into the power which would not exist in the power if the proviso was not there, I venture to differ from him, because I think that shows that the appointment might be made by one trustee who was desirous of retiring, if there was only one trustee, and it leaves the ordinary rule of the court, which existed, as I say, without dispute, to my mind, down to the time of *Travis v. Illingworth* (*ubi sup.*), and which was acted upon in that case, altogether undisturbed. Is it then the case, where there are two trustees, and one of them wishes to retire, that the continuing trustee, by which I mean the trustee who intends to continue as a trustee of the instrument, cannot appoint by himself, but he must require the concurrence of the trustee who is actually retiring? Now the objection to that to my mind is this: In the first place, I admit that Bacon, V.C. took a different view, but, with all respect to his judgment, I cannot think that the words "continuing trustee" there mean a trustee desirous of retiring, and who is intending to retire *instantly*, because, according to the forms, as I recollect them, giving power to the continuing trustee to appoint, the form used to go on to say, "thereupon the trust premises shall be conveyed so that they may vest in the new trustee and the continuing trustee." If that be so, it shows that the person in whom they are to vest cannot be the trustee who is then about to retire, but a "continuing trustee" means, not that trustee, but the trustee who intends to remain a trustee of the instrument. There is a further consideration which indirectly may be relied upon, and that is this: a consideration of the great inconvenience that, to my mind, would result from coming to that conclusion, namely, that in many cases, although not in the case before the court at the present moment, but in the case before Bacon, V.C., and ordinarily, according to my experience in almost all the cases provided for by these clauses, one of the contingencies is, "if he shall leave this country." Here it is "going to reside beyond the seas." Now, if you are to say that the continuing trustee remaining in this country cannot appoint a new trustee in the place of a person who has gone abroad, and who will not be accessible, possibly whose whereabouts may not be known, you would be throwing at once a difficulty upon the exercise of the power of appointment which would in many cases be fatal, and the same would be the case if, instead of going abroad and declining to act, the trustee became incompetent from mental disease. He may not be able then to exercise the power, and these clauses would never fulfil the function for which they are inserted in the instrument; because I think I may say in almost all, or in the majority of cases, it would be found impossible to exer-

cise the powers if they were construed in that way; and for that reason I adhere to the opinion expressed by Kindersley, V.C. in *Travis v. Illingworth* (*ubi sup.*). I think the proper person to appoint is the trustee who intends to remain a trustee, and that consequently, so far as form goes, the appointment of Mr. Charles J. Allen by Mr. Joshua J. Allen was a good and valid appointment. The other question remains as to whether or not the court, being called upon now to sanction the appointment, ought to do so, and I am of opinion that the court ought not to sanction it. It is admitted that, according to the ordinary practice, the court would not appoint, even in the case of one trustee, the solicitor of the appointor to be trustee, and I think also that the court would certainly not appoint as a co-trustee with that solicitor his partner, whether he was another person or whether he was his son. In the present case he is his son. The court would not look at all to the competency of the person; it is because of the position which he fills, and according to the ordinary rule of the court a solicitor is not a person who should be appointed a trustee. To my mind it is of the greatest importance that the court should act upon the general rules, and for no other reason than for this, that it saves the court the necessity of considering, in any case, whether a solicitor himself is not a person of the greatest respectability and most trustworthy. The court declines to go into any question of that kind, and says, Assuming that you are the very person who would be most fit in the circumstances to be a trustee, we object to you simply on the ground of the position which you hold. Then Mr. Everitt says: "Here are trustees going to be appointed for the purpose of sale; they are going to conduct the sale under the order of the court, or to a great extent the conduct of the sale would be subject to the sanction of the court, carried on with the knowledge of all the parties, and there is no reason therefore, in this instance, why, whatever may be the case in other circumstances, these two solicitors should not be the trustees." I differ from Mr. Everitt there. I think, whether the sale is to be conducted under the direction of court, or whether it is to be conducted outside the court, the *cestuis que trust* are entitled to have the assistance of two independent persons as trustees to assist them in conducting the sale in the best manner in which it can be conducted. They have the right to ask that they shall have the aid of two minds, and not, as they would in this case, where the father and son are in partnership together, the aid practically of one mind only, because it is plain that, in a case of this kind, where the father and son are in partnership, it would be practically one person acting as trustee, and not two persons acting as trustees. For these reasons I am of opinion that I cannot sanction this appointment. I must, therefore, refer the matter to chambers to appoint a new trustee. Mr. Joshua J. Allen will have power, as he had before, to nominate a fit and proper person, but that proper person, for the reason I have given, cannot, I think, be the partner of the solicitor in the case. I am very far from saying, and I must not be understood to say, that, if there be a trust which is not being administered by this court, and the person *bond fide* had appointed two persons trustees, and they



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were solicitors, one the father and the other the son, as they are here, that would be a bad appointment towards the trust, so as to render that appointment of trustees null and void. I not only do not hold that, but I should be very sorry to hold that it would be so outside the court. If a case came before me, and I found that the appointment had been made *bond fide* outside the court, I should certainly hold that the trustees were properly appointed.

Solicitors: J. J. and C. J. Allen; Chester and Co.

Tuesday, July 8, 1884.

(Before PEARSON, J.)

Re JAMES (deceased) AND THE SETTLED LAND ACT 1882. (a)

*Will—Construction—Infant—Vested estate.*

A testator devised his residuary real estate to trustees upon trust for such of his six younger children as should survive him, and being sons should attain twenty-one or dying under that age should leave issue surviving, or being daughters should attain twenty-one or be previously married, and he directed that if any of his said children should die in his lifetime leaving issue living at his decease, which issue being male should attain twenty-one years or dying under that age should leave issue surviving, or being female should attain twenty-one years or be previously married, then the share to which each child of the testator so dying would, if surviving the testator and attaining twenty-one years, have become absolutely entitled to should be in trust for the issue of such child, but so that such issue in their several degrees should take only "after the decease and by representation of their respective parents." Held, that the infant children of one of the testator's younger sons, who predeceased him, took a vested interest in their father's share in the estate, liable to be divested in the event of their deaths under twenty-one years.

THOMAS JAMES, who died on the 14th June 1883, by his will dated the 16th July 1873 gave all his residuary real estate upon trust for all or such one or more of his six younger children Emily Hope Fellows, Harry Redesdale James, John Collinson James, Richard James, Charles Woodhouse James, and Christian Hugh Septimus James, who should survive him, and being a son or sons should have attained or should attain the age of twenty-one years or dying under that age should leave issue surviving, or being a daughter should attain that age or be previously married, and for the heirs, executors, administrators, and assigns of such child or respective children, the share of his said daughter being held upon such trusts as she, whether covert or sole, should by deed or will appoint, and in default of and until such appointment upon trust for his said daughter, her heirs, executors, administrators, and assigns for her separate use, provided always, and the testator directed that in case any one or more of his said six younger children should happen to die in his lifetime leaving issue living at his decease, and which issue being issue male should live to attain the age of twenty-one years or dying under that age should leave issue surviving, or being

issue female should live to attain that age or be previously married, then and in every such case the share to which each child so dying would if he or she had survived the testator, and had attained the age of twenty-one years, have become absolutely entitled as aforesaid of and in the trust premises should be held upon trust for such his or her issue, and if more than one for them equally, and for their respective heirs, executors, administrators, and assigns, but so nevertheless that such issue in their several degrees should take only after the decease and by representation of their respective parents.

Two of the testator's six younger children, namely, Harry Redesdale James and Richard James, died without issue, and in the testator's lifetime.

The testator's son, John Collinson James, married on Oct. 29, 1872, and there were issue of his marriage two children, namely, Effie Redesdale James, who was born on Feb. 3, 1874, and Tom James, who was born on Dec. 30, 1875, both of whom were still living.

John Collinson James died on Feb. 27, 1883, thus predeceasing the testator.

The others of the testator's six younger children, namely, Emily Hope Fellows, Charles Woodhouse James, and Christian Hugh Septimus James, were still living, all of them having attained twenty-one years.

The present summons was taken out under the Settled Land Act 1882, asking for a declaration that Emily Hope Fellows, Charles Woodhouse James, and Christian Hugh Septimus James, as the only younger children of the testator who survived him, were persons having the powers of tenant for life within the Act under the settlement by the will made in favour of younger children in respect of the share in the settled estates, to which John Collinson James would, if he had survived the testator, have become absolutely entitled; or in the alternative, that Tom James and Effie Redesdale James were tenants for life, or persons having the powers of a tenant for life within the Act in respect of the said share. The summons also asked for the appointment of trustees of the settlement for the purposes of the Act.

Cozens-Hardy, Q.C. and F. F. Proctor, for Emily Hope Fellows and Christian Hugh Septimus James, in support of the summons.

Rawson, for the infant grandchildren of the testator and the surviving trustee of the will.—The court will, if possible, hold the estates of the infants to be vested. There was a clear intention on the part of the testator that his grandchildren should succeed to their parents' shares. What he gave to the grandchildren were vested interests liable to be divested. By analogy the following cases apply:

*Boraston's case*, 3 Rep. 19 a;

*Goodtitle v. Hayward v. Whitby*, 1 Barr. 228.

The Conveyancing Act 1881, sect. 43, gives infants the right to maintenance out of their contingent interest. That brings this case within the principle of *Hayward v. Whitby* (*ubi sup.*).

PEARSON, J., after remarking that the effect of the last proposition, if true, would be to read the Act into the will, said:—The questions in this case are whether the grandchildren of the testator took vested estates liable to be divested in the event of

(a) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

death under twenty-one years, or whether they take vested interests liable to be divested *pro tanto* so as to let in the grandchildren who attain twenty-one years. The previous decisions bearing upon the questions are so conflicting that I might hold either of the propositions to be the correct solution of the matter without much fear of the Court of Appeal coming to a distinct conclusion to the contrary. The chief question of course which has to be considered is which will be the conclusion most consistent with the intention of the testator. His intention apparently was to substitute the children for their parents, and that they should take immediately upon the decease of the parents. He uses the word "issue" in its widest possible sense, and says that they are to take "after the decease and by representation of their parents." The nearest case to the present which I have been able to find is *Andrew v. Andrew* (34 L. T. Rep. N. S. 82; 1 Ch. Div. 410). The head-note to the report of that case is not altogether correct. What James, L.J. said in delivering the judgment of the court was this: "There is a long category of cases from very early times down to a very recent decision of the Master of the Rolls, in which the words 'if,' 'when,' 'so soon as,' have been held from the context not really to import contingency in the sense of a condition precedent to the vesting, but to mean a proviso or condition subsequent operating as a defeasance of an estate vested. And we should be well warranted by the authorities in so dealing with this case, inasmuch as the limitations were plainly intended to make a complete settlement of the property to a man for life, then to that man's eldest son on his attaining the age of twenty-one, with a remainder over to the other descendants (which would necessarily take effect on that son's dying under the prescribed age) with an ultimate remainder over to another branch of the family. But all doubt and difficulty are in this case removed by the fact that the gift is actually expressed to be what without the express words, we should have implied it to be, viz., that the gift is expressed to be 'from and after' the death of the tenant for life." Though I do not quite follow the argument contained in the last sentence, I consider that this case falls within the principle of the passage I have read. I come, therefore, to the conclusion that the testator's intention was not to postpone the period of the vesting of the estates, but to place the children in the place of their parents, so nevertheless that their estates were not to be absolute until they should attain twenty-one years. There must be a declaration that the infants' one-fourth share of the testator's residuary estate became vested in them at the death of the testator, subject to being divested in the event of their both dying under twenty-one years, as to Tom James without issue, and as to Effie James without having been married. The summons will be formally amended by making the infants applicants by a next friend. There will be a direction that the sale be carried out by the trustees, and the summons must be referred back to chambers for the appointment of the trustees. The costs of all parties as between solicitor and client may be paid out of the sale moneys.

Solicitors: *Pattison, Wigg, and Co.*, for *G. Armstrong and Sons*, Newcastle-on-Tyne.

Friday, July 18, 1884.

(Before PEARSON, J.)

THE ACCIDENT INSURANCE COMPANY LIMITED v. THE ACCIDENT, DISEASE, AND GENERAL INSURANCE CORPORATION LIMITED. (a)

*Injunction—Trade name—Insurance company—Similarity—Probable deception.*

*An insurance company, registered under the Companies Acts, having carried on its business in the City of London for many years under the name of the Accident Insurance Company Limited, sought an interim injunction to restrain another insurance company, recently registered under the Companies Acts, and having its office and place of business in the City of London, from carrying on its business under its registered name of the Accident, Disease, and General Insurance Company Limited.*

*Held, that the plaintiff company was entitled to the injunction to restrain the defendant company from using its registered name, or any other name calculated to cause the defendant company to be mistaken by the public for the plaintiff company.*

THIS was an application by the plaintiff company for an injunction to restrain the defendant company until judgment or further order, from in any way carrying on its business under the title of "The Accident, Disease, and General Insurance Corporation Limited," or any other title containing the word "accident," either alone or in combination with any other word or words, in such manner as to cause, or tend to cause, the public to confuse the defendant company with, or mistake the defendant company for, the plaintiff company, and from advertising itself, or issuing, circulating, or publishing its prospectuses, or in any way holding itself out as entitled to use for the purposes of its business, or otherwise, the said title of "The Accident, Disease, and General Insurance Corporation Limited," or other such title as aforesaid, and for an order that the defendant company should pay the costs of the motion.

The plaintiff company was registered under the Companies Acts in Feb. 1870 for the purpose of acquiring and carrying on an accident insurance business which had been carried on under the same name at No. 7, Bank-buildings, Lothbury, since the year 1849. The plaintiff company also acquired and carried on the existing business of the General Accident and Guarantee Company. For a time the plaintiff company carried on business at No. 7, Bank-buildings, Lothbury, but the offices were subsequently removed to, and were now located at St. Swithin's-house, St. Swithin's-lane.

In the year 1883 the defendant company was registered under its present name, the offices being in St. Nicholas-lane, in the immediate neighbourhood of St. Swithin's-lane. The directors of the plaintiff company became aware of the fact of this registration in July 1884, when it came to their knowledge that the defendant company was issuing advertisements and prospectuses.

The plaintiff company adduced evidence from actuaries and others connected with insurance business to prove that the plaintiff company was generally known as "The Accident Company," or "The Accident;" that the first conspicuous word in a company's name was that by which it was usually

(a) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

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known; that although various other insurance companies included the word "accident" in their title, yet that word was not so used as to be the prominent word, and that upon the above grounds it was probable that the defendant company would, if the present name were continued to be used, attract to itself business intended for the plaintiff company.

*Cozens-Hardy, Q.C.* and *Wm. Fooks* for the plaintiff company.—Since the defendant society is intended to carry on the same business as the plaintiff company, and it bears a name so similar as to be calculated to deceive the public, the injunction should be granted:

*Hendriks v. Montagu*, 44 L. T. Rep. N. S. 86; 17 Ch. Div. 638.

In the case of *Merchant Banking Company of London v. Merchants' Joint Stock Bank* (9 Ch. Div. 560) the rival concerns were situated in different localities, and the court could not see any intention to commit fraud, but the principle was fully recognised. In the present case the two offices are close together. The exigencies of the present case would be met by the defendant using some other word than "Accident," e.g., "Disease," as the prominent word in the title.

*Cookson, Q.C.* and *P. B. Abraham* for the defendant company.—The plaintiff company is in fact trying to secure a monopoly in the word "accident" to which it is not entitled. It is used by a great number of companies, and it is not a fancy word. It is really descriptive of the business carried on:

*The Colonial Life Assurance Company v. The Home and Colonial Assurance Company Limited*, 10 L. T. Rep. N. S. 448; 33 Beav. 548.

The exclusive use of a name which correctly describes the nature of a company's business, or the locality of its operation, ought not to be monopolised. Per *James, L.J.*:

*Australian Mortgage Land and Finance Company v. Australian and New Zealand Mortgage Company*, W. N. 1880, p. 6.

The court will consider whether, taking all the names together, it is or is not apparent that there is such a deceptive quality as is likely to produce the injury complained of:

*The London and Provincial Law Assurance Society v. The London and Provincial Joint Stock Life Assurance Company*, 10 L. T. Rep. O. S. 127.

We claim the benefit of the decision in *Merchants' Banking Company of London v. Merchants' Joint Stock Bank* (*ubi sup.*) as applying to this case. The injunction was also refused in

*The London Assurance v. The London and Westminster Assurance Corporation Limited*, 8 L. T. Rep. N. S. 497.

The only case not in our favour is *Hendriks v. Montagu* (*ubi sup.*). No case is to be found of interference with a company already registered.

*PEARSON, J.*—The plaintiff company has existed since the year 1849; that is to say, it succeeded to a business which had been carried on since 1849, and during the time since its establishment I suppose it has been a very profitable business. The defendant company seeks now to call itself by a name which is so like that of the plaintiff company that I am satisfied in my own mind that it would deceive persons, and would be likely to appropriate to the defendant company business which belonged to the plaintiff

company. The defendant company was registered only in the year 1883, and I think I cannot do any serious injury in making an order which would have the effect of causing them to act with honesty and justice in commencing their business. There is no new law upon the subject, either in the case of *The Merchant Banking Company of London v. The Merchants' Joint Stock Bank* (*ubi sup.*), before the Master of the Rolls, or the case of *Hendriks v. Montagu* (*ubi sup.*), before the Court of Appeal. In each case the court proceeded to act upon the same rule. In the case of *The Merchant Banking Company of London v. The Merchants' Joint Stock Bank* (*ubi sup.*), the Master of the Rolls pointed out that, whilst the one company would be in the heart of the city, the other would be in Bloomsbury, as he said, and they were intended for different clients—and then going over the whole of the evidence, in order, if he could, to see what grounds there were in support of the application made to him, he summed it all up at the end in a passage to which I will invite attention, as showing the grounds on which he proceeded. This is what he said: "In this case I am quite satisfied that there never was an intention on the part of the defendants to appropriate, nor a probability of their appropriating, the plaintiffs' business; and I am also satisfied that there is not likely to be any damage or injury to the plaintiffs at all from the act of the defendants, and, that being so, I refuse the injunction." In the case of *Hendriks v. Montagu* (*ubi sup.*) *James, L.J.* said: "So far as the Registrar is concerned, they have a right possibly to go to him and say, 'Register this company, subject to the statutory provision as to similarity of name with that of any other registered company;' but that has nothing to do with the jurisdiction of the High Court to say, 'Yes, but you must not do mischief to anybody else.' Supposing they had registered in the very name of an existing company, they might say: 'We are entitled to do that because we have not registered for the purpose of carrying on the same business, although we have registered in your very name.'" So that the same rule would apply. In this case the plaintiff company has carried on business for a number of years as "The Accident Insurance Company," the new company has registered itself as "The Accident, Disease, and General Insurance Corporation Limited." I have it proved before me that which it is almost unnecessary to prove, viz., that either of the companies would, in the course of business, become known by a name shorter than the whole name, and that the old company is known as "The Accident Company." The other company professes to have discovered a new ground with regard to disease, and that being a novelty, instead of putting "Disease" first, it puts "Accident" first. It might as well have called itself by the words "Disease, Accident, and General Insurance Corporation." It might even have put the word "General" first. That would have answered all its purposes as well as anything else; but instead of that it takes a title which is so like the plaintiffs' title that I am satisfied by the evidence before me that it is calculated to deceive, and that it is also calculated to appropriate to the defendant company business which would legitimately go to the plaintiff company. It is impossible to allow the defendant company to carry on its business under that name,

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and I must therefore grant the injunction with costs.

Solicitors for the plaintiff company, Wynne-Baxter, Rance, and Mead.

Solicitor for the defendant company, J. Tickle.

# QUEEN'S BENCH DIVISION.

Friday, Nov. 21, 1884.

(Before GROVE and HAWKINS, JJ.)

TRUSTEES OF EVAN JONES v. GITTINS. (a)

*Prohibition—County Court—Insufficient notice for new trial—Jurisdiction of judge to re-hear a case when an insufficient notice has been given.*

Order XXVIII., r. 1, of the County Court Rules 1875, provides that a person applying for a new trial in a County Court shall give the opposite party seven clear days' notice in writing of his intention so to apply.

A notice was given by the defendant to the plaintiff by letter on the 8th Nov., stating that he would apply on the 12th Nov. for a new trial. The plaintiff refused to accept this notice as being too short, and did not attend at the hearing on the 12th.

The fact that the plaintiff objected to the notice was brought before the judge, who, however, made an order for a new trial.

The plaintiff applied for a prohibition to restrain the judge from hearing the case on the new trial.

Held (refusing a rule for prohibition), that a prohibition ought not to be granted, as the proper proceeding to have been adopted would have been to have made an application to the judge to set aside the order for a new trial as irregular.

Motion for a rule nisi for a prohibition to the County Court judge of Newtown, Montgomeryshire, to restrain him from hearing a case on a new trial.

An action had been brought in the above County Court, and judgment given for the plaintiff on the 23rd Oct., for a sum of 29l. and costs; execution was stayed for one month on the terms of the defendant paying the amount of the judgment into court. The money was not paid in, and execution was issued and the amount realised.

On the 8th Nov. a letter was written by the defendant's solicitors to the solicitors for the plaintiffs, stating that they would apply on the 12th Nov. for a new trial, and hoping that they (the plaintiffs' solicitors) would accept this letter as a sufficient notice under the circumstances. This the plaintiffs' solicitors refused to do.

On the 12th Nov. the plaintiffs did not appear, and the defendant applied for a new trial, at the same time informing the judge of the objection raised by the plaintiffs as to the insufficiency of the notice.

The learned County Court judge granted a new trial.

By Order XXVIII., r. 1, of the County Court Rules 1875, a person applying for a new trial in a County Court must give to the opposite party seven clear days' notice in writing of his intention so to apply.

Sidney Woolf now moved for a rule for a prohibition.—The provision as to giving seven clear days' notice of an intention to move for a new trial

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

is obligatory and not merely directory; and the giving of such notice is a condition precedent to the right of the County Court judge to grant a new trial. Here there was only four days' notice given, and I submit that the judge had no jurisdiction to hear the application for a new trial.

*Re Jones v. Jones*, 17 L. J. 170, Q. B.; 5 D. & L. 635, B. C.;

*Great Northern Railway Company v. Mossop*, 17 C. B. 130; 25 L. J. 22, C. P.

*Barker v. Palmer*, 45 L. T. Rep. N. S. 490; 8 Q. B. Div. 9; 31 L. J. 110, Q. B.

GROVE, J.—I am of opinion that there should be no rule in this case, and the ground of my decision is, that there is nothing in the case to show that this question has ever been brought before the County Court judge. He thought he had the right to grant a new trial and he did so, and no application has been made to him to rescind it. In the case of *Barker v. Palmer* (*ubi sup.*) the objection was taken and argued before the judge, and he gave his decision upon it. Here the County Court judge's opinion has never been asked, and I think that, before any application was made to this court for a prohibition, the judge should have had an opportunity of hearing the question, but that step has not been taken. I do not express any opinion as to whether, after the opinion of the County Court judge had been taken on the question, this court would grant a prohibition or not. As the case stands, there are not sufficient grounds for this court to grant a prohibition.

HAWKINS, J.—I am of the same opinion. This is an application for a prohibition to restrain a County Court judge from trying a cause. He tried the case once, and the judgment in it has been set aside by him. It is quite true that before a verdict can be set aside a certain notice must be given; but a defect in the notice would be merely an irregularity. Here there was no attendance before the judge of the complaining party, and no complaint was made as to the insufficiency of the notice, and under these circumstances the judge made an order for a new trial. If that order was rightly made, no objection can be made to the new trial, and while that order remains in force, the first step ought to have been to set it aside on the ground of irregularity in the notice. I am of opinion that the proper proceeding would have been to have made an application to the judge to set aside the order as irregular, and, as no such application was made, the rule for a prohibition must be refused.

Rule refused.

Solicitors, E. Flus and Leadbitter.

Monday, Nov. 24, 1884.

(Before MATHEW and SMITH, JJ.)

THE LONDON, TILBURY, AND SOUTHEND RAILWAY COMPANY v. KIRK AND RANDALL. (a)

*Practice—Interrogatories—Privilege—Sufficiency of answer—Answer as to matters within the knowledge of servants—Privileged reports sent in by servants or agents.*

In an action for damage caused by the negligence of the defendants or their servants in the use of an

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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engine, whereby sparks and red-hot cinders escaped from the engine and set fire to the plaintiffs' buildings, the plaintiffs administered the following interrogatory:

"Have the defendants or any of their servants or agents any knowledge, information, or belief as to the cause of the fire in respect to the happening whereof this action is brought? If yea, set out the same fully, with dates and all particulars. If any of the said servants or agents have communicated to the defendants such knowledge, information, or belief, let the defendants set out the substance of such communications, with dates and all particulars."

To this the defendants answered:

"We have no information at all on the subject, save such as appears in the reports set out in the schedule to our affidavits, filed in this cause on the 28th May 1884, and which by the judgment of the Divisional Court of the 7th July last were held to be privileged from production, which we decline to produce."

Held, that the answer was sufficient, as a further or better answer could not be given without disclosing the contents of privileged reports made to the defendants by their servants, which reports the defendants were not bound to disclose.

*Bolckow v. Fisher* (47 L. T. Rep. N. S. 724; 10 Q. B. Div. 161; 52 L. J. 12 Q. B.) distinguished.

SUMMONS for further and better answers to interrogatories referred by Field, J. to the court.

The action was brought for damage caused to certain buildings at Tilbury belonging to the plaintiffs, which damage was alleged to have been caused by the negligence of the defendants or their servants in the management and use of an engine, whereby sparks and red-hot cinders escaped from the engine, setting fire to the buildings and destroying their contents. The defendants were at the time employed in the construction of the Tilbury Docks, under a contract with the East and West India Dock Company.

The plaintiffs wished to interrogate the defendants as to what was their information as to the cause of the fire, and it was proposed to obtain this information from the reports which were scheduled to the defendants' affidavit of documents, as having been made by persons in their employment at, or subsequently to, the time of the fire, but the defendants claimed privilege for these reports, as having been made by their servants in the ordinary course of their duty, and ultimately a divisional court held that these reports were privileged.

An order was then obtained by the plaintiffs for leave to administer further interrogatories, when the following interrogatory was administered:

Have the defendants, or any of their servants or agents, any knowledge, information, or belief as to the cause of the fire, in respect to the happening whereof this action is brought? If yea, set out the same fully, with dates and all particulars. If any of the said servants or agents have communicated to the defendants such knowledge, information, or belief, let the defendants set out the substance of such communications, with dates and all particulars.

To this the defendants answered:

We have no information at all on the subject save such as appears in the reports set out in the schedule to our affidavits filed in this cause on the 28th May 1884, and which by the judgment of the Divisional

Court of the 7th July last were held to be privileged from production, which we decline to produce.

Master Pollock made an order for a further and better answer to the above interrogatory. The defendants appealed, and the matter was referred to the court by Field, J.

*Edwyn Jones* for the defendants.—The reports here have been held by the court to be privileged, and the plaintiffs, therefore, are not entitled to see them. But then it is said that, although the plaintiffs are not entitled to see the reports, they are entitled to a discovery of their contents; but I submit this comes to the same thing, as it is an attempt to get at the contents of documents which have been held to be privileged. In *Lyell v. Kennedy* (50 L. T. Rep. N. S. 277; 9 App. Cas. 81) it was held, by the House of Lords, that a party to an action cannot be compelled to answer interrogatories asking as to his knowledge, information, or belief, with regard to matters of fact, if he swears that he has no knowledge or information with regard to those matters except such as he has derived from privileged communications made to him by his solicitors or their agents; for since, under those circumstances, his knowledge and information are protected, so also is his belief when derived solely from such communications. [SMITH, J.—How do you get over *Bolckow v. Fisher* (*infra*)?] That case is different from the present, as there it was simply held that a party was not excused from answering on the ground that the interrogatories were as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of business. In giving judgment in that case Brett, L.J. said: "Then it is further said, that a party to a cause cannot be asked to give the contents of his brief. That is a figurative expression, and I take it to mean that, though a party may be asked as to certain facts, he cannot be asked with regard to the evidence of those facts." I submit that is precisely what the plaintiffs are trying to do in this case, as they are trying to discover, not facts which have come to the knowledge of the defendants' servants in the ordinary course of business, but the evidence by which the defendants' case would naturally be supported at the trial. He also referred to

*Rasbotham v. Shropshire Union Railways and Canal Company*, 48 L. T. Rep. N. S. 902; 24 Ch. Div. 110.

*Gore* for the plaintiffs.—The defendants admit that at the time of the accident their servants were close to the fire. By *Bolckow v. Fisher* (47 L. T. Rep. N. S. 724; 10 Q. B. Div. 161) a party is bound to give such information if it is within the knowledge of his agents or servants, and derived in the ordinary course of their employment, and is also bound to obtain the information from such agents or servants. According to this case, if there had been no reports sent in by the servants of the defendants at the time when this question was asked, the defendants would have been bound to obtain the information from their servants and to answer the question. This being so, they are not exempted from answering by obtaining privileged reports in the meantime. [SMITH, J.—The defendants cannot answer this interrogatory without having recourse to the privileged reports.] I do not contend that I can have either the contents of the

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privileged documents or the documents themselves. The first interrogatory is simply this: "Your agents or servants were close to the fire, have they any knowledge, information, or belief as to the cause of the fire?" It is immaterial that the defendants have privileged reports, if they had none they would have been bound to answer the question. In *Lyell v. Kennedy* (*ubi sup.*) the case is different, as in that case the answer was privileged in the hands of the agents, as well as in the hands of the principals.

MATHEW, J.—This motion must be refused. I come to this conclusion because it is an attempt to get at the contents of documents which have been held to be privileged. The first interrogatory is stated in the following form: [reads it]. The objection on the part of the defendants to answer this interrogatory was, that it was simply an attempt on the part of the plaintiffs to obtain indirectly what they could not obtain directly, namely, the contents of these privileged reports, and to obtain the evidence by which the defendants would sustain their case at the trial. I think this objection is well founded. We have been referred to *Bolckow v. Fisher* (*ubi sup.*). It seems to me that the foundation of that case is, that the knowledge of the agent is the knowledge of the principal, and that all that case says is that, if you say you are not informed, you are bound to inform yourself from your agents or servants. That case is different from the present, where the reports have been held to be privileged. I think the proper way of dealing with this case is to refuse the application; the costs to be costs in the cause.

SMITH, J.—I am of the same opinion. I think the defendants are not bound to answer this interrogatory, as it is drawn for the purpose of enabling the plaintiffs to get at the contents of documents which have been held to be privileged. *Bolckow v. Fisher* (*ubi sup.*) was an action by cargo owners against the owners of a ship for a loss alleged to have arisen from negligence in the navigation of such ship, by which she ran ashore and was stranded, and an answer by the defendants to interrogatories as to what was done by those on board with regard to such navigation at the time of the accident, which stated in substance that the defendants were not on board at the time, and had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which the plaintiffs had had inspection, was held insufficient, as it did not appear that there was any difficulty in the defendants obtaining the required information from those who were in charge of the ship at the time of the accident. But that is not the same as this case, which is an attempt to obtain the information from the reports sent in by the servants of the defendants, as it is impossible to answer this question without giving the contents of the reports which have been held to be privileged, and it seems to me that it would be useless for the court one day to decide that a document was privileged, and the next day to say that the contents of that document must be given in answer to an interrogatory.

*Application for further answer refused; costs, costs in the cause.*

Solicitors: For the plaintiffs, Palmer and Bull; for the defendants, John Mackrell, Maton, and Co.

Monday, Nov. 24, 1884.

(Before MATHEW and SMITH, JJ.)

SAYWOOD v. CROSS. (a)

*Practice—Costs—Action on contract which cannot be brought in a County Court—Breach of promise to marry—Verdict for less than 50l.—Order LXV., r. 12.*

*Order LXV., r. 12, provides that "in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50l., he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the court or a judge otherwise orders."*

*Held, that this rule does not apply to an action for breach of promise to marry, inasmuch as such an action cannot be brought in a County Court.*

APPLICATION to review a taxation of costs.

An action for breach of promise to marry was tried before Smith, J. and a jury in May 1884. The plaintiff claimed 200l. damages, and the jury gave a verdict for her for 20l. The plaintiff's counsel applied for costs on the High Court scale, but the learned judge refused to certify for such costs, under Order LXV., r. 12, leaving the plaintiff to recover such costs as, on the construction of the rules, she might be entitled to. Order LXV., r. 12, provides that:

*In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50l., he shall be entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the court or a judge otherwise orders.*

On the taxation of costs, the master held that Order LXV., r. 12, did not apply to actions for breach of promise to marry, as such actions could not be brought in a County Court, and he accordingly taxed the costs on the High Court scale.

The defendant appealed, and Wills, J., in chambers, referred the question to the court.

*Earle* for the defendant.—Order LXV., r. 12, applies to all actions of contract, whether they can be brought in a County Court or not. By sect. 5 of the County Courts Act 1867 (30 & 31 Vict. c. 142) it was provided that if the plaintiff in an action recovered a sum not exceeding 20l. in an action of contract, or 10l. in an action of tort, he should not be entitled to costs, unless the judge certified for such costs. In *Sampson v. Mackay* (20 L. T. Rep. N. S. 807; L. Rep. 4 Q. B. 643) it was held that sect. 5 of the above Act applied to all actions, whether they can be brought in a County Court or not.

*Cluer*, for the plaintiff, was not called upon.

MATHEW, J.—The object of Order LXV., r. 12, seems to me to be to coerce a plaintiff to go into a County Court in cases where it is possible for him to do so. The effect of the rule, therefore, is to deprive a plaintiff of his costs in those cases only where he could have had recourse to a County Court. If the rule did that for which Mr. Earle has contended, I should be strongly of opinion that it was *ultra vires*; but it seems to me that it only applies to those cases where a plaintiff brings an action in the High Court which he could have brought in a County Court. Here the plaintiff

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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brings in the High Court an action which she could not have brought in a County Court, and recovers a verdict for 20l. I am of opinion that Order LXV., r. 12, has no application in such a case, and that the costs have been properly taxed on the High Court scale. We have been referred to the case of *Sampson v. Mackay* (ubi sup.), but that case was decided before the Judicature Act 1873, sect. 67 of which expressly says that sect. 5 of the County Courts Act 1867 shall be confined to actions where the relief sought could be given in a County Court.

SMITH, J.—The question is whether Order LXV., r. 12, applies to actions for breach of promise to marry. It appears to me that it does not. The rule merely says that if a persons brings in the High Court an action which he may bring in a County Court and recovers only a certain amount, he shall only have County Court costs, unless the court or judge shall otherwise order. I am of opinion, therefore, that the costs were properly taxed on the High Court scale.

*Application refused.*

Solicitor for the plaintiff, C. E. R. Preston.

Solicitors for the defendants, Postans and Landons.

### QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

*Monday, Nov. 10, 1884.*

(Before CAVE, J.)

Re THOMAS; Ex parte POPPLETON. (a)

*Money-lending society—More than twenty members—Non-registration—Sect. 4 of Companies Act 1862—Loan to member—Subsequent registration—Acquiescence of debtor—Bankruptcy of debtor—Admissibility of society's proof.*

A money-lending society, consisting of more than twenty persons, and not being duly registered under the Companies Act 1862, advanced 100l. to one of its members upon a promissory note, the amount to be repaid by monthly instalments. Subsequently the society was registered in accordance with the Act, and the debtor, who had duly paid instalments up to the time of registration, continued to pay further instalments up to the time of his bankruptcy. When he became bankrupt the society tendered a proof for the balance of his debt to them, but the trustee rejected the proof on the ground that the society, by reason of the non-registration at the period when the advance was made, could not have enforced any claim against the debtor, and were therefore not entitled to prove. The County Court judge, however, admitted the proof on the ground that the society might have enforced their claim against the debtor because, at the first meeting of the society, there were less than the prescribed number of members.

*Held, on appeal (reversing the County Court judge), that the society was within the scope of the 4th section of the Companies Act 1862, but that it must be inferred from the payment by the debtor of instalments after the registration that he had acquiesced in the registration; and that the several members of the society had entered into a mutual and binding contract to treat as binding the engagements of the old society, in*

*which contract the agreement of each member was a good consideration for the agreement of the remainder; and further, that this acquiescence on the part of the debtor was binding on the trustee, and rendered the proof admissible.*

*Crowther v. Thorley* (50 L. T. Rep. N. S. 43) distinguished.

THIS was an appeal from a decision given on Friday the 27th June by the County Court judge at Huddersfield. On the 21st Jan. 1881 seven persons, one of whom was the debtor Thomas, met together for the purpose of forming a mutual money-lending society, to be called the Star Inn Building and Commercial Society. The meeting was adjourned until the 2nd Feb., and from then till the 2nd March. Upon that occasion, and upon all subsequent occasions, the number of members exceeded twenty, and the society, which existed for the purpose of gain, ought therefore, from the beginning, to have been protected by registration under sect. 4 of the Companies Act 1862.

On the 9th Sept. 1881 the debtor Thomas borrowed 100l. from the society upon a promissory note, to be repaid by monthly instalments. He duly paid several of these instalments. The company was registered in June 1883, and he subsequently paid three other instalments.

On the 6th Dec. 1883 he filed his petition. Upon the society's presenting their proof for 68l. the balance of the debt due, it was rejected by the trustee on the ground that it could not have been enforced against the debtor by reason of the non-registration. The County Court judge, however, admitted the proof on the ground that the original number of the members of the society was less than twenty. This decision was now appealed against.

Forbes, Q.C. (with him Harper) for the appellants.—I will first treat the learned County Court judge's ground for admitting the proof, and the other matters later.

CAVE, J.—I should like to hear Mr. Learoyd in support of the decision first.

Learoyd (solicitor) for the respondents.—The company ought, I admit, to have been registered from the beginning. It was not registered until the 29th June 1883; but the debtor had notice of the registration and acquiesced in it, showing his acquiescence by paying 2l. 17s. 3d., and more on subsequent occasions as the instalments due in payment of his debt. On the 6th Dec. 1883 he filed his petition, leaving a balance of 68l. due which is the subject of the present proof. I assume, and I could not deny, that the debtor himself could at the time of registration have repudiated the liability. But the agreement of the members to abide by their former contracts was equivalent to a mutual contract to remove the legal infirmity attaching to the society; their contract was not without consideration, and it would not now be open to anyone of them to withdraw from his former liabilities in respect of the society:

*Cuimores v. Lorrimer*, 7 Jur. N. S. 149.

The trustee can have no better title than the debtor would have had, for there is no pretence of a bankruptcy title here. I might also argue that there was a new contract—not to take advantage of the legal infirmity—of which the consideration



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for each member was the contract of his fellow-members :

*Sharpe v. Taylor*, 2 Phillips, 801;

*Beaife v. Morgan*, 4 M. & W. 870.

Further, the Act is only aimed at the formation of a society, and in *Shaw v. Benson* (36 L. T. Rep. N. S. 805) the Court of Appeal showed a decided inclination to avoid the strictness of the Act. My last point is, that the business of the company was conducted by eight trustees, and that I am therefore within the decision in

*Crowther v. Thorley*, 50 L. T. Rep. N. S. 43.

*Forbes*, Q.C. in reply.—The debtor did not alter his attitude towards the society after registration, but merely went on paying as before; and in the society itself there was no change after registration. The original society could not have enforced the debt, and the new society could not better the character of the note which it received together with full notice of its defective character.

CAVE, J.—The Star Inn Commercial and Building Society was originally founded by ten or eleven persons who met together on a certain day in Jan. 1881, and who adjourned their meeting to the 2nd Feb. 1881. They then fixed the 2nd March 1881 for the payment of contributions, and on the 2nd March 1881 more than twenty persons became members of the association, and the association has consisted of more than twenty from that day to this. I am of opinion that this is clearly an association within the meaning of the 4th section of the Act. I cannot assent to the doctrine that, because a society is projected by ten people and subsequently grows, it is outside the Act. This would be making a laughing-stock of the Act altogether. In my view the moment the number of the members amounted to more than twenty, it became illegal for them to carry on business without registration. Secondly, it is urged by Mr. Learoyd that, although the members of the association numbered over twenty, yet the business was really carried on by the committee as trustees within the meaning of *Crowther v. Thorley* (*ubi sup.*), and consequently it was not bound to be registered under the Act. The society was a money-lending society, and the committee carried on, as the agents of the society, business which the individual members of the society could not possibly have carried on for themselves. The committee did not carry on business as trustees, like the trustees in *Crowther v. Thorley*, but carried on business simply and solely as the officers and agents of the society, whatever they may have been called. The main object of the society in *Crowther v. Thorley* was to buy freehold land and divide it amongst the members, and, in my opinion, the judgment in that case proceeds upon the fact that the trustees carried on business in their own name, and were themselves responsible. In this case the committee did not carry on business in their own name, and their authority was exceedingly limited. They were appointed in pursuance of the rules of the society, and, although they were empowered to make and did make bye-laws, yet those bye-laws were all of quite a subordinate character. If I were to hold that the society did not require registration, I should be holding practically that no society, although it should contain more than twenty members, required to be registered so long as its business was carried on by agents. I have there-

fore come to the conclusion, as I have stated before, that the business of the society was being carried on in an illegal manner, and that down to 1883 the debtor might have repudiated his obligation to the society, and could not have been compelled to repay the money which he had borrowed. But on the 23rd June 1883 a very important change took place. It was discovered that the society was unprotected because it was not registered, and steps were taken to procure registration. It was sworn that the debtor had notice of the incorporation of the society, and that since the incorporation he had made three payments, at different periods, and that he had recognised and adopted the incorporation. In my opinion there was a binding and an express agreement between the parties that they would treat as binding the engagements of the old society, and to this agreement the debtor bound himself by acquiescence. It was competent for the several members to bind themselves to their old contracts, and the agreement of the one was a good consideration for the agreement of the other. In the case of this society there were a large number of advanced members. There were others who were lending members and who had a very strong interest in seeing what was to be done and whether the old society would be kept up. The interests of the advanced members were rather in the direction of having nothing to do with the original society. The society was registered, and I have no doubt whatever that the members in general continued, with notice of that registration, to make payments. I have offered Mr. Forbes an opportunity of taking an adjournment in order that an inquiry might be made so that it might be discovered whether or no the shareholders, after the 23rd June, and with the knowledge of the registration, continued to pay their contributions to the society and to act as if the society had been registered all along. He, in the exercise no doubt of a very wise discretion, declined this. I am of opinion that, upon the statements contained in the affidavit of Mr. Jessop and in the absence of any explanation as to these circumstances from the debtor, the proper conclusion is that he, along with the others, did determine to recognise and adopt the incorporation of the new society, and that they would go on with the new society in exactly the same way as before the registration. I am of opinion on these grounds that there was a good debt, and that the proof ought to have been admitted, but I come to that conclusion upon different grounds from those taken by the County Court judge.

*Appeal dismissed.*

Solicitors for the appellants, *C. Fitch*, agent for *Milnes and Marshall*, Huddersfield.

Solicitors for the respondents, *Learoyd and James*, agents for *Learoyd and Piercy*, Huddersfield.

ADM.]

THE BRITISH COMMERCE—REG. v. WELLARD.

[CR. CAS. RES.]

# PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

## ADMIRALTY BUSINESS.

Tuesday, June 17, 1884.

(Before BUTT, J.)

### THE BRITISH COMMERCE. (a)

*Collision—Salvage—Commission on bail—Liability of wrong-doer—Practice.*

*In a damage action the plaintiffs are not entitled to recover as part of their damages a sum paid by them as commission on bail given in an action brought against their ship by salvors whose services were necessitated by the collision.*

*The vessels A. and B. came into collision, in consequence of which salvage services were rendered to the B. by the C. The salvors instituted an action against the B., in which the owners of the B. tendered, but the salvors recovered more than was tendered them. The A. was condemned in the damage action brought by the B., and on reference to the registrar and merchants to ascertain the amount of the A.'s liability, the registrar allowed the costs incurred by the owners of the B. in defending the salvage suit, but struck out the commission on the bail given by the owners of the B. for the release of their vessel in the salvage action. On objection to the registrar's report:*

*Held, that, as commission on bail is not recoverable as defendants' costs in a salvage action, such item could not be recovered from the owners of the A.*

*Quære, whether the owners of the B. were entitled to the costs incurred by them in the salvage action.*

*The Legatus (Swa. 168) doubted.*

THIS was a special case stated by the parties to a damage action for the opinion of the court as to the liability of the defendants, under the circumstances hereinafter stated, in respect of commission on bail given for the release of the plaintiffs' ship.

In consequence of a collision between the two vessels the *County of Aberdeen* and the *British Commerce*, salvage services were rendered by the steamship *Paris* to the *County of Aberdeen*. In respect of these services the owners, master, and crew of the *Paris* instituted a salvage action against the *County of Aberdeen*, in which action the *County of Aberdeen* was arrested, but released on her owners giving bail in 2000*l.*, for which they had to pay a commission of 1 per cent., amounting to 20*l.* A tender of 1000*l.* was overruled by the court, which awarded 2000*l.* In the damage action subsequently instituted by the owners of the *County of Aberdeen* against the *British Commerce*, the *British Commerce* was held alone to blame. On the reference to the registrar and merchants to ascertain the amount of the liability of the *British Commerce*, amongst other items claimed was the 20*l.* paid by the owners of the *County of Aberdeen* as commission on bail in the salvage action. This item the registrar refused to allow, to which objection was taken by the plaintiffs, and the question now came before the court by way of motion.

*Bucknill*, for the owners of the *County of Aberdeen*, in support of the motion.—In consequence of the wrongful act of the defendants this expense

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

had to be incurred by the plaintiffs. If the ship had not been bailed out the plaintiffs would have had a claim for marshal's possession fees against the defendants, which would have greatly exceeded the 20*l.* paid as commission on bail. [BUTT, J.—Surely it only needs a statement of the facts to at once show that you must fail on this application. Your course is clear. You should tender. If the tender is adequate, then you get your costs; if inadequate, then you must bear the consequences.] The principle for which I am contending was acted upon by Dr. Lushington in *The Legatus* (1 Swa. 168), where he, under similar circumstances, allowed the plaintiffs in the damage action to recover from the defendants the costs incurred by them in the salvage action. That is the practice of the court, and it covers the present case. [BUTT, J.—I doubt whether that is correct, but you are now asking me to extend that practice to commission on bail, which the registrar tells me is never allowed. If I am bound by the practice laid down in *The Legatus* (*ubi sup.*), I am just as much bound by the practice as to commission on bail.]

*J. P. Aspinall*, for the defendants *contra*, was not called upon.

BUTT, J.—I cannot alter this report. In the first place, I am told that the 20*l.* would not by the practice of the court be allowed as between the immediate parties to a salvage action. Therefore, if I am bound by the practice of the court I am right in disallowing this commission on bail as against the defendants in the damage action, who were not parties to the salvage action. At the same time, although it is not necessary to decide it, I have my doubts as to the principle laid down in *The Legatus* (*ubi sup.*). I myself should want a great deal of persuasion to induce me to think that under circumstances like the present the defendants in the salvage action are entitled to be paid the costs of defending that action by the defendants in the damage action. It is enough for me now to say that I shall not extend that principle by applying it to commission for bail.

*Application dismissed.*

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Gregory, Rowcliffe, and Co.*

## CROWN CASES RESERVED.

Saturday, Nov. 29, 1884.

(Before Lord COLERIDGE, C.J., GROVE, J., HUDDLESTON, B., MANISTY and MATHEW, JJ.)

REG. v. WELLARD. (a)

*Public place—Indecent exposure—Witnesses of offence trespassing at time of commission—Place to which public have access, but no legal right of access.*

*In order to support an indictment for indecent exposure in a public place, it is sufficient to show that the offence was committed in a place where an assembly of the public is collected.*

CASE stated by the justices of the peace for the County of Kent:—

At the Court of General Quarter Sessions of

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

the peace, holden in and for the county of Kent at Maidstone, on the 3rd day of July, 1884, Frederick Wellard was indicted, tried, and convicted of the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet.

The evidence showed that the prisoner Frederick Wellard, in the middle of the day on the 28th May last, called some seven or eight girls of the ages of eleven and eight and thereabouts, who were at play near Northfleet Church, and told them that if they would go down into the marsh with him he would give them a halfpenny. On this the girls all went down into Northfleet Marsh with him, following him. They first went along a public footpath for some distance, and then came to a row of willow trees growing at a certain angle with the path, there the prisoner and the girls turned off the footpath on to the marsh where there was no path. There was another row of trees a little distance off, the prisoner and the girls went in on the grass land between the two rows of trees till they came to a fallen tree about one hundred and seventy paces from the footpath, and out of sight of it. At the fallen tree the prisoner lay down on the ground and there intentionally exposed his person indecently to all the seven or eight little girls together, who were close to him, and he invited them to touch his person, and used disgusting language. No one but the girls saw this exposure, nor could anyone have seen it from the footpath. As the girls were on the footpath on their way to the fallen tree they saw some boys bathing in the water two or three hundred yards off on the other side of the marsh. These boys saw the girls while the girls were on the footpath, but lost sight of them for a short time when they turned off. The boys dressed quickly and came up as soon as they could after the girls to the fallen tree, there they found prisoner lying down after his exposure of his person to the girls. The girls were there also. These boys saw nothing improper, as the prisoner had turned round on their approach, and was lying on his stomach. When the prisoner and the girls turned off from the footpath towards the fallen tree they were, legally speaking, trespassing, but all persons who desired to do so were in the habit of going on to the marsh, and no one interfered with them or hindered them, or made objection.

The question for the court is whether on these facts the jury were justified in finding that the prisoner exposed himself indecently in a "public place."

Sentence was deferred. The prisoner was let out on bail to come up for judgment at the next quarter sessions.

JOHN G. TALBOT, Chairman of the Court of Quarter Sessions.

F. J. Smith, on behalf of the prisoner, contended that there was no evidence to support the conviction, for the act of indecency was not committed in a place of public resort, or in a place where it was visible to the public. In *Reg. v. Thakman* (33 L. J. 58, M. C.; L. & C. 326) it was held that it is an indictable offence to commit an act of indecency where a great number of persons may be affected by the criminal act, but here the act was committed on private land, out of sight of

any place to which the public had a right to resort. [Lord COLERIDGE, C.J.—There is the case of *Reg. v. Holmes*, 32 L. J. 122, M. C., where it was held that the inside of an omnibus was a public place.] In that case the omnibus was passing along the highway. No private property, unless it is within the view of the public, can be a public place. In *Turnbull v. Appleton* (45 J. P. 469) a conviction for gaming in a place to which the public were permitted to have access was upheld, although the place upon which the offence was committed was private property, but that was a conviction under the Vagrancy Act of 1875, which amended the old Vagrancy Act (5 Geo. 4, c. 83), by adding the words "in any open place to which the public have or are permitted to have access." The former Act only referred to "any street, road, highway, or other open and public place," and the court doubted whether the conviction could have been sustained had that Act not been amended. In *Reg. v. Watson* (2 Cox C. C. 376) the prisoner had exposed himself to a young girl in Paddington churchyard, and although that is undoubtedly a public place, the court held that the indictment could not be sustained. The present case was one which certainly ought to be brought within, but at present it was not within the reach of the law. In *Langrish v. Archer* (47 L. T. Rep. N. S. 548; 10 Q. B. Div. 44; 52 L. J. 47, M. C.) had the railway carriage, in which the gaming was being carried on, been shunted into a siding, it could not have been held to be "an open and public place to which the public have or are permitted to have access," as was in that case held: (see *Re Freestone*, 1 H. & N. 93; 25 L. J. 121, M. C.) In *Reg. v. Harris* (40 L. J. 67, M. C.) a urinal was held to be a public place, but it was found in the case that it was open to the public. In order that a place may be a public place, it is necessary that the public should have a right of access to it, or that it be within view of the public from a place to which they have a right of access; and, as here it was found that the prisoner and all the witnesses of the act of indecency were trespassers at the time the act was committed, the jury could not find that it had been committed in a public place.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction must be affirmed. This is an indictment at common law, apart from any statute, which charges the prisoner with the misdemeanour of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet. That is the indictment. The offence undoubtedly was committed before seven or eight girls together, and the sole question is whether on the facts which are stated, the jury were justified in finding that the prisoner had indecently exposed himself in a public place. The evidence is, that the offence was committed in a field on a grassy spot between two rows of trees, where the indecent act could not be seen from the footpath which led near to the spot; it was committed in a place to which the public had no legal right of access. Still they had always been in the habit of going upon this marsh, and no one interfered with them or hindered them, or made any objection. The question is whether, under these circumstances, in a place thus described, this indecent exposure was an indecent act committed in a public place. Now

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Mr. Smith has been asked by me several times during the course of the argument, whether he can define either affirmatively or negatively, in a matter of this kind, what is a public place. He has not given us any affirmative definition, and has been disposed to contend that, in no place where there is a collection of persons, and I suppose he must go so far as to say a collection of however many persons, if there is no legal right on the part of those persons to be in such place, can a person who is guilty of an indecent act in the presence of the people assembled be found guilty of the misdemeanour of indecently exposing himself in a public place. I am of opinion that such a negative argument as this will not hold good, and that it is sufficient to show that the place is such a place as this marsh, to which the public have access, though they have no legal right of access thereto. In my opinion the offence is complete, as against public morality, if it is committed in any place where an assembly of the public is collected. There is a difficulty to my mind certainly in giving an affirmative definition as to what is a public place, but I am by no means certain that the publicity of the spot where the offence takes place has anything to do with it. This, however, is clear, that what is a public place will vary from time to time; that is to say, that a place may be a public place at one time for the purpose of having an offence committed in it, and may not be a public place at another time for that purpose. The question is, whether at the time the offence is committed the place is a public place in the natural and ordinary sense of the term. In *Reg. v. Crunden* (2 Camp. 89) M'Donald, C.B. points out in a short and, if I may say so, good judgment, the obvious sense of what I have been endeavouring to give as my opinion. There it appeared that on a Sunday afternoon the defendant had bathed opposite the East Cliff at Brighton, undressing and dressing himself upon the beach; that till within a very few years of the commission of the offence there were no houses near this spot, and when Brighton was a fishing village whole regiments of soldiers used to bathe there at the same time; that at the time the offence was committed there was a row of houses erected on the cliff, from the windows of which the defendant might be distinctly seen as he undressed; and when Brighton grew up, that which was before a place where bathing could take place without any observation became a place where it could not so take place, and the Lord Chief Baron says: "Nor is it any justification that bathing at this spot might a few years ago be innocent. For anything that I know a man might a few years ago have harmlessly danced naked in the fields beyond Montague House, but it will scarcely be said by the learned counsel for the defendant that anyone might now do so with impunity in Russell-square. Whatever place becomes the habitation of civilised men, there the laws of decency must be enforced." That appears to be exceedingly good sense, and to be a guiding statement of the law which may fully guide us in this case. Here is a place which persons, though they may be legal trespassers, do go upon, and no one interferes with them. In a place, therefore, where the public go without interference, a man takes seven or eight little girls and exposes himself to them. I am of opinion that the prisoner exposed himself

indecently in a public place, and that it was not necessary in the present case to prove that the place in which he committed this offence was a place to which the public had a legal right of access. It was clearly a place where an indecent act took place in the presence of several persons, and, in my opinion, the conviction must be affirmed.

GROVE, J.—I am of the same opinion. Mr. Smith has contended, and in fact has been obliged to contend, that, in order that a place may be a public place, it must be a place to which the public have a legal right to go. Now the only case which at all supports such a contention is the case of *Turnbull v. Appleton* (*ubi sup.*), but that does not go so far as to say that, had the statute there not contained the words "in any open place to which the public have or are permitted to have access," the *locus in quo* would not have come within the words "open and public place" in the statute. There it was held that under the words "place to which the public are permitted to have access" which were imported into a former statute, an infringement of the statute had taken place. It is said that there would have been some difficulty had those words been omitted, and the words in the previous statute had been relied upon, namely, "any street, road, highway, or other open and public place;" and that "any open and public place" would then have been *ejusdem generis* with "any street, road, or highway." But even then it would not follow that the words "public place" when standing alone must necessarily mean a place to which the public have a right to go. Do they not mean a place which is public, and open to the public, whether as of right or not? It is found in the case that persons going to this place were legally trespassing, but it is also found that no one ever interfered with them; and does not that come within the plain meaning of the words "open and public place?" Whether it does or does not is, to my mind, a question of fact, and here this is found to have been an open place, round which there was nothing in the shape of an inclosure to sever it from the general publicity of the marsh. Unless, therefore, there is some decision limiting an open and public place to a place to which the public have a right to go—and none has been cited to us—I am of opinion that this case comes within the ordinary and reasonable meaning of the principle which makes it a misdemeanour to outrage public decency and morality, and that the conviction was right.

HUDDLESTON, B.—I am of the same opinion. It must be remembered that this is an indictment for a nuisance, and the principle is well established which is laid down in Blackstone and in Hawkins' Pleas of the Crown, viz., that whatever openly outrages decency, and is injurious to public morals, is a common nuisance, and indictable as a misdemeanour at common law. Now in this case the indictment has, in accordance with this general principle, alleged that the act was done in a certain public and open place. I agree with the Chief Justice that it is not clear that an act of indecency is not an offence if it is committed before a number of persons, even if the place in which it is committed is a private place. But here the question is whether, it having been found that the place was open, and that all

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persons who desired to do so were in the habit of going on to the marsh, and no one interfered with their doing so, the prisoner was guilty of an act of indecency in a public place. The marsh was perhaps a place where people ought not to go, but the prisoner himself took several people there, and in my opinion he made the place public so far as the commission of the offence was concerned, and was rightly convicted.

MANISTY, J.—I am of the same opinion, and I only wish to state that I entirely agree that it is not necessary, in order to support a common law indictment for indecent exposure in an open and public place, to show that the place where the offence was committed was a place to which the public have a legal right of access.

MATHEW, J.—I am of the same opinion, and I concur with my learned brothers in the opinion that this offence may be committed at common law without the selection of a place over which the public have rights. To my mind there was abundant evidence to justify the jury in finding that this was such a public place as was meant by the indictment, and I am therefore of opinion that the conviction should be affirmed.

*Conviction affirmed.*

Solicitors for the prisoner, *Dollman and Pritchard*, agents for *Hayward and Smith*, Rochester.

*Saturday, Nov. 29, 1884.*

(Before Lord COLERIDGE, C.J., GROVE, J., HUDDLESTON, B., MANISTY and MATHEW, JJ.)

REG. v. BUTT. (a)

*Falsification of Accounts Act 1875—Making and concurring in making false entry—False memorandum handed by collector to employer's cash clerk—Memorandum copied by cash clerk into cash-book—38 & 39 Vict.c. 24, s. 1.*

*B., a collector in the employment of N., collected on the 22nd Feb. from Sheppard 8l. 14s. 10d. due to N. The ordinary course of business was for B., at the end of each day, to account to E., N.'s cash clerk, for moneys collected during the day, E.'s duty being to enter payments accounted for by B. in the cash-book. On the evening of the 22nd Feb. B. gave E. a slip of paper on which he had written, "Sheppard, on account, 5l.," which E. copied into the cash-book, believing it represented the whole amount collected by B. from Sheppard.*

*Held, that B. was rightly convicted under sect. 1 of the Falsification of Accounts Act 1875.*

Case stated by the Deputy-Recorder of Poole, which was as follows:—

The prisoner was tried before me at the Midsummer Quarter Sessions for the Borough of Poole on 5th July 1884, on an indictment (a copy of which is appended to and forms part of this case) framed on the 1st section of the Falsification of Accounts Act 1875 (38 & 39 Vict. c. 24).

The evidence was, that the prisoner, who was employed as a clerk and traveller by J. J. Norton at Poole, collected on the 22nd Feb. a sum of 8l. 14s. 10d., which was due to his employer from W. Sheppard, of Bournemouth, for which he gave him a receipt, which was produced at the trial.

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

On his return to Poole the same evening he went to his employer's office, and according to custom rendered an account of the money he had received during the day to Mr. Norton's cash clerk, a man named Elford. The prisoner wrote out on a slip of paper (which was produced) various sums he had received, but instead of putting down the 8l. 14s. 10d. which he had had from Sheppard, he wrote "Sheppard, on account, 5l." Elford said that he then innocently either copied this sum from the prisoner's memorandum, or that the prisoner read it out to him from the memorandum, he could not remember which, into Mr. Norton's cash-book, in which consequently there appeared the false entry "W. Sheppard, 5l.," instead of, as it should have been, an entry of a payment by Sheppard of 8l. 14s. 10d. The cash-book with this entry in it was produced at the trial. At the time when he delivered the memorandum, or read its contents out, to Elford, the prisoner knew that in the ordinary course of business the items as communicated by him would be entered in his employer's books.

At the close of the case for the prosecution, the prisoner's counsel submitted that I ought not to leave the case to the jury, as no offence had been committed by the prisoner within the terms of the statute.

I held that the case came within the statute, but agreed to reserve the point for the consideration of the court.

I accordingly left the case to the jury, directing them that the prisoner himself would be guilty of making a false entry in Mr. Norton's cash-book if he, with intent to defraud, gave Elford, who was an innocent agent in the matter, the memorandum to copy into the cash-book, or read its contents out to him for that purpose.

The jury found the prisoner guilty. I respited judgment, and admitted him to bail, to come up for judgment at the next sessions.

The question for the consideration of the court is, Whether the prisoner committed an offence within the above statute? If he did not, then the conviction is to be quashed; otherwise the conviction is to stand.

CHRISTOPHER RAWLINSON, Deputy-Recorder of Poole.

By the Falsification of Accounts Act 1875 it is enacted:

That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or shall wilfully and with intent to defraud make, or concur in making, any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour, for any term not exceeding two years.

C. W. Matthews contended, on behalf of the prisoner, that it was not made out that there had been any false entry made or caused to be made by the prisoner. The cash-book only purported to show the moneys which the collectors accounted for to the cash clerk, and the prisoner had accounted for 5l., and therefore the entry was not false. The cash-book was to show the trans-

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action between the collector and the cash clerk, and this was a true entry of the transaction that took place. Even assuming the entry to be a false entry, the prisoner did not make it, and the prosecution must rely on his having concurred in making it; but the cash clerk was innocent of the falsity of the entry, and therefore there could not have been any concurrence in making it. One mind cannot concur, for concurrence implies that there must have been agreement between the minds which concurred in doing an act, and here the case found that there was no agreement between the collector and the cash clerk. The statute was not passed in order to punish the giving of false information, but to prevent the making of false entries in books to which clerks have access. The collector here had no access to the cash-book. A collector in Manchester who telegraphed to his firm in London false information as to a debt collected could not be convicted of making a false entry, if the cash clerk in London made an entry according to the information telegraphed. The cash-book only showed that which it was intended to show, namely, what happened between the collector and the cash clerk, and the prisoner had been guilty of no offence within the statute.

LORD COLERIDGE, C.J.—The defendant in this case is indicted under the 1st section of the statute 38 & 39 Vict. c. 24, an Act to amend the law with reference to the falsification of accounts, and that section enacts that if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud falsify any book or account which belongs to his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in any such book or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be punished in a certain way. Now the facts here are, that the prisoner was a collector of money, and from time to time he had to render an account of the money collected by him to another person in his master's employment. It appears to me to be immaterial whether the money was paid over at the same time when he rendered such accounts. What was done here was, that he received 8l. 14s. 10d. from a particular gentleman, that he accounted for 5l. of this sum only, and that he wrote on a slip of paper words which he knew would be understood to mean that he had received from a person named Sheppard the sum of 5l., that he gave or read out the contents of this slip of paper to the cash clerk, and that the cash clerk copied this sum from the slip of paper into Mr Norton's, his employer's, cash-book, in which consequently there appeared the false entry, "W. Sheppard, 5l." instead of, as it should have been, an entry of a payment by Sheppard of 8l. 14s. 10d. It is admitted that in the ordinary sense of the word that was a false entry, and it is equally clear that with the making of that false entry the prisoner had something to do. It is contended, however, that the statute is not broken because the person who made the entry did not know it was false, and the person who did know it was false did not make the entry. There is high authority that where a man who knew of the falsity of the representation he was making, made such representation by means of an agent who was ignorant of its falsity, there was no fraud (*Cornfoot v.*

*Fowke*, 6 M. & W. 358); but that was in a civil action, and is, I believe, a decision not universally approved of. This is clearly a false entry as far as Sheppard is concerned. It purports to represent receipts from the persons who have been entered as making payment of such receipts, and it seems to me clear that the prisoner either made it with the innocent hands of Elford, or concurred in the innocent hands of Elford making it. I am of opinion that this conviction was perfectly right, and must be upheld.

GROVE, J., HUDDLESTON, B., and MANISTY and MATHEW, JJ. concurred. *Conviction affirmed.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Nov. 5 and 6, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

THE TRUSTEE IN THE BANKRUPTCY OF A. G. POOLEY  
v. WHETHAM AND OTHERS. (a)

*Practice*—Security for costs—Order LXV., r. 6—*Trustee in bankruptcy*—Official name—*Bankruptcy Act 1883* (46 & 47 Vict. c. 52), s. 83—*Insolvent trustee*.

*The fact of a plaintiff being a trustee in bankruptcy, and suing in his official name, is not per se a sufficient ground for requiring him to give security for the costs of the action. To justify such an order insolvency, or some of the other grounds required in the case of an ordinary plaintiff, must be shown.*

*Decision of Pearson, J. (51 L. T. Rep. N. S. 195) affirmed.*

THIS was an appeal from a refusal of Pearson, J. to order the plaintiff to give security for the defendants' costs of the action (see 51 L. T. Rep. N. S. 195).

The action was brought by Archibald George Buttifant, the trustee in the bankruptcy of Alexander Gopsall Pooley, against the Metropolitan Bank Limited and the Royal Exchange Bank Limited, for the purpose of setting aside certain orders pronounced in other proceedings on the ground of fraud and collusion, and to restrain any dealings by the defendants with certain moneys.

The plaintiff sued in his official name as "the trustee of the property of Alexander Gopsall Pooley, a bankrupt," under the provisions of the Bankruptcy Act 1883, s. 83, in effect repeating the Bankruptcy Act 1869, s. 83, sub-sect. 7. The plaintiff's own name was not mentioned in the record.

The two sets of defendants each moved that the plaintiff be ordered to give security in the sum of 100l. for costs. Both motions were heard together, there being no distinction in the cases.

Pearson, J. held that, although the court had authority to order the trustee of a bankrupt to give security for costs, notwithstanding he was suing in his official character, there was not

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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sufficient evidence of his inability to pay the costs, and refused the motion.

From this order the defendants appealed.

The affidavits filed at the original hearing showed that, in 1874, the plaintiff was adjudged a bankrupt, and had subsequently left the country, and no statement of affairs was ever filed; that in July 1880 proceedings were instituted by him for liquidation by arrangement or composition with his creditors; and that the debtor received his discharge in Aug. 1880. It was also alleged that the plaintiff had opened an account with a bank, and had largely overdrawn his account, and several cheques were returned to the holders, there being no funds to meet the drafts.

At the hearing of the appeal a fresh affidavit by the managing clerk of the defendants' solicitors was read, stating that the furniture in the plaintiff's house had been assigned in 1883 to trustees for his wife, and that the deponent had made inquiries as to the pecuniary position of the plaintiff, and from the results thereof believed that the defendants would not be able to recover from him the amount of the costs of the action.

*Grosvenor Woods (Cozens-Hardy, Q.C. with him), for the defendants the Royal Exchange Bank Limited, cited*

*Bankruptcy Act 1883, sect. 83;*  
*Ex parte Sheard; Re Pooley (2), 44 L. T. Rep. N. S. 260; 16 Ch. Div. 110;*  
*Denton v. Ashton, 21 L. T. Rep. N. S. 20; L. Rep. 4 Q. B. 590.*

*Napier Higgins, Q.C. and Northmore Lawrence, for the defendants Sir C. Whetham and the Metropolitan Bank Limited, cited*

*Sykes v. Sykes, 20 L. T. Rep. N. S. 663; L. Rep. 4 C. P. 645;*  
*Ex parte Angerstein; Re Angerstein, 30 L. T. Rep. N. S. 446; L. Rep. 9 Ch. App. 479;*  
*M'Connell v. Johnstone, 1 East, 431;*  
*Bankruptcy Act 1883, ss. 27, 83, 84.*

*Cookson, Q.C. and Emden, for the plaintiff, were not called upon.*

BAGGALLAY, L.J.—We will not trouble you, Mr. Cookson, in this case. These are two appeals from orders of Pearson, J., made on the 18th July last, by which he refused, with costs, two applications made to him by two of the defendants in the action that security might be given by the plaintiff for costs. I may just refer, at the outset, to rule 15 of Order LVIII. of the Rules of Court 1883, which provides for the giving of security for costs in the cases of appeals. The last words of the rule are: "Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." There are certain circumstances which have, from time to time, been recognised as special circumstances within that rule, and the first and foremost has been the insolvency of the appellants. There are also certain other cases which it becomes unnecessary to mention, because the ground upon which it is insisted in the present case that security should be given, other than the insolvency of the plaintiff, is a special circumstance. Now, the two grounds on which security is asked are, first, that the plaintiff is insolvent; and, secondly, that if the court is not satisfied on that point, then the character which he fills, as trustee in the bankruptcy of A. G. Pooley, is such as to entitle the appellants to security for costs. I will deal first

with the allegation that the plaintiff is in insolvent circumstances. I can see no evidence of insolvency such as the court is in the habit of requiring when it proceeds upon insolvency as a special circumstance. It appears that the present plaintiff became bankrupt in 1874, and absconded, and only paid 10d. in the pound. However that may be, he received his discharge in June 1881, three years before the present application, and two years before he was appointed trustee in the bankruptcy of Pooley. In addition to that, it is also stated that he made a composition with his creditors in the year 1880, and that at the first general meeting of his creditors, he received his discharge. Therefore there was no evidence before the learned judge in the court below, other than that I have just referred to, indicating that he had been in circumstances such as not being able to meet his engagements or pay his debts, subsequent to the month of June 1881. Are we to assume that, because a person in June 1881 received his discharge in bankruptcy, therefore in July 1884 he is not in a position to pay his debts or meet his engagements as they may arise from time to time? I do not think we are. Upon the evidence before him, I think the learned judge in the court below arrived at a perfectly right conclusion. Then, what is called additional evidence has been brought before us, and that divides itself into two parts. The first part is an allegation based on this state of circumstances, that the plaintiff was living in a house, the furniture of which had been supplied by his wife's father, and that a settlement upon her was made in 1883 of that property by the wife's father. How long the parties had been married does not appear. It is not a very unreasonable thing to do for a father to make that property, which he gives for the benefit of his daughter, secure to his daughter. It would be carrying the allegation of insolvency to a very much greater length than it has ever been carried before if we were to say that, because a man's father-in-law settles property upon his daughter, therefore that man is insolvent. The other additional evidence I am sorry to see introduced into an affidavit for the purpose of affecting the reputation of the plaintiff as an apparently solvent man. The allegation is first made in these words: "I have caused inquiries to be made as to the position, pecuniary and otherwise, of the said Archibald George Buttifant, and I say, from the result thereof, I verily believe the said defendants would not be able to recover from him the amount of their costs if the said action is brought to trial, and judgment given in favour of the defendants." This is said without a tittle of reference to any particular inquiries that were made, or particular information that was received. It is merely what he believed from what he had heard. The next paragraph is still worse, for he says: "I have been informed by a creditor of the bankrupt Pooley that he has made inquiries as to the assets of the bankrupt, and ascertained, and I believe that it is the fact, that there is no property of the bankrupt in the hands or recoverable by the trustee which is, or can be made, available towards payment of the costs of this action." If people's reputations are to be taken away by broadcast allegations such as these, without one bit of reason given, it is a very sad thing, and I am extremely sorry to find such paragraphs introduced into an affidavit for the purpose of



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bringing additional evidence before the Court of Appeal. I have therefore come to the conclusion that there is no such evidence as this court has been in the habit of requiring upon questions of security for costs, as to the suggestion of insolvency of the person required to give the security. As regards the other point, it is raised in this way. It is raised before us in the same way as it was raised in the court below, namely, that by reason of this plaintiff being described as trustee in the bankruptcy of Pooley, there will be no sufficient security for the costs of the defendants in the event of the decision going against the plaintiff. Now, as long as the present plaintiff is trustee, it is beyond all question, and I agree with Pearson, J. on that point, that he is liable for the costs. But then it is suggested that he may be removed from being trustee, and somebody else may be appointed, and some question may arise so far as regards his liability for costs incurred after he is so removed. Any difficulty of that kind is got rid of by a consideration of the 4th rule of the 17th Order, which is in these words: "Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence," and so on, it is provided that "an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the court or a judge, upon the allegation of such change or transmission of interest or liability, or of such person interested having come into existence." If no person is appointed in his place, the present plaintiff remains liable as the plaintiff in the action. If another person is appointed in his place, then, from the time that other person becomes the nominal plaintiff, by the effect of the orders under the Judicature Act that new person becomes liable, and, if he is not solvent, the defendant can obtain an order for security for costs. It appears to me that all the grounds on which Pearson, J. decided this case are quite right, and that the order he made was right, and that the appeal must be dismissed with costs. I deem it unnecessary to consider, in the view which I take of this case, how far we ought to affirm or overrule the decision of *Denston v. Ashton* (21 L. T. Rep. N. S. 20; L. Rep. 4 Q. B. 590). That decision went as far as this, that in a case similar to the present, with the addition of the insolvency of the plaintiff, the court would not make an order for security for costs. Whether that view would be entertained by this court is not for us to say. At present I see no reason to dissent from it, but I have not fully considered the point, and therefore express no opinion about it.

BOWEN, L.J.—I am of the same opinion. This is an application for security for costs, upon the ground that the plaintiff, who is the trustee of an insolvent, is himself insolvent. Suppose it was made out that he was insolvent, the question would arise whether that falls within the principle of the numerous precedents upon which the court orders a plaintiff, who is suing nominally only on behalf of others really interested, to find security for costs. It has been said in the cases of *Sykes v. Sykes* (20 L. T. Rep. N. S. 663; L. Rep.

4 C. P. 645) and *Denston v. Ashton* (*ubi sup.*) and others, that that principle only applies to the cases of nominal plaintiffs strictly so called, and is not to be extended to the case of assignees in bankruptcy. Whether we should agree or not with the decisions in the cases of *Sykes v. Sykes* and *Denston v. Ashton* I say not, for the best of all reasons, that it seems unwise that courts should decide that which they are not called upon to decide. The point does not arise, if the fact is not made out that the present plaintiff is insolvent. Upon the point whether he is proved to be insolvent, I will not add one word to what has been said by Baggallay, L.J., except that I entirely concur with him that there has been a complete breakdown of the evidence on that point. But then Mr. Grosvenor Woods and Mr. Higgins, assuming our judgment is against them upon the fact that insolvency is not made out, say nevertheless that this is a very special case, because there is here no real plaintiff, and that therefore the court ought to see, for the purposes of justice, that there is some tangible person to stand the brunt of the costs in case the action turns out to be unfounded. That argument has been addressed to us on the assumption that, in a case of litigation commenced by a trustee suing by the official title of the trustee in a bankruptcy, there is no real plaintiff. Is that so? It would be a most singular effect of legislation if it were to be held that an Act of Parliament has given this sort of quasi-corporate capacity to trustees after trustee of a bankrupt, with the additional power that at any given moment, by their own free will, they may slip out of the litigation, and leave nothing at all behind to represent them. Corporate and quasi-corporate bodies are not unknown to the Legislature. Ministers, who represent great departments of State, may be, for anything I remember, instances of the kind; but that the trustee of the bankrupt should have this extraordinary privilege conferred upon him of being able to sue in his own official name, and, by reason of the section, should be entitled at any given moment to quit his shell and leave nothing behind him for the new trustee to take up, and that this process might be resumed as often as the trustee chose, to the utter confusion of the litigant on the other side, is to me a marvel of legislation. I do not think any such result is produced. I do not think that a trustee in bankruptcy has been made a sort of ghost of this kind—a mere wraith without substance, who may disappear, from time to time, from the scene. What is the legislation? First, you have one great devolution of estate by which the property passes to the trustee. That is a statutory devolution of estate, but you have also this—you have power given to the creditors, with or without the sanction of other persons, to change trustees and substitute new ones. At every single change there is a new devolution of estate, and I doubt not that the rights and interests of the old trustee vest in the new one when the proper formalities are gone through. But it does not follow that the opposite party can have this devolution take effect against him without his knowledge, and without notice to him, simply because there is a devolution which, when the proper procedure is adopted, may enable the new trustee to come in and take up the litigation where the old trustee has left it.

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The mere fact that a trustee may be removed proves nothing of the sort. It only proves there is the devolution. If we are to consider what is the effect of this devolution taking place during litigation, we find rules 3 and 4 of Order XVII. deal with that subject. Just as when there is a devolution by death, just as when there is a devolution by bankruptcy, just as when there is a devolution to the trustee of the estate of the bankrupt, so when there is a devolution by succession of trustees in a bankruptcy, you must follow the procedure pointed out by the Judicature Act; that is to say, the new person must get an order which will give the other side notice that a new plaintiff has been substituted for the old plaintiff, and that henceforward the new plaintiff is the person to look to. There can, therefore, be no injustice. Suppose the old plaintiff was not solvent, an order may be obtained, or not, that he should give security; and it depends on the terms of that order whether the security for costs is such as only operates against him so long as he is a trustee, or whether the order is so framed as to make him give security for costs, even in the event of his being superseded by another trustee. But suppose the original plaintiff is not insolvent, and that the new plaintiff is so, then all that has to be done is that application should be made to the court for an order against the new trustee. That is sensible and reasonable, and can produce no injustice. Then is there anything in the statute of bankruptcy which shows that the trustee is to be dealt with in any other way? Mr. Grosvenor Woods and Mr. Higgins have tried to extract this doctrine of a succession of ghosts out of the words that a trustee may sue by his official title. That simply seems to me to mean this, that the person who is trustee, and clothed with the representative character of trustee representing the estate of the bankrupt and the interests of those interested in the estate, may sue by his official character. That is all it says. It does not say he may slip out without notice to the other side. It does not interfere with the portion of the procedure I have referred to. It would be just as unjust to suppose that a firm, because it can sue by its firm name, can change its members and carry on the old action, as to suppose that a trustee may change and leave the defendant litigant in the cold when he comes to ask for his costs.

FRY, L.J.—Two points have been urged upon us in the present appeals. The first is this: It is said that the plaintiff, Mr. Buttifant, is the insolvent trustee of an insolvent estate, and, as such, ought to be required to give security for costs. Upon the evidence, I have come to the conclusion which my learned brethren have arrived at, namely, that it is not shown that Mr. Buttifant is insolvent, and I desire to add nothing but this, that the very point upon which the evidence broke down is pointed out by the learned judge of the court below, and that, when the pinch of the defect of evidence is apparent, evidence intended to make good the defect must be viewed with the utmost jealousy. Taking that view of the facts, it is unnecessary to express any opinion as to what would have been the proper decision if the facts had been otherwise, and it is unnecessary to express any opinion upon such cases as *Sykes v. Sykes* (ubi sup.) and *Denston v. Ashton* (ubi sup.).

I only desire to say that the consideration of those cases is entirely unaffected by my decision in this case. The second point urged upon us is this: It is said that in the present case Mr. Buttifant is suing as trustee of the estate of Mr. Pooley, and that wherever the trustee of a bankrupt estate sues in his own official name he is, as Mr. Higgins has described him, a *quasi*-corporate or innominate plaintiff, and that the defendants have no means of knowing when the person who fills that office is changed from time to time. In other words, as representing the trustee of a bankrupt's estate describing himself as the trustee, he is a sort of permanent mask who carries on the litigation, behind which there may stand at one time one real man, at another time another real man, and at another time nobody at all, and it is said that such a plaintiff is one against whom security ought to be given. Now, if the plaintiff who sues as trustee answers to that description, it would add considerable weight to the argument, but, in my opinion, a trustee suing in his official name is no such person as has been described. When A. B. begins an action in his official name he sues, in my opinion, simply as A. B., and it is immaterial whether he sues as A. B., or with the description of A. B., namely, as trustee; and I find nothing whatever in the 83rd section of the Act of 1869 which interferes with that view. The words of the section, sub-sect. 7, are that, "The trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of \_\_\_\_\_, a bankrupt,' inserting the name of the bankrupt." When the particular person, A. B., ceases to be trustee of the estate, it appears that he remains liable on the record until some other person is substituted in his place, and that if another person be named and appointed trustee of the estate, he may continue the action in the name of the trustee of the bankrupt; but he is just as much a distinct person as if he continued the action as C. D. or as E. F. The succession of persons filling the office of trustee, describing themselves as trustees of the estate, does not prevent there being a true succession of persons, any more than permission for one earl to sue by his title in the peerage would enable his successor to continue the action in the same name without being liable for the costs. Taking that view, it appears to me that, when one particular person has been appointed trustee of a bankrupt estate in lieu of another, the 3rd rule of the 17th Order applies, and that we have, in the words of that rule, a case of devolution of an estate *pendente lite*. That rule enables the cause or matter to be conducted by the person on whom the estate has devolved, and that being so, the 4th and 5th rules apply, and consequently when one person succeeds another in the office of trustee, and there is pending an action by the first person in the official name as trustee of the estate, the person who succeeds him must obtain an order *ex parte* substituting himself in the place of the original plaintiff, and having obtained that order *ex parte*, he must, under rule 5, serve that on the other parties to the litigation. That appears to displace the argument addressed to us, and I think this appeal must be dismissed with the usual result, namely, with costs.

Solicitors: *Newman, Stretton, and Hilliard; Snell, Son, and Greenup; Harper and Battock.*

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CHARLSTON v. ROLLESTON.

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Oct. 30, Nov. 1 and 10, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

CHARLSTON v. ROLLESTON. (a)

*Company—Costs—Entry on land—Abandonment of line—"Taking"—Lands Clauses Act 1845 (8 Vict. c. 18), ss. 80, 84, 85.*

*Where a railway company have paid a deposit, given a bond, and entered and used land under sect. 85 of the Lands Clauses Consolidation Act 1845, there is a case of "moneys deposited in the bank under the provisions of this Act," and a "taking of the land" within the meaning of sect. 80, and the court has jurisdiction to make orders as to the costs mentioned in that section.*

*A railway company, being desirous of entering on lands before any agreement as to purchase was come to, or award or verdict as to compensation given, made the deposit and gave the bond required by sect. 85 of the Lands Clauses Act 1845, and then entered and constructed works on the land. The purchase was never completed, but the company obtained an Act of Parliament, which enabled them to abandon their line, but provided that compensation should be made to the owners of land for injuries sustained by the non-completion of the purchase, to be determined in the manner provided by the Lands Clauses Act for determining the amount of compensation paid for lands taken under the provisions thereof. By an agreement with the landowners it was provided that the amount of compensation payable to them for non-completion and acts done by the company should be £3501., but that this should not include any costs, charges, or expenses which by the Companies Acts or the Acts incorporated therewith the owners might be entitled to receive or recover from the company, and that the owners should be entitled to such costs, &c. in addition to the compensation, as if the agreement had not been made.*

*Held (affirming the decision of Kay, J.), that the court had jurisdiction to, and would, order the company to pay the costs of the agreement and of ascertaining the amount of the compensation as being costs of taking the land, or incurred in consequence thereof.*

*Tiverton and North Devon Railway Company (50 L. T. Rep. N. S. 637; 9 App. Cas. 480, and Great Western Railway Company v. Swindon and Cheltenham Extension Railway Company (32 W. R. 957) discussed.*

*THE Swindon, Marlborough, and Andover Railway Company were incorporated by an Act passed in 1873, with which the Lands Clauses Act 1845 was incorporated.*

*On the 16th Dec. 1874 the company served notice to treat with respect to certain lands in the parish of Swindon, but no agreement was come to, award made, or verdict given for the purchase money or compensation.*

*The company, being desirous of entering on the lands, on the 6th Oct. 1875 deposited 3679l. in court under sect. 85 of the Lands Clauses Act 1845, and gave the bond required by that section.*

*In Oct. 1875 the company entered on the land and constructed certain works thereon.*

*The purchase was never completed.*

*By an Act passed in 1879 (42 & 43 Vict. c. xci.) the company were authorised to abandon the*

*line and works so far as they concerned the land taken.*

*By sect. 9 of this Act the abandonment was not to prejudice or affect the right of the owner or occupier of any land to receive compensation for any damage occasioned by the entry of the company on such land for the purpose of surveying and taking levels, or probing or boring to ascertain the nature of the soil, or setting out the line of railway, or the right of the owner or occupier of any land temporarily occupied by the company to receive compensation for such temporary occupation, or for any loss, damage, or injury which might have been sustained by reason thereof, or of the exercise, as regarded such land, of any of the powers in the Railways Clauses Consolidation Act 1845, or the Act of 1873.*

*By sect. 10, when, before the passing of the Act, any contract might have been entered into or notice given by the company for the purchasing of any land for the purposes of or in relation to any portions of the railway or works authorised to be abandoned, the company should "be released from all liability to purchase, or to complete the purchase of any such lands; but, notwithstanding, full compensation shall be made by the company to the owners and occupiers or other persons interested in such lands for injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice, and the amount and application of the compensation shall be determined in the manner provided by the Lands Clauses Consolidation Act 1845, as amended by any subsequent Act, for determining the amount and application of compensation paid for lands taken under the provisions thereof."*

*By an agreement dated the 5th Dec. 1882 between the trustees of the lands taken (which was under a settlement the trusts of which were being administered in this action) and the mortgagees thereof and the company, after reciting as above stated, and reciting that the lands taken were not required by the company and that they had relinquished possession thereof, it was agreed, subject to the approval of the court (which was subsequently obtained) as follows (*inter alia*):*

1. The amount of the compensation payable by the company for or in respect of all loss, injury, and damage whatsoever sustained, or which may be sustained, by the owners or other persons interested in the said pieces of land . . . by reason of the purchase of the said lands not being completed pursuant to the said notice, or of the entry of the company upon the said lands, or of the user or occupation by the company of the said lands, or of the acts of the company done upon or in respect of the said lands or otherwise howsoever by reason of the exercise by the company as regards the said lands, or any of them, of any of their statutory powers, shall be the sum of 1350l.

*It was provided that this sum should not be less than the amount to be determined by a valuation. (The valuation found the proper compensation to be the same amount.)*

2. The compensation mentioned in the last clause does not and shall not extend to or include any costs, charges, or expenses which under or by virtue of the company's Acts of 1873 and 1879, hereinbefore recited, and the Acts therewith incorporated, the trustees may be entitled to receive or recover from the company, and the trustees shall be entitled to receive and recover such costs, charges, and expenses from the company in addition to such compensation in the same way and to the same extent as if this agreement had not been entered into.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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On the 8th Dec. 1882 a summons was taken out by the plaintiffs that the provisional agreement might be confirmed, and the compensation money under it paid into court; and that such sum when paid in might not be dealt with without notice to the company; and that the company might be ordered to pay the costs, charges, and expenses of and incidental to the preparation and execution, on behalf of and by all parties except the company, of the provisional agreement, and the costs, charges, and expenses of the parties to the summons of and incidental thereto, and of all proceedings relating thereto.

By an order made on the 20th Jan. 1883, without prejudice to any question as to the company's liability for costs, the provisional agreement was confirmed, and the company was to be at liberty to pay into court the compensation moneys under it; the rest of the summons to stand over.

In June 1883 a petition was presented by persons interested in the lands, asking for investment of and payment of the dividends on the compensation moneys under the provisional agreement, which had been paid into court, and that, pursuant to the provisions in that behalf contained in the Lands Clauses Consolidation Act 1845, the company might be ordered to pay the costs of and incidental to the taking of such lands and of the provisional agreement, and of and incidental to the application and consequent thereon respectively. The petition and the undisposed-of portion of the summons were heard by Kay, J. in court on the 30th June 1883.

*Robinson, Q.C., Ryland, and E. Beaumont* in support of the application.

*Upjohn* for the company.

KAY, J.—I have, in this case, heard an argument of considerable length on the part of the company, who are resisting the payment of some costs. The company took and entered into possession of lands under the 85th section of the Lands Clauses Act, depositing a sum of money, and giving a bond as required by that section. They never completed the purchase of those lands. Eventually they abandoned the line, and, under the Act which enabled them to do that, the landowners are entitled to compensation; for, although now the lands have been given back to them, they have not been given back in the state they were in when the company took possession. The company have dealt with the land, and altered it and injured it to such an extent, that the landowners are entitled to some compensation. The matter has altogether arisen through the company having, under the 85th section entered into possession of the land, and then done the owners the additional wrong and injury of not completing their purchase, but throwing the land back on their hands in the condition different to that in which it was. An action has been brought for the purpose of administering the trusts of the settlement. The amount of compensation might be determined by proceeding under the Lands Clauses Act, either by arbitration, or by going before a jury. The amount of compensation was not so determined, but the parties came to an arrangement out of court to settle the amount of compensation, and incurred costs in making that arrangement, which I am informed, and am quite ready to

believe, are less than would have been incurred if the form of proceedings under the Lands Clauses Act for ascertaining the compensation had been adopted. A conditional agreement was entered into for accepting an amount in compensation, subject to the approval of the court in the administration action. An application was made to the court to approve of the agreement, and thereupon the money was paid into court in the action, and in the matter of the Lands Clauses Act. Now, first of all, the company object to pay the costs of these proceedings. As to that I have not a moment's hesitation, because, whether the Lands Clauses Act authorises me to order payment of costs or not, the general order does authorise me. The costs of all these proceedings in court, which have been rendered necessary by the conduct of the company taking the land, I, under the power given to me by the general order, have general jurisdiction to order the company to pay, and accordingly I do order them so to do. The question which raises some difficulty is as to the costs of the agreement as to the amount of compensation. Sect. 80 of the Lands Clauses Act provides that "in all cases of moneys deposited in the bank under the provisions of this or the special Act or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in England, or the Court of Exchequer in Ireland, to order the costs of the following matters, including therein all reasonable charges and expenses incidental thereto, to be paid by the promoters of the undertaking (that is to say), the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for." Pausing there, the money I now have to deal with is the 1350*l.* which has been deposited under the provisions of an Act of Parliament, which does incorporate the Lands Clauses Act, as well as in the matter of the action. Therefore, it seems to me that sum is money which comes within the description I have read at the commencement of sect. 80 of the Lands Clauses Act; the section says, "It shall be lawful for the Court of Chancery in England, or the Court of Exchequer in Ireland, to order the costs of the following matters, including therein"—Then, omitting a number of other words, the section continues—"and of all proceedings relating thereto except such as are occasioned by litigation between adverse claimants." The question is, whether these other costs, namely, the costs of ascertaining the amount of compensation, are not costs strictly within the meaning of these words, "the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof." In my opinion they certainly are. I am told that purchase and taking are the same thing. They may be the same thing with regard to some matters, but purchase and taking are not the same thing in a clause which contradistinguishes purchase from taking. It is the costs of the purchase or taking of the lands, and taking must here mean a taking which does not amount to purchase, that is, entering into possession and

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taking. If I had any doubt about that, it would be removed by this circumstance, that there may be costs incurred in respect of the money deposited under sect. 85, costs incurred by the landowners, and those costs the courts have been in the habit of ordering the company to pay. And as the only power given in respect of costs is under sect. 80, those costs can only be ordered to be paid by the company under the power which the court has under that section. I do not think I am bound to give much favour to an objection of this kind, and I do think I am bound, if I can, to give a liberal construction to sect. 80, so as to include these costs. The company has been dealt with in a most merciful way, because no doubt, if the formal proceedings to ascertain the amount of compensation had been taken, that would have inflicted more costs upon them than the costs of this agreement. I think the costs of this agreement are proper costs, which come within the words of sect. 80, and that they are costs, not of the purchase but of taking the land, or incurred in consequence thereof. They are costs strictly incurred in consequence of the company having taken possession of the lands and then thrown them back on the landowners' hands in the manner I have described. Therefore I think I have jurisdiction to order them to pay the costs, and I order the payment of those costs, of course subject to taxation.

The order, as drawn up, directed the company to pay the costs (including all reasonable charges and expenses incident thereto) of the taking of the lands, or which had been incurred in consequence thereof (other than such costs as by the Lands Clauses Act were otherwise provided for), and of the petition and the adjournment into court, including the preparation of the provisional agreement, and of ascertaining the compensation thereon, and of obtaining this order, and of all proceedings relating thereto, except costs occasioned by litigation between adverse claimants.

The company appealed, asking that they might only be ordered to pay the costs of the petition and summons, and of the order below.

*Upjohn*, for the appellants, cited

*Spencer v. Metropolitan Board of Works*, 47 L. T. Rep. N. S. 459; 22 Ch. Div. 142;

*Ex parte Buck; Re Hampstead Junction Railway*, 9 L. T. Rep. N. S. 374; 1 H. & M. 519;

*Tiverton and North Devon Railway Company v. Loosemore*, 50 L. T. Rep. N. S. 637; 9 App. Cas. 480;

*Marquis of Salisbury v. Great Northern Railway Company*, 18 L. T. Rep. O. S. 240; 17 Q. B. 840;

*Doe d. Armitstead v. North Staffordshire Railway Company*, 16 Q. B. 526;

*Re Lond. n. Brighton, and South Coast Railway Company; Ex parte Flower*, 15 L. T. Rep. N. S. 258; L. Rep. 1 Ch. App. 599;

*Ex parte Maris*, 25 L. T. Rep. N. S. 20; L. Rep. 12 Eq. 418;

*Cobb v. Mid Wales Railway Company*, L. Rep. 1 Q. B. 342;

*Sharpe v. Metropolitan District Railway Company*, 5 App. Cas. 425;

*Great Western Railway Company v. Swindon and Cheltenham Extension Railway Company*, 32 W. R. 957.

*W. Pearson, Q.C., Ryland, and E. Beaumont*, for the owners of the land, were stopped.

*Cur. adv. vult.*

Nor. 10.—BAGGALLAY, L.J.—So far as I was concerned, it was out of deference to the able

argument of Mr. Upjohn that we postponed giving judgment in this case at the conclusion of his argument, particularly having regard to the reference he made to two cases decided in the House of Lords to which I will advert presently. The appeal is presented under the following circumstances: The company obtained their special Act in 1873. They gave notice to treat to the owners of this land in Dec. 1874, and in the month of Oct. 1875, the purchase money not having been paid, they deposited in court, under sect. 85 of the Lands Clauses Consolidation Act 1845, a sum of over 3000*l.*, and gave a bond for a like amount, pursuant to the terms of that section. They entered upon the land in Oct. 1875, and proceeded with the works necessary for the construction of the railway. I gather from the Act of Parliament which was passed in 1879, not that the railway itself was abandoned, but that particular portions of the railway were abandoned, and a fresh course adopted, and that necessitated, or rather involved, the abandonment of the purchase of the land which had been taken, and with which we have to deal on the present occasion. The material sections of the Abandonment Act are sects. 9 and 10. [His Lordship read sect. 9, and continued:] Now, the earlier part of that section provides for those entries for limited purposes which are referred to in the 80th section of the Lands Clauses Consolidation Act, and the latter part provides for securing to the owners of the land any compensation which they might be entitled to, not under the Lands Clauses Act, but under the Railways Clauses Act. Then comes sect. 10, which has a material bearing upon the present question, and is as follows: "Where before the passing of the Act any contract may have been entered into, or notice given by the company, for the purchasing of any land for the purposes of or in relation to any portions of the railway or works authorised to be abandoned by this Act, and which shall not be required for the purposes of any of the works by this Act authorised" (that is, providing for the case with which we have to deal), "the company shall be released from all liability to purchase or to complete the purchase of any such lands" (that is where there has been no notice to treat given, or where there has been a notice to treat, but no valuation made under it), "but, notwithstanding, full compensation shall be made by the company to the owners and occupiers, or other persons interested in such lands for injury or damage sustained by them respectively by reason of the purchase not being completed pursuant to the contract or notice, and the amount and application of the compensation shall be determined in the manner provided by the Lands Clauses Consolidation Act 1845, as amended by any subsequent Act—for determining the amount and application of compensation paid for lands taken under the provisions thereof." Now in that state of the case, the land having been given up to the owners, an agreement was come to with the owners of the land. [His Lordship read the material portions of the agreement down to the end of clause 1, and continued:] That sum of 1350*l.* was made subject to the approval of the amount by surveyors to be appointed, but it does not seem to have been altered or departed from, and it was provided that of the sum of 1350*l.*, 100*l.* should represent the income, and the balance should represent the corpus. There, it

will be observed, the provision is confined to the amount of compensation payable for loss, injury, or damage sustained. [His Lordship then read the second clause of the agreement, and continued:] We had a little discussion at the close of Mr. Upjohn's argument as to the effect of the latter words of that clause, and it has been suggested that, inasmuch as, if the agreement had not been entered into, there could have been no costs of the agreement, therefore those costs ought to be excluded. I do not take that view of the case at all. I take it that all it means is this, that the owners are to have the costs in the same way as if they had not come to any agreement as to compensation for loss or damage. The real difficulty that arose in the case arose in this way. The £250*l.* was paid into court in the action of *Charlton v. Rolleston*, which was an action for the administration of the trusts of a settlement, and a petition was presented for the appropriation of that money, intituled not only in the action, but in the matter of the Act of Parliament, and the costs were applied for very much in the same way as an application would be made for costs in the case of the Lands Clauses Act where the purchase money had been paid into court and an application was made to take it out. That turns upon the provision of sect. 80 of the Lands Clauses Act. The preliminary words of that section are as follows: "In all cases of moneys deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith." As I read those introductory words, they clearly embrace the case of moneys deposited under sect. 85, and apply to the case of agreed moneys deposited. After certain exceptions, which I need not refer to in detail, the section goes on to say that, in all these cases, "it shall be lawful for the Court of Chancery in England or the Court of Exchequer in Ireland to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking (that is to say), the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for;" and then it enumerates a series of costs, charges, and expenses which are to be provided for. Upon the application to Kay, J. he was of opinion that the parties applying were entitled to have the same costs, charges, and expenses as if the application had been made with reference to purchase money paid in under the preceding section, he considering that section as merely extending the old provision as to payment in under sect. 85. It has been alleged that that was an erroneous view, and for this reason, that although sect. 80 would be applicable to cases of payment in under sect. 85, yet some of the costs which were so asked for, as being governed by the same general rule, were not costs of the purchase or taking of land; in other words, that this land, in respect of which the money had been paid, was not taken, and therefore the provision of sect. 80 would not apply. Mr. Upjohn addressed to us a very learned and able argument on that point with reference to the true effect of sect. 85. His argument was substantially this, that the lands entered upon by the company, and in respect of which they paid

money under sect. 85, had not either been taken or purchased, and therefore the court had no jurisdiction to give the costs which were asked, and which were given by Kay, J. For that purpose he referred to two cases in the House of Lords, which I desire to consider closely before expressing my opinion finally upon the case. I am bound to say that they do not in any way affect the judgment or the opinion I had formed at the close of the argument, that Mr. Upjohn had failed to show that these were not lands coming within the description of "lands purchased or taken," but a careful consideration of those cases has confirmed me in the view which I previously formed. In *Tiverton and North Devon Railway Company v. Loosemore* there was a limit of three years for the exercise of the powers of compulsory purchase of the land, and of five years for the completion of the works of the railway, and if the works so authorised to be made were not completed in the time specified, the powers for making and completing the same were to cease. Notice to treat for the purchase of those lands was given a very few days only before the three years expired, and having given the notice to treat the company kept quiet and took no steps until about thirteen days before the expiration of the five years for completion, and then, to the disgust of the proprietor, Mr. Loosemore, they obtained a valuation of the land and paid the money into court under the 85th section of the Lands Clauses Act. As far as I can make out, all that was decided in that case was that the entry under sect. 85 was lawful. I think I might take the words from the marginal note as regards that matter, but the parts of the report which appear to me the most material are those containing the judgments of Lord Cairns and Lord Watson. Lord Cairns gives this as the groundwork of his decision: "The power to the company to enter and use appears to me to be equivalent to a power to convert to their own use, and this is completed as soon as the company enter on and appropriate the land." The question was whether, having complied with the terms of the Act of Parliament thirteen days before the five years expired, the company might or might not go on after the thirteen days expired to complete the works. But the principles, if I read the judgment rightly, which appear to substantiate the view which I have taken of the case, are also to be found in Lord Cairns' judgment. He says: "The statute appears to me to place the company and the respondent, by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequence of that possession after the expiration of the five years may be." I think, in enunciating the effect of the notice to treat and of what took place subsequently, Lord Cairns stated that which has been the recognised view, for many years, of courts of equity, of the effect of a notice to treat. It puts the parties in an analogous position to that of vendor and purchaser, leaving the price to be apportioned if the parties cannot agree, and either



party having power to enforce it. There is a power for the deposit to be paid out of court, and a further power, if the purchase money is not paid, to take and use the land, giving adequate security for the highest price eventually to be paid for the land. Then Lord Cairns says on the same page: "The company, before the expiration of the five years, took possession of the land, changed the whole character and formation of the ground, adapted it to their own purpose, and destroyed its suitability for its former use." That is the case we have got here. Then he says: "In my opinion, where there has been a notice to treat, and where, before the price has been ascertained, the company has, under the statute, regularly obtained possession of the land, and proceeded to use it for making a railway, nothing more remaining to be done but the ascertainment of the price, the transaction is one that must go forward and not backward; the landowner has a continuing right under the statute to have the price fixed and paid, and that right he must pursue." I think we have got the principle applicable to a case of this kind recognised in the judgment of Lord Cairns. Mr. Upjohn referred to certain passages in the judgment of Lord Blackburn; but Lord Blackburn can hardly be considered as having arrived at the same conclusion as the other members of the House who gave judgment in the case. Lord Watson gave his decision in that case, and some passages in his judgment are quite as clear and precise as those in Lord Cairns' judgment, and perhaps it may be said that they carry a greater amount of weight, because he had originally taken the other view, but eventually came round to the view he finally adopted. It appears to me that that case affirms this proposition: You have got the relative position of vendor and purchaser established by the notice to treat. It may be worked out either by actual agreement between the parties, or by an arbitration, or by their agreeing to assess the amount of the valuation, or it may be worked out by the permission to the railway company to enter before the settlement of the amount has been come to on their paying the amount into court under the 85th section. In my opinion it is equally strong. The landowner is deprived, during the notice to treat, of the power of exercising any control over his land. What is the effect then of a valuation? It is simply this, that, although you have taken the land, you may give it up, and instead of paying the full price, which you would have had to pay if you had retained it for the purposes of your railway, you shall pay for that limited use which you have acquired over it, and by means of which you have made your railway. The other case to which Mr. Upjohn referred us was the *Great Western Railway Company v. The Swindon and Cheltenham Extension Railway Company*. We have had the opportunity of seeing the proofs of the judgments delivered in the House of Lords in that case. I believe those proofs have not been finally approved, but still they have been quite sufficient to tell us the nature of the case. I have great difficulty in seeing what possible bearing that has on the case with which we are now dealing. No doubt one or two passages in the judgment were referred to by Mr. Upjohn, but the case itself, if we look at the circumstances, appears to have no bearing upon the present. In that case the Swindon and

Cheltenham Extension Railway Company obtained power to carry their railway across the Great Western Railway. They were to cross it at one point by going over it, and at another point by going under it, but in no case were they to acquire the land. The land was to remain the property of the Great Western Company, and merely an easement was granted to the other company to this extent, that they might enter upon it to construct the necessary works for their railway, but afterwards they were merely to have a right to use those portions which went over and under the railway for the purposes of their traffic. Perhaps the substantial part of the matter was this: the defendant company had not got the full amount of their subscriptions paid, as provided by the 16th section of the Lands Clauses Act, and the Great Western Railway Company attempted to obtain an injunction to restrain the defendant company from going on with the railway, because they had not got the full amount of their capital subscribed, and it was held that there was nothing whatever in the circumstances of the case as framed to bring them within the provisions of the 16th section. In that case there had been an arbitration to settle the amount to be paid for the use of the easement which was granted to the Swindon Company. That amount was ascertained and paid into court under the 85th section. That was not the compulsory taking of land. There was a difference of opinion, I think, between the two learned lords who decided the case adversely to the third learned lord. Lord Watson, Lord Bramwell, and Lord Fitzgerald differed as to the meaning of the words "taking of land." Lord Bramwell seems to have thought that the easement was land within the meaning of the Act, and Lord Fitzgerald was of opinion that it was not, and came to the conclusion that what was to be done under the 85th section was not the exercise of compulsory powers. It seems to me that in all these cases the compulsory purchase or taking of land arises when a notice to treat is given, and when the relative position of vendor and purchaser is established. For these reasons it appears to me that the conclusion at which Kay, J. arrived was quite right, and consequently this appeal must be dismissed.

BOWEN, L.J.—The company in this case, under their special Act, entered on and used certain lands. It then seemed good to them to abandon their undertaking or a portion of it. An Act of Parliament was thereupon obtained providing that they might do so, compensating those persons whose lands they had used, and who otherwise would have been left out in the cold by the abandonment of the undertaking. That is to say, that those whose lands had been taken and used should be compensated for the company not going on to complete, and that the owners of the land should be compensated for the company not utilising it for the purposes of their undertaking. The land in this case belonged to trustees, who were entitled to the benefit of this compensation clause. They were to have compensation for all injury or damage done to their estate by reason of the purchase not being completed. Now where would such compensation be ascertained and assessed? Either by agreement or by the machinery of the Lands Clauses Consolidation Act. What would such compensation include? It would include, first of all, what we may call non-



legal charges, viz., the compensation which either a jury or a business man could very well ascertain and assess in respect of the damage done by the occupation of the property by the railway company, or by the paralysis of the property during the period. But there would also be another class of "damage" which would consist of what one might call strictly legal charges and expenses, which would easily be ascertained by the legal tribunal of the court, namely, the taxing master. Both those elements of compensation were in the first instance left to be ascertained by the machinery of the Lands Clauses Act. The parties put their heads together and entered into an agreement of the most reasonable kind by which these two kinds of compensation were dealt with specifically. First of all, the sum of 1350*l.*, subject to a certain abatement or possible abatement which we need not discuss at the moment, was to be paid by the company, but the compensation so paid in respect of the general damage was not to include the legal charges proper, which were to be left outside the agreement, and, in my opinion, with one object only, namely, that the parties thought they could be dealt with more expeditiously by a tribunal accustomed to deal with such things, namely, a court of law, which can ascertain and measure costs with a precision and with a justice which an arbitrator cannot do. That is very obvious. I also wish to point out that it seems to me that the persons who drew that agreement especially thought that the costs would be ascertained under sect. 80 of the Lands Clauses Consolidation Act. They thought, rightly or wrongly (and they may have been wrong) that the costs would be ascertained in that way; and it was all for the benefit of the company, and for the company only, that legal expenses should not be inquired into by a lay arbitrator, or a jury, but should be dealt with specifically and directly by the court itself. Everyone who knows anything at all about business knows well enough that the taxing master is the protector of the person who has to pay costs, and that, if you leave it to a jury, they deal with the matter much more roughly than a taxing master would. Therefore, I repeat that the arrangement was for the benefit of the company. What do the company do? They do what other companies have done before them—as soon as these costs are to be taxed they take the point that the court is not the proper tribunal to tax its own costs, and that it should be done by arbitration under the Lands Clauses Act. After considering the case as carefully as I have been able to do, and going over the facts, I have, although with considerable doubt and hesitation, come to the conclusion which has been expressed by Baggallay, L.J. I think that all these costs can be dealt with under sect. 80 of the Act, that the cases of moneys deposited alluded to in sect. 85 include cases of money deposited under sect. 80, and that the land is sufficiently taken, for the purpose of the costs being dealt with under sect. 80, by being taken and used under sect. 85. I shall not go through the cases more elaborately than I have done, because, if I were to do so, I should only elaborate my doubt and hesitation, for, as I have already said, I have come to the conclusion at which I have arrived with some amount of doubt. The reasons given to me by Baggallay, L.J. and Fry, L.J. have induced me to agree with them.

Fry, L.J.—I am entirely of the same opinion. The question is whether, under the 85th section, these costs can be ordered to be paid by the company. What are the introductory words of the 80th section of the Lands Clauses Act 1845? "In all cases of moneys deposited in the bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such moneys shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required." Now it appears to me that we are bound to give those words the generality which they express, and to apply the section to the cases of deposit of money not only under the sections which relate to a compulsory taking of land, but to deposits under the 84th and 85th sections of the Act, because those are cases of deposit of money in the bank under the provisions of this Act, and they are not within the limited exception referred to. The case therefore contemplated by the 80th section arises in the case of money deposited under the 85th section. But then, in the event contemplated at the commencement of the 80th section, it is provided that it shall be lawful for the court to do certain things, and amongst those things is the power to direct the payment of the costs of the purchase or taking of the land. Now, it appears to me to be perfectly plain that a company acting under the 85th section is taking land, and it is to be borne in mind that the word "taking" is used in the 80th section in contrast with "purchase," and it appears to me apt to describe the circumstances under which the company finds itself placed when it has exercised the powers of the 85th section. Now, is there any reason for not including the costs of the "taking" under the 85th section in the word "taking" in sect. 80? I can find none. On the contrary, I can see strong reasons in favour of so holding, and no better illustration of the reason for so holding can be given than the present case. Then, it is said that where under the 85th section a company has given a bond, and the condition of that bond has been performed, and the money deposited has been repaid, the vendor or the landowner has no lien whatever on that fund. That may be perfectly true, but that has nothing whatever to do with the question whether the court under the 80th section has jurisdiction to order the costs of taking land under the 85th section to be paid. I agree with my learned brothers therefore that this appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellants, *Moon and Gilks*.  
Solicitors for other parties, *Clarke, Woodcock, and Ryland*; *Munns and Longden*.

[CT. OF APP.]

CECIL V. LANGDON.

[CT. OF APP.]

Friday, Oct. 24, 1884.

(Before BAGGALLAY, LINDLEY, and FRY, L.JJ.)

CECIL V. LANGDON. (a)

*Trustees—Appointment—Conveyancing Act 1881 (44 & 45 Vict. c. 41), ss. 31 (sub-sects. 1, 7). 33.*

*By a settlement made in 1849 four persons were appointed trustees. The settlement provided that if the trustees thereby appointed, or any future trustees to be appointed in place of them, or any of them "as hereinafter mentioned" should die, &c., it should be lawful for the surviving or continuing trustees, with the consent in writing of the tenant in tail in possession for the time being, to appoint new trustees. In 1854 the Court of Chancery appointed new trustees in place of two of the original trustees, and in 1872 the same court appointed four new trustees in the place of two original trustees and the two previously appointed by the court. It being necessary to appoint three new trustees, the continuing trustee claimed to exercise the power of appointment given by sect. 31 of the Conveyancing Act, without obtaining the consent of the tenant in tail in possession.*

*Held, that he was entitled to do so, as the proposed new trustees, being in the place of trustees not appointed under the power in the settlement, but by the court, the event, in the settlement mentioned, on the occurrence of which the consent was required, had not happened, and therefore that sub-sect. 7 of sect. 31, by which the power of appointment given in the section is to apply if and as far as a contrary intention is not expressed in the trust instrument, did not apply.*

*Semble, that such a contrary intention is expressed when the trust deed requires the consent of a third person to the appointment.*

THE four trustees under an indenture of settlement, dated the 6th July 1849, were R. Cecil, R. Etough, J. Nicholson and R. Whall. The settlement contained a proviso that "if the trustees hereby appointed, or any future trustee or trustees to be appointed in the place of them, or any of them as hereinafter mentioned," should die, or be desirous of being discharged from, or refuse or become incapable to act in the trusts in them respectively reposed as aforesaid, before the said trusts should be fully executed or discharged, then and so often as the same should happen, it should be lawful for the surviving or continuing trustee or trustees for the time being, or if there should be no such surviving or continuing trustees, then for the retiring trustee or trustees for the time being, or the executors or administrators of the last surviving trustee for the time being, "and they and he are and is hereby required, with the consent in writing of the tenant or tenants for life or in tail, for the time being entitled in possession to the estates hereby settled," by any deed or instrument, to "nominate and appoint" any other person or persons, trustee or trustees, in the place of the trustee or trustees so dying, &c., so that the number of four trustees might be as nearly as might be continually kept up.

R. Cecil died in 1852, and R. Etough in 1853, and in a suit in Chancery in 1854 G. Butt and T. J. Flockton were appointed trustees of the settlement in their place.

J. Nicholson died in 1864, and R. Whall in 1870, and G. Butt and T. J. Flockton being desirous of being discharged, by an order of the Court of Chancery made in 1872 under the Trustee Act 1850, H. D. Langdon, C. A. A. Penley, J. H. Ward, and W. H. Stemp were appointed trustees of the settlement.

In 1874 a suit was commenced to have the trusts of the settlement carried into effect under the direction of the Court of Chancery.

On the 2nd Feb. 1884 a summons was taken out by the plaintiff in this suit, who was an infant aged fifteen years and the tenant in tail in possession of the settled estates, for the appointment of three persons named in place of Langdon and Stemp, who were dead, and Penley, who was willing to retire.

On the 9th Feb. 1884 J. H. Ward took out a summons that he as the continuing trustee might be at liberty to appoint three persons named in the place of the two dead trustees and Penley.

The summonses were adjourned into court, and heard before Pearson, J. on the 23rd May.

*Northmore Lawrence* in support of the plaintiff's summons.—Mr. Ward claims as the continuing trustee the right to nominate the new trustees, and therefore to appoint them under sect. 31 (sub-sect. 1) of the Conveyancing and Law of Property Act 1881; but, by sub-sect. 7, the section only applies "if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust," and is to have effect "subject to the terms of that instrument, and to any provisions therein contained." One of the terms of the instrument is that the power of appointing new trustees shall only be exercised with the consent of the tenant in tail in possession, and he, although an infant, is capable of giving or refusing his consent, and will not agree to the nominees of Mr. Ward being appointed.

*Cozens-Hardy, Q.C. and S. Dickinson contra*, and in support of Mr. Ward's summons.—The event, on the happening of which the consent of the tenant in tail is required, has not happened, for the trustees whom it is now intended to replace were all appointed by the Court of Chancery, and are not therefore "trustees hereby appointed," or "trustees appointed as hereinafter mentioned"—that is, as mentioned in the settlement. The event only happens where trustees are to be appointed in the place of original trustees or trustees appointed under the power in the settlement. The power of appointment given by sect. 31 of the Act therefore vests in the surviving or continuing trustees, and the fetter imposed by sub-sect. 7 does not apply.

*Lawrence* in reply.—By sect. 33 of the Act, which applies to all appointments, a trustee appointed by the court has the same powers as if originally appointed by the trust instrument.

*Cur. adv. vult.*

May 26.—PEARSON, J.—I do not mean to decide whether Mr. Cozens-Hardy's proposition, that the emergency has not arisen, is correct, and for this reason, that I should be very sorry to control what I conceive to be the intention of the Act of Parliament, that a trustee appointed by the court stands exactly in the same position as he would if appointed by a deed. I can conceive that such a case might

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

CT. OF APP.] *Re NORWICH EQUITABLE FIRE ASSURANCE CO.; W. A. MILLER'S CASE.* [CHAN. DIV.]

arise under the same, or nearly the same, conditions, and that it might be very right for the court to say that such a trustee did occupy the same position. In this case it is impossible to comply with the requisition as to the consent of the infant. Then all I have to ask myself is, Who are the persons to nominate the new trustees? Mr. Cozens-Hardy's client has that power, and therefore his nomination will be approved by the court; but, as all the beneficiaries seem to have one view about the case, I hope he will consider that circumstance, and try whether he cannot select trustees who are satisfactory to them all.

The Court therefore referred it to chambers to appoint fit persons to be three of the trustees, without prejudice to the right of Mr. Ward to nominate such new trustees.

The plaintiff appealed.

*Northmore Lawrence*, for the plaintiff, and *Cozens-Hardy*, Q.C. and *S. Dickinson*, for the respondent, repeated the arguments in the court below. The only case cited was

*Re Gadd; Eastwood v. Clark*, 48 L. T. Rep. N. S. 395; 28 Ch. Div. 134.

**BAGGALLAY, L.J.**—This is a singular case in its circumstances. Four gentlemen were named as trustees in a settlement made in 1849. Two of them having died, two persons were appointed trustees in their place by the Court of Chancery. The two other original trustees afterwards died, and in 1872 four new trustees were appointed by the court, so that in 1874, when the present suit was commenced for the execution of the trusts of the settlement, all the four existing trustees had been appointed by the court, and there was no original trustee, or trustee appointed by the original trustees under the power in the settlement. But that power is only to be exercised with the consent of the tenant for life or in tail when the appointment is made by the original trustees or by trustees appointed "as hereinafter mentioned"—that is, under [the power in the settlement. I think, therefore, that the argument of Mr. Cozens-Hardy must prevail, and that the power in the settlement cannot be exercised at all. Can anything be done under sect. 31 of the Conveyancing Act 1881? In my opinion, an appointment can be made under that section, which is framed to meet all cases of need. If so, the appointment is to be made by the surviving or continuing trustee for the time being, and Mr. Ward, as occupying that position, has the power under the section of appointing new trustees. But it is urged, on behalf of the appellant, that sub-sect. 7 of sect. 31 modifies the power given by the earlier part of the section when a contrary intention is expressed in the instrument creating the trust. Such a contrary intention is expressed in the instrument in this case, but not in the event which has now occurred. It therefore appears to me that the fetter imposed by sub-sect. 7 does not apply in this particular case, and that, having regard to the circumstances, Mr. Ward may himself make the appointment. Mr. Lawrence says that the effect of sect. 33 is that Mr. Ward stands exactly in the same position as if he had been originally appointed a trustee. If this were a case in which the trustee was claiming to act under sect. 33 it might be that he could act only subject to the consent required by the settlement; but he does not come here claiming to

act under that section, but asks to have the appointment under sect. 31 carried into effect. In my opinion the appeal ought to be dismissed.

**LINDLEY, L.J.**—I am of the same opinion. The short way of looking at the case is, that by clause 1 of sect. 31 there is a power of appointment vested in the continuing trustee, subject to the fetter imposed by clause 7, and that clause 7 applies to this case, but that this is an appointment made on the happening of an event when the consent of the tenant in tail is not required by the terms of the settlement.

**FRY, L.J.**—I take the same view. In the settlement the settlor put a fetter on the power of appointment by requiring the consent of the tenant in tail; but that consent was only required on the exercise of the power by the original trustees or a person appointed as thereinafter mentioned. This is not an exercise of the power by such a person, but an appointment by a trustee who was appointed by the Court of Chancery.

*Appeal dismissed with costs.*

Solicitor for the appellant, *C. J. Mander*.

Solicitors for the respondent, *Tampin, Taylor, and Joseph*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Thursday, Nov. 27, 1884.

(Before BACON, V.C.)

*Re THE NORWICH EQUITABLE FIRE ASSURANCE COMPANY; W. A. MILLER'S CASE.* (a)

*Unlimited company—Call—Summons—Affidavit in support—Companies Act 1862 (25 & 26 Vict. c. 89), s. 102—Gen. Ord. Nov. 1862, r. 33, N. (a), form 33.*

*This was a summons by an official liquidator asking that a contributory of the company might be ordered to pay within four days to him a sum of 819l. in respect of a call made before the commencement of the winding-up of the company, or otherwise to pay to him the said sum as being money required to be paid by the contributory for the adjustment of the rights and liabilities of members of the company among themselves. The debts of the company were not paid.*

*The Court made the order, holding that an affidavit of the liquidator stating that "It was necessary in the winding-up of the company that the sums mentioned should be forthwith paid, and the order should be made," though not in the words of form 33 in the schedule to Gen. Ord. Nov. 1862, implied that the money was required for payment of debts, and was sufficient to bring him within sect. 102 of the Companies Act 1862.*

On the 5th May 1884 the original summons in this case was issued on behalf of the official liquidator of the above-named company, asking that "W. A. Miller, a contributory of the company may be ordered to pay within four days after service of the order to be made herein to W. L. C. Browne, the official liquidator, the sum of 819l., being the amount due from the said W. A. Miller in respect of the call of 30s. made

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

Re NORWICH EQUITABLE FIRE ASSURANCE CO.; C. BRASNETT'S CASE.

[CHAN. DIV.]

by the company prior to the commencement of the winding-up of the company."

On the 27th April 1883 a resolution was passed that the call should be made.

The company, which was an unlimited company, incorporated in accordance with the provisions of 7 & 8 Vict. c. 110, was ordered to be wound-up on the 14th July 1883.

When the summons came on for hearing, *Micklem*, for the respondent, objected that there was no call.

*Marten*, Q.C., for the applicant, asked for the case to stand over that he might amend the summons, claiming to be paid the money under sect. 102.

The amendment, dated the 22nd Oct. 1884, added on to the original summons was as follows: "Or otherwise to pay to the said W. L. C. Browne, as such official liquidator, the said sum of 819*l.*, as being moneys required to be paid by the said W. A. Miller for the adjustment of the rights and liabilities of members of the above-named company amongst themselves, and that such further or other order may be made as the nature of the case may require."

*Marten*, Q.C. and *Seward Brice* for the official liquidator.—The court has power to make the order asked for under sect. 102 of the Companies Act 1862; sects. 199 and 200 refer to unregistered companies:

*The Royal Victoria Palace Theatre Syndicate*, 30 L. T. Rep. N. S. 3; L. Rep. 18 Eq. 661.

*Micklem* for Miller.—The call was made under sect. 102 of the Companies Act 1862. The debts of the company have not been paid. The amended summons merely asks for payment of the sum of 819*l.* as being moneys required to be paid by the said W. A. Miller for the adjustment of the rights and liabilities of members of the above-named company amongst themselves. There is no affidavit in accordance with form 33 in the schedule to the General Order of Nov. 1862, stating that the call is necessary for the payment of debts. A call for the adjustment of the rights and liabilities of members amongst themselves cannot be made until the creditors have been paid. The summons should be dismissed.

*Marten*, Q.C. in reply.—This is an unregistered company, a partnership, and Mr. Miller is bound to pay the 819*l.* to put himself on an equal footing with the other partners. In his affidavit of the 23rd Oct. 1884, the liquidator says: "It is necessary in the winding-up of this company that the said several sums should be forthwith paid, and that the order should be made against the said contributories, directing them to pay such amounts to me." That affidavit implies that the moneys are required for the payment of the debts of the company. In any case sect. 102 of the Act of 1862 gives a general power to ask for the money.

BACON, V.C.—Under sect. 102 of the Companies Act 1862, the court has power to make a call if a proper case has been made out by the official liquidator. I am of opinion that the affidavit of the official liquidator made on the 23rd Oct. 1884 is sufficient to bring him within sect. 102. The adjustment of the rights and liabilities of members among themselves is a subsequent matter, and cannot take place until the debts of the company

are paid. Others have paid sums in respect of this call, so that Mr. Miller is in the position of having paid less than the other contributories. I now hold that he is bound to pay the sum of 819*l.* which the official liquidator finds necessary for the adjustment of the rights and liabilities of the members. I order him to pay the 819*l.* to the official liquidator, and the costs of the amended summons.

Solicitors: *Bozall and Bozall*; *Montague Hawkins*.

Thursday, Nov. 27, 1884.

(Before BACON, V.C.)

Re THE NORWICH EQUITABLE FIRE ASSURANCE COMPANY; C. BRASNETT'S CASE. (a)

*Practice—Company—Adjourned summons—Limit of time—Companies Act 1862* (25 & 26 Vict. c. 89), s. 124—*Supreme Court of Judicature Act 1873* (36 & 37 Vict. c. 66) s. 50—*Rules of Court 1883, Order LVIII.*, r. 15.

Where a summons, taken out on the 25th March 1884, was heard on the 30th June, when the chief clerk made no order, and on the 23rd Oct. the chief clerk refused an application to adjourn it into court on the ground of lapse of time; on summons on the 29th Oct. for the opinion of the judge upon the chief clerk's refusal to make an order upon the summons of the 25th March:

Held, that though no time was limited for an adjournment into court by sect. 50 of the Judicature Act 1873, the court would not hesitate to act by analogy, and the application being in the nature of an appeal from the summons of the 25th of March last, should have been made within twenty-one days from the hearing of that summons; the summons therefore must be dismissed. No order as to costs.

This was a summons on behalf of the official liquidator of the above-named company asking for the opinion of the judge upon the chief clerk's refusal to make an order upon the applicant's summons, dated the 25th day of March 1884, that the official liquidator might be at liberty to rectify the register of shareholders of the company by substituting the name of Charles Brasnett as the holder of five hundred and sixty-four shares, for that of Helen Brasnett his wife.

The original summons was taken out on the 25th March 1884, and was heard on the 30th June, when the chief clerk made no order, and no order was drawn up.

On the 23rd Oct 1884 an application was made to the chief clerk to adjourn the summons of the 25th March into court. This he refused to do on the ground of lapse of time.

On the 29th Oct. 1884 the present summons was taken out.

*Marten*, Q.C. and *Seward Brice* for the applicant.

*Horton Smith*, Q.C. and *Methold* for the respondent.—We take the preliminary objection that the summons is out of time. This summons is an indirect attempt to rehear the order of the 30th June 1884. Notice of the rehearing of an order made in the matter of the winding-up of a

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

CHAN. DIV.]

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company must be given within three weeks after any order complained of has been made, unless such time is extended:

*Re Elham Valley Railway Company; Dickson's case*, 41 L. T. Rep. N. S. 184; 12 Ch. Div. 296;

*Dickson v. Harrison*, 38 L. T. Rep. N. S. 794; 9 Ch. Div. 243;

*Heatley v. Newton*, 45 L. T. Rep. N. S. 455; 19 Ch. Div. 326.

No time for appealing from an order in chambers is limited by sect. 50 of the Supreme Court of Judicature Act 1873; but Chitty, J. in *Re Woodbridge* (W. N. 9th Aug. 1874) held that, though there is no express provision in the Rules of the Supreme Court 1883 limiting the time within which an application should be made to a judge of the Chancery Division to discharge an order made in chambers, the times prescribed by Order LVIII., r. 15, of those rules, with reference to appeals from orders made at chambers to the Court of Appeal, should by analogy be adopted.

*Marten, Q.C.*—The circumstances of the case have changed since June. Brasnett was then placed on the list of contributories for 1250 shares. The 564 shares in the name of his wife were not then material; but on the 21st July England was placed on the list, and on the 31st De Caux, two solvent men. The court can rectify the register of members of a company at any time after making an order for winding it up: (Companies Act 1862, s. 98.) Rule 31 of the General Order of Nov. 1862 enables the chief clerk to make certificates from time to time stating the result of the settlement of the list of contributories down to any particular time, or as to any particular person, or stating any variation of the list. Rule 74 of the same order makes the Master in Chancery Abolition Act (15 & 16 Vict. c. 80) applicable to proceedings for winding-up a company. Sect. 33 of that Act enables any party before the certificate or report shall have been signed and adopted to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceedings when it is brought by the chief clerk to a conclusion. The certificate is still in draft until it is settled and signed by the judge, and four days afterwards the official liquidator may take the opinion of the judge with respect to any person being on or not on the list of contributories as a matter of right and not of indulgence.

BACON, V.C.—It is one of the established rules of procedure that time as to appealing should be limited, and, where no limit is provided by statute, the court does not hesitate to act by analogy. It was argued that the court has a discretion as to orders made in chambers; but, in my opinion, in this case the time for appealing has gone by. Then I am told that the summons is in time, and I ought to hear it because the list of contributories is still in draft; but, as to this item, the certificate has been conclusively settled. Then it was argued that circumstances have changed, and that it was not worth while to place Mr. Brasnett on the list in June with respect to these shares; but that does not appear to me to affect the matter. The chief clerk has gone carefully into the whole matter; what he does I do, he acts for me in my place and in my name. If I were to accede to this application I could not

refuse any application; it would be a most mischievous innovation. The application is wholly too late. It is in effect an appeal from the decision of the 30th June. In the exercise of my discretion I dismiss the summons, but make no order as to costs.

Solicitors: *Boxall and Boxall; Owles and Collinson.*

Friday, Dec. 12, 1884.

(Before BACON, V.C.)

EDELL v. CAVE. (a)

*Practice—Appearance—Address for service—Illusory or fictitious—Rules of Court 1883, Order XII., rr. 11, 12.*

*Where a defendant in an action had appeared in person, and in the memorandum of appearance gave an address for service at an office in the city, but on inquiry it was found that, though once a partner in a firm on the premises, he had for some time ceased to have any connection with it, and had not authorised any person on the premises to take in, receive, or forward any documents left for, or to be forwarded to, him, and he had left the country:*

*On motion ex parte, asking that the appearance might be set aside as illusory or fictitious under Order XII., r. 12, of the Rules of Court 1883: The Court made the order.*

THIS was a motion *ex parte* on behalf of James Edell, the plaintiff in this action, asking that the appearance entered by George Cave, the defendant, on the 30th July 1884, might be set aside with costs on the ground that the address for service was illusory or fictitious under Order XII., r. 12, of the Rules of Court 1883.

The writ was issued on the 24th July 1884, and was served on the defendant at his private address at Streatham Hill.

On the 30th July the defendant entered an appearance in person, and in the memorandum of appearance gave as his address for service, 8, Lime-street, City, E.C.

On the 2nd Aug. 1884 the plaintiff wrote to the defendant at his private address, and the letter was returned to him through the dead letter office. The plaintiff subsequently received a letter from the defendant, stating that he had started for New Zealand, and later another letter dated the 21st Aug. 1884, and posted in Cape Town.

On the 17th Nov. the plaintiff called at 8, Lime-street, and found that the defendant had carried on the business of a tea merchant at that address, but had long since ceased to have any connection with the premises, neither had he authorised any person there to take in, receive, or forward any documents left for, or to be forwarded to, him.

*Macwinney* for the plaintiff.—The address given by the defendant is illusory. There is no defence to the action. The defendant put in an appearance and gave this illusory address for the purpose of delay. Field, J. made such an order in the case of *A. v. B.* (W. N. Nov. 17, 1883, 174). [BACON, V.C.—What do you say about service?] I cannot serve the defendant because I do not know where he is.

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BACON, V.C.—I allow the motion. You must serve the defendant with that order at 8, Lime-street, City, E.C.

Solicitor, *James Edell*.

Saturday, July 26, 1884.

(Before BACON, V.C.)

Re DONALDSON. (a)

*Taxation—Mortgagee solicitor—Trustee solicitor—Profit costs.*

*Where a solicitor was mortgagee with others of certain properties, the money lent on mortgage being trust money, and the solicitor sent in a bill to the mortgagor of costs incurred in an abortive sale, and a sale of part of the mortgaged property; on summons by the mortgagor to review the taxation, and disallow the solicitor's profit costs:*

*Held, that the solicitor, not being a trustee for the applicant, did not lose his professional rights by discharging business necessary to the trust, and that therefore he was entitled to charge profit costs; also that the mortgagor should have raised the objection to profit costs in the petition for taxation.*

THIS was a summons on behalf of Miss Sarah Ann Farrant Walter asking, "that the objections of the applicant, dated the 12th May 1884 to the taxation of costs in this matter, under the order dated the 5th Feb. 1884 may be allowed, and that it may be referred back to the taxing master to vary his certificate accordingly; and that the above-named Archibald Donaldson may be ordered to pay to the applicant her costs of this application and consequent thereon."

By an order of the 5th Feb. 1884 it was ordered that it be referred to the taxing master to tax and settle the bills of fees, charges, and disbursements amounting to the sums of 198l. 16s. 5d., 185l., 10s. 9d., and 18l. 4s. 8d. delivered by the said Archibald Donaldson to the applicant.

On the 12th May 1884 objections were taken by the applicant to the taxation by George Henry Drew, one of the taxing masters of the court, of the bills of cost of the said Archibald Donaldson under the order last referred to.

The applicant objected, on the following grounds, to the allowance of the following items, namely:

1. Because the said Archibald Donaldson, being one of the mortgagees under the mortgages in respect of which the costs are charged, is not entitled to charge profit costs in respect thereof, or any other costs than costs out of pocket.

2. Because the said mortgages were taken by the said Archibald Donaldson as a trustee, and as an investment of trust money, and he is therefore not entitled to charge profit costs in respect of the said mortgages, or any other costs than costs out of pocket.

Items. The first and all other items in the said bill of costs, whereby the said Archibald Donaldson would derive any pecuniary benefit above and except costs out of pocket.

Answers to the objections of the applicant to Mr. Drew's taxation of the solicitor's bill of costs:

On the taxation the applicant's solicitor objected to the first and a number of other items in the bills on the ground, as stated in the objections, that the solicitor was a trustee, and therefore not entitled to charge profit costs, but only costs out of pocket. I was of opinion that the rule that a trustee may not make a profit of his

trust, and therefore that a solicitor trustee may not charge any but costs out of pocket does not apply to the case of a mortgagor taxing the costs of his mortgage, where there is no relation between them but that of a mortgagor and mortgagee. If the beneficiaries of the money lent to the mortgagor were taxing the bill, the rule would, no doubt, apply, and I must have allowed the objection; but in this case the trust fund will not in any way be diminished, and the persons interested in that fund will not suffer by my allowing to the solicitor profit costs. It was suggested on behalf of the applicant that the security may not be sufficient to pay the principal and interest and profit costs; but, if so, my decision in this case will not prevent the beneficiaries taxing the bill of costs on the principle contended for. On these considerations I was of opinion that I ought to allow the solicitor profit charges, and therefore I allowed the first two items in the bill, forbearing at present to tax the remainder of the bill in order that the applicant might, if she thought fit, at once take steps to appeal from my decision. I have considered the objections, and I am of the same opinion, and I disallow them.

G. H. DREW.

The taxing master's certificate, dated the 21st May 1884, was as follows:

In pursuance of an order in this matter, dated the 5th Feb. 1884, and made upon the application of S. A. F. Walter, of Belle Vue House, Ipswich, in the county of Suffolk, spinster, I have been attended by the solicitors for the said applicant and for the respondent, and I should have proceeded to tax the bill of costs as by the said order directed; but the solicitor for the applicant having carried in objections to my allowance of profit costs to the said Archibald Donaldson, I have considered such objections, and, disallowed the same, and, at the request of the applicant, I make this my separate certificate, so that the applicant may take the opinion of the court upon the principle on which the said bills should be taxed before I proceed further with such taxation, all which I humbly certify to this honourable court.

Archibald Donaldson was mortgagee with others of two properties belonging to the applicant, called respectively the Belle Vue Estate and the Hill House Estate. The bills of cost delivered by Archibald Donaldson were for fees and disbursements relating to the abortive sale of the Belle Vue Estate, and the sale of the Hill House Estate.

*Hemming, Q.C. and F. W. Baines* for the applicant.—Independently of the trustee question, a solicitor who is a mortgagee cannot charge profit costs:

*Broughton v. Broughton*, 5 De G. M. & G. 160:

*Sciator v. Cottam*, 3 Jur. N. S. 630; 29 L. T. Rep. O. S. 809;

*Re Taylor*, 18 Beav. 165.

As a co-trustee Donaldson could not charge more than costs out of pocket against the mortgagees, his *cestuis que trust*; therefore he cannot charge more against the mortgagor, a third party, under the third-party clause of the Attorneys and Solicitors Act 1843 (6 & 7 Vict. c. 73), s. 38:

*Re Jones*, 8 Beav. 479;

*Re Baker*, 32 Beav. 526.

*Marten, Q.C. and Farwell* for the respondent.—The solicitor as mortgagee is entitled to charge profit costs. A mortgagee is entitled to be paid his principal, interest, and costs, and in an action for foreclosure or redemption a mortgagee as solicitor is entitled to his full profit costs. The solicitor as trustee is also entitled to his costs:

*Whitney v. Smith*, 20 L. T. Rep. N. S. 463; L. Rep. 4 Ch. App. 513.

The mortgagor has no right to taxation under the third-party clause:

*Galloway v. The Corporation of London*, 16 L. T. Rep. N. S. 407; L. Rep. 4 Eq. 90.

CHAN. DIV.] *Re THE GLAMORGANSHIRE BANKING COMPANY; MRS. MORGAN'S CASE.* [CHAN. DIV.]

*Selater v. Cottam* is not followed by more modern authorities:

*The London Scottish Benefit Society v. Chorley*, 50 L. T. Rep. N. S. 265; 51 L. T. Rep. N. S. 100; 12 Q. B. Div. 452; 13 Q. B. Div. 872;  
*Price v. McBeth*, 33 L. J. 460, Ch.

The mortgages empowered the solicitor to charge his costs. The applicant took the ordinary order; she should have stated in her petition for taxation her objection to profit costs; the objection now is too late.

*Hemming, Q.C.* in reply.—*Selater v. Cottam* has never been overruled, and is exactly in point. It is quoted in *Coots on Mortgages*, 4th edit. 798; in *Fisher on Mortgages*, 4th edit. 923 n; in *Seton on Decrees*, 4th edit., 1061 and in *Morgan & Davey on Costs*, 2nd edit., by *Morgan & Wurtzberg*, 390. *The London Scottish Benefit Society v. Chorley* is different from our case.

BACON, V.C.—In this case, which is one relating to the practice of the court on the question of taxation, I am asked to overrule the decision of the taxing master and the chief clerk, officers of the court, well versed in the matters of taxation, and in the principles by which they are regulated. A number of cases have been cited to me, but the case of *Selater v. Cottam* is the only one having any bearing on the subject; that was a very special case, and the facts are so different, that I cannot decide this case by reference to that. It is a well-established and familiar rule that a trustee cannot charge profit costs, on the principle that a trustee cannot make a profit out of his trust, though he is entitled to the costs incurred by him in the exercise of his trust; but it appears to me that this rule has no application to the present case, because the respondent is not a trustee for the applicant. Trustees are obliged to do certain things to protect the trust property, and must frequently employ a solicitor for that purpose, and are entitled to the costs so incurred. If I accede to Mr. Hemming's argument, I must decide that in a case where a separate solicitor is not employed, and a solicitor is both trustee and mortgagee, he cannot under any circumstances be entitled to his costs of acting as solicitor for his co-trustees and himself. There is no authority to sustain that contention, but there is authority that a solicitor, when acting for himself, can charge for costs. Now, in this case, the trustees, who are entitled to employ a solicitor so as to discharge the duties of the trust, in pursuance of their trust proceed to realise their security. One of the trustees is a solicitor. Because one of them happens to be a solicitor, am I to disallow costs properly incurred? Mr. Donaldson is one of several trustees; I cannot hold that he loses any professional rights by discharging business necessary to the trust. I cannot strike him off the rolls, as far as regards this matter, because he is a trustee. If he were the sole surviving trustee, and he had to bring an action for foreclosure, he would be entitled to costs. What has he done in this case? In the course of the trust he offers the property for sale, and charges for his costs. On objection being made, the taxing master is of opinion that the rule that a trustee may not make a profit of his trust does not apply to the case of a mortgagor taxing the costs of his mortgagee when there is no relation between them but that of

mortgagor and mortgagee. I know of no principle on which I can say that the taxing master was wrong. *The London Scottish Benefit Society v. Chorley* decides that a solicitor is entitled to charge for costs in an action where he is a party. Another circumstance which is against the applicant's contention is this: The mortgagor applies to have her bill taxed in the ordinary form; she ought to have specially stated her objections in her petition for taxation; she is too late. She took out the common order, and then made the objection; she cannot justify that. I must hold that the objection was too late, irregular in form, and against principle. On the matter of principle I have no doubt. *Re Taylor* was different from this case. The summons must be dismissed with costs.

Solicitors: T. W. Smart; Brown and Woolnough.

Nov. 26 and 27, 1884.

(Before BACON, V.C.)

*Re THE GLAMORGANSHIRE BANKING COMPANY; MRS. MORGAN'S CASE.* (a)

*Company—Reconstruction—Right of dissentient shareholder to inspect books of old company—Arbitration—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 161, 162.*

*The liquidators of a company being voluntarily wound-up for the purpose of the transfer of its assets to a new company, offered a dissentient shareholder 5s. in the pound per share. She elected to have the price settled by arbitration.*

*On summons by the dissentient shareholder against the liquidators for an order compelling them to produce the books and documents of the old company.*

*Held, that the onus lay upon the liquidators to show in the arbitration that 5s. in the pound per share was a proper price; the summons, therefore, was unnecessary, and must be dismissed, with the costs of the adjournment into court.*

THIS was a summons on behalf of Elizabeth Morgan, widow, a contributory of the Glamorgan-shire Banking Company, asking that the liquidators of the company might be ordered to produce to her, or her solicitors, or some other person to be named by her, all books, accounts, statements and returns, reports, and other documents in their custody or control, containing entries or information relative to the assets of the said bank at the date of the resolution to wind-up the company, or to the value of such assets; and that the costs of the application might be paid by the liquidators.

On the 10th and 28th March 1884 special resolutions were passed and confirmed at extraordinary general meetings of the old company to wind it up, and reconstruct the same in manner provided by the said resolutions.

The new company was to bear the same name as the old company, and took over the assets and liabilities of the old company on the 26th March 1884.

On the 28th March 1884 Mrs. Morgan gave notice to the liquidators that she dissented from the special resolutions so passed, and required them either to abstain from carrying such reso-

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.



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lutions into effect, or to purchase the interest held by her in the said company at a price to be determined in accordance with the provisions of the Companies Act 1862.

On the 16th April 1884 the liquidators offered to purchase Mrs. Morgan's interest in the company by payment to her of 2l. 10s. for each share held by her with 10l. paid up thereon, and 1l. 17s. 6d. for each share with 7l. 10s. paid up thereon.

On the 24th April 1884 the offer was declined on behalf of Mrs. Morgan, her solicitor writing that, "unless an increased offer is made by the liquidators, and accepted, the price must be settled by arbitration."

The liquidators refused to increase their offer, and on the 16th July 1884 declined to produce the books of the company on the request of Mrs. Morgan.

On the 29th July 1884 the summons was taken out.

Millar, Q.C. and Kirby for the applicant.—We desire to inspect the books of the company, for the purpose of seeing whether 5s. in the pound per share is a fair price, or whether it is worth while to go to arbitration. We have an undoubted right to inspect the books and documents of the bank: (Sect. 156 of the Companies Act 1862). In your Lordship's language in *The Imperial Mercantile Credit Association* (L. Rep. 12 Eq. 513) Mrs. Morgan "should not go to the arbitration blindfold."

*Re The Mutual Society*, 48 L. T. Rep. N. S. 651; 22 Ch. Div. 715;

*Re The Birmingham Banking Company and The Joint Stock Discount Company*, 36 L. J. 150, Ch.;

*Re The Contract Corporation*; *Gooch's case*, 28 L. T. Rep. N. S. 177; L. Rep. 7 Ch. App. 207.

Marten, Q.C. and Prior for the respondents.—The general arrangement of the 26th March 1884 was binding on the members of the company, and on Mrs. Morgan. The books and documents of the old company have been transferred by the liquidators to the new company, and they cannot comply with Mrs. Morgan's application. The company is being reconstructed under sect. 161 of the Companies Act 1862. A dissentient shareholder is in the position of an unpaid vendor, and is obliged to transfer her shares subject to the price being settled under sect. 162 of the same Act:

*The Metropolitan Provincial Bank*; *Ex parte Davis*, 16 W. E. 688;

*The Marine Investment Company*; *Poole's Executors*, L. Rep. 8 Ch. App. 702.

Millar, Q.C. in reply.

Bacon, V.C.—I have listened to a very lengthy argument; but, in my opinion, the point is extremely simple. A summons is taken out by a shareholder asking that the liquidators may be ordered to produce the books and documents relative to the assets of the old company. The answer is in point of fact, "We have not got them." All that is ordered by the Companies Act 1862 in such a case has been done, and there is no suggestion that the books, if produced, would show that Mrs. Morgan would be found to be entitled to more than the 5s. in the pound offered. The liquidators have complied strictly with the Act of Parliament, and have transferred all the assets, including the books and documents of the old company, to the new company. The number of the dissentient shareholders is six out of several hundreds. If

in a case such as this an inaccuracy of procedure is pointed out, the court would see that justice was done; but here all that has been done has been done regularly, all but six shareholders agreed to the arrangement, and the assets and books were handed over to the new company. The answer to the summons is, "We have no such books, and no such accounts." Then comes the letter of the 24th April 1884, "unless an increased offer is made by the liquidators, and accepted, the price must be settled by arbitration." Arbitration is chosen by the applicant, and the arbitrators are appointed, why not go on? It was argued that Mrs. Morgan should not be allowed to go to the arbitration blindfold, referring to *Sir Trevor Lawrence's case* in the Imperial Mercantile Credit Association; but she cannot be said to go blindfold. The liquidators in the arbitration have the onus laid upon them to make out that the 5s. in the pound per share offered was a good offer. The applicant has power in the arbitration to examine into the accounts, and it has never been suggested that the applicant labours under any disability, or any want of knowledge such as to prevent her from establishing her claim. The case differs from the Birmingham Banking Company, and the other cases cited in support. Here the current accounts of the old banking company have been transferred to the new, and the applicant asks to be allowed to examine into the private means of the members of the old company. Arbitration gives her ample means of finding out the state of the assets of the old company. Such an application should never have been made to this court. She has all the powers conferred by the various Acts relating to arbitration, and yet she asks me to make an order to the liquidators to produce these books and documents. Whether the offer of 5s. in the pound per share is enough, or whether it is too much, means are provided by law for a shareholder who chooses to go to arbitration, to discover the facts. Mrs. Morgan has the means in the arbitration of obtaining the fullest information from the liquidators to which she is entitled. All that has been done in March last was regularly done, and the assets, books, and accounts of the old company were transferred to the new: the business has since been carried on. The liquidators, by the transfer, are deprived of the means of obeying the order which I am asked to make. No argument has been addressed to me showing any necessity for this summons, and I dismiss it with the costs of the adjournment into court.

Solicitors: Nicholl Morgan and W. Voss.

Friday, Nov. 28, 1884.

(Before KAY, J.)

FOAKES v. WEBB. (a)

Practice — Discovery — Interrogatory — Answer — Sufficiency of — Professional confidence — Solicitor and client.

An action was brought for the specific performance of an agreement for sale, which was alleged to be contained in a receipt. The defendants denied that the receipt contained the true terms of the agreement.

The plaintiffs thereupon delivered interrogatories,

(a) Reported by E. A. BORATCHELTY, Esq., Barrister-at-Law.

the second of which was as follows: "Is it not the fact that, between the 13th Nov. 1883 and the date of the delivery of the defence in this action, numerous, or some, and how many, interviews took place, and a large amount of correspondence passed between the plaintiffs' solicitor . . . and the defendants' solicitors . . . in relation to the said agreement, and to the terms and completion thereof?"

The defendants declined to answer this interrogatory on the ground that they had no personal knowledge of these matters, and that the only information they had relating to these matters was derived from confidential communications between them and their solicitors in reference to their defence of the action.

The plaintiffs took out a summons to compel the defendants to make a better answer to the interrogatory.

Held, that it was not sufficient for the defendants to say that they had no personal knowledge of the subject of the interrogatory; that they were bound to state as to their information and belief; that the information obtained from their solicitors relating to these matters was not privileged; and that the defendants must, therefore, make a further answer.

By their amended statement of claim, delivered on the 19th May 1884, the plaintiffs, Foakes and White, alleged that, on the 28th Sept. 1883, the defendants, Webb and Gibbons, who were partners, entered into an agreement with White for the sale to him, at the price of 330*l.*, of a field known as the High-street Field, at Great Dunmow; that White on that day paid to Webb and Gibbons the sum of 10*l.* as a deposit in part payment of the purchase money; and that Gibbons, in the presence and by the authority of Webb wrote out and signed a receipt or memorandum, as follows:

Sept. 28, 1883.—Received from Mr. J. P. White the sum of 10*l.*, as deposit on sale of High-street Field for 330*l.* Purchase to be completed by the 25th Dec. 1883.  
10*l.* Os. 0*d.* WEBB AND GIBBONS.

The plaintiffs also alleged that the agreement was entered into by White at the request and for the benefit of Foakes; that, on the 29th Nov. 1883, White, by deed of that date, conveyed to Foakes all his interest in the High-street Field under the agreement; that notice of such conveyance was immediately given to the defendants; and that the receipt of such notice was at once acknowledged by their solicitors.

The plaintiffs further alleged that the defendants had, in spite of numerous applications to them, neglected and refused to deliver any abstract of their title to the field, or to complete the agreement, and threatened to sell the field to other persons without regard to the agreement.

The plaintiffs claimed specific performance of the agreement.

By their amended statement of defence, delivered on the 26th May 1884, the defendants alleged that the receipt did not contain the true terms of the agreement between White and the defendants; that the agreement between them was a verbal agreement made before the receipt was signed; and they stated the terms of such agreement.

The plaintiffs thereupon delivered the following interrogatories to the defendants:

1. Is it not the fact that it was not a term or part of the agreement for sale in the pleadings mentioned that the defendants' solicitors, Messrs. Wade, Wix, and Wade, should act as solicitors for the plaintiff White in carrying out such agreement? If the contrary, state the occasion on which such term was agreed upon, between what persons it was so agreed, by whom it was first suggested that such a term should form part of the agreement, and as nearly as you can the short effect of the conversation or discussion in which it was so agreed?

2. Is it not the fact that, between the 13th Nov. 1883 and the date of the delivery of the defence in this action, numerous, or some, and how many, interviews took place, and a large amount of correspondence passed between the plaintiffs' solicitor, Mr. E. T. Foakes, and the defendants' said solicitors, and also between Charles Carne Lewis and the defendants' said solicitors, or one of them, in relation to the said agreement, and to the terms and completion thereof; and is it not the fact that, from the date of the said agreement (i.e., the 28th Sept. 1883) until the delivery of the defence, it was never suggested or alleged to the plaintiffs, or either of them, or their said solicitor, by the defendants, or their said solicitors, that it was any part or term of the agreement that the defendants' said solicitors should act as solicitors for the plaintiff White in relation to the sale? Or let the defendants state the occasions on which, and the terms in which, such suggestion or allegation was made, and to whom.

The defendants' answers were as follows:

1. It is not the fact that it was not a term or part of the agreement for sale in the pleadings mentioned that our solicitors, Messrs. Wade, Wix, and Wade, should act as solicitors for the plaintiff White in carrying out such agreement. Such term was agreed upon between us and the plaintiff White as part of the agreement for sale when such agreement was made.

It was first suggested by us that such a term should form part of the agreement. The short effect of the conversation or discussion in which it was so agreed is that it was agreed that the plaintiff White should purchase High-street Field on the terms stated in paragraph 2 of our amended defence.

2. We decline to answer the second interrogatory, so far as it relates to communications between our solicitors and other persons, on the ground that we have no personal knowledge of these matters, and that the only information we have relating to these matters is derived from confidential communications between us and our said solicitors in reference to our defence of this action. It is not the fact that from the date of the said agreement (i.e., the 28th Sept. 1883) until delivery of the defence, it was never suggested or alleged by us to the plaintiffs or their solicitor that it was any part of the term of the agreement that our said solicitors should act as solicitors for the plaintiff White in relation to the sale. Such suggestion or allegation was made by us to the plaintiff White at the time when the said agreement was made, and was also made by the defendant Thomas Gibbons to the plaintiff White at an interview between the said defendant and plaintiff which took place on or shortly after the 28th Sept. 1883, when the said defendant stated that the only reason why we sold to the said plaintiff without a formal contract was that it was agreed that our said solicitors should act for both parties.

The plaintiffs then took out a summons for better answers by the defendants to the interrogatories.

The summons was adjourned into court at the instance of the defendants, and now came on to be heard.

*Lyttelton Chubb*, for the plaintiffs, in support of the summons.

*Leveti*, for the defendants, *contra*.

*Lyttelton Chubb*, in reply, cited

*Bray's Law of Discovery*, pp. 364, 434;

*Spencely v. Schulenberg*, 7 East, 357;

*Griffith v. Davies*, 5 B. & A. 502;

*Parvitt v. North Metropolitan Tramways Company*,

48 L. T. Rep. N. S. 731.

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KAY, J.—I think I must stop you, Mr. Chubb. I must say that, in my opinion, this is rather like a revival of the old disputes about interrogatories. However, my duty is to determine whether a further answer ought to be given to these interrogatories. As to the first, it is substantially answered. The second is this: [His Lordship read the second interrogatory, and continued:] The answer was as follows: "We decline to answer the second interrogatory, so far as it relates to communications between our solicitors and other persons, on the ground that we have no personal knowledge of these matters." That is not enough. They are bound to state as to their information and belief, and upon that they do not say a word. But then they go on to say: "The only information we have relating to these matters is derived from confidential communications between us and our said solicitors, in reference to our defence of this action." That comes to this: "Whether our solicitors have had communications with the other side or not is a fact of which we have no personal knowledge. We have information which our solicitors have given us, but we say that that is a confidential and privileged communication." Suppose a letter had been written by the solicitor of the one side to the solicitor of the other side, and it became important to prove the handwriting, and one of the parties to the action, in reply to an interrogatory as to the handwriting, said, "I have no personal knowledge of the handwriting, and any information I may obtain from my solicitor is privileged." Would such an answer be enough? In my opinion, such information cannot be privileged. That would be an entire perversion of the rule of privilege as to protected communications. The fact that the solicitor was the person who signed a particular letter cannot be a confidential communication? Suppose the solicitor himself was asked that question in the witness-box, he could not claim privilege, and would be obliged to answer. If he must answer, can his client refuse to do so because he has no personal knowledge, and the only information he can get is from the solicitor, who would be bound to answer? The privilege of the solicitor is the privilege of the client. How can there be a confidential communication of an outside fact? I will now go to the authorities. The cases that touch the question most nearly are, first of all, those collected in Mr. Bray's excellent book on *Discovery*, at pages 138 and 434. Take the case of *Griffith v. Davies* (5 B. & A. 502) which has been referred to. In that case "it was said (I am reading from Mr. Bray's book) that an attorney could not refuse to state what he had communicated to the opposite party by order of his client, for it was not a confidential disclosure but an open communication from one adversary to another—something which had been already said to the plaintiff . . . and accordingly he was held bound to state what passed at a conversation between the plaintiff and the defendant respecting a compromise at which he was present as the defendant's solicitor." So here, the question is what did the defendants' solicitors say to the other side? As a solicitor never could protect himself from answering that question if he were in the witness-box, it seems to me ridiculous to say that a client can refuse to answer an interrogatory as to that external fact on the ground that his information is privileged. It seems to me

that that is wrong. The whole thing is very idle, though I cannot say that it is wholly irrelevant to the matters which are going to trial; and, therefore, although I think there must be an order for a further answer to this interrogatory, I decline to give costs of this application.

Solicitor for the plaintiffs, *Edward Thomas Foakes*.

Solicitors for the defendants, *Park Nelson, Morgan, and Gemmell*, agents for *Wade, Wix, and Wade, Dunmow*.

Aug. 1 and 2, 1884.

(Before NORTH, J.)

THE MAYOR, &C., OF NEW WINDSOR v. STOVELL (a)

*Local Board of Health—Ultra vires—Public Health Act 1848, s. 48—Premises beyond limit of district—Agreement for connecting sewer—Drainage of houses hereafter to be erected.*

The defendants were the owners of the Clewer estate of 142 acres, of which sixteen were within and the remainder without the limits of the borough of New Windsor, for which the plaintiffs were the local board of health. By an indenture dated the 3rd Aug. 1857 the local board of health of that date had granted to the predecessor in title of the defendants, his heirs and assigns, in consideration of his having constructed a certain sewer, and of a payment of 10l. a year, "leave and licence to drain, carry off, and permit to flow off into and through a certain drain within the limits of the said district all the drainages and sewage from the property and houses then belonging to him at Clewer, and any houses thereafter to be erected on the said property." There was at the date of the indenture only one street of houses on the said property outside the limits of the district; many others had since been built. This was an action to set aside this deed as *ultra vires* so far as it related to houses not erected at this date.

Held, that sect. 48 of the Public Health Act 1848, under which the board acted in executing the deed, only gave them the power of making the terms and conditions upon which a sewer might be connected with their system, and so long as the sewer remained the same no complaint could be made of the amount of sewage sent down it; therefore the agreement was not *ultra vires*.

THE plaintiffs in this action were the urban sanitary authority for the borough of New Windsor. The defendants were the persons entitled under the will of one Arthur Vansittart to an estate called the Clewer estate in the neighbourhood of New Windsor, whereof eighteen acres were within and three hundred and sixteen acres or thereabouts without the boundaries of the borough. Of the part without the boundaries one hundred and twenty-four acres or thereabouts were suitable for building purposes.

By an indenture dated the 3rd Aug. 1857, made between Arthur Vansittart, the predecessor in title of the defendants, of the one part, and the Windsor Local Board of Health, the then sanitary authority for the borough of New Windsor, of the other part, after reciting that the local board had constructed and laid down a system of drains and sewers for the purpose of draining the district of Windsor, in the county of Berks, and

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

that the said A. Vansittart was the owner of large property and numerous houses forming a street called Bexley-street, at Clewer, in the said county, which were adjoining or near to, but beyond the limits of, the said district, and had applied to the said local board for permission to carry the drainage and sewage of the said property and houses along the line of a drain therein mentioned, so as to communicate with and run into the said district system of drains and sewers, and that the local board, in pursuance of the Local Public Health Act 1848, had agreed to grant him such permission upon the terms and conditions that he should construct and execute the works, and pay the yearly sum, and observe and perform the other acts thereafter mentioned; the said A. Vansittart agreed to construct certain brick barrel drains, and do certain other works for the benefit of the local board, and to pay 10*l.* a year to the local board, their successors and assigns, so long as they should drain and carry off, or permit to flow off, the drainage and sewage of the said property or houses belonging to him the said A. Vansittart as aforesaid, or any part thereof, through the said barrel drains, and the said local board covenanted in the following words:

"The said local board do give and grant unto the said Arthur Vansittart, his heirs and assigns, full and free leave, licence, and permission for him and them to drain and carry off, and permit to flow off into and through the said barrel drain, so to be constructed between the points therein specified, within the limits of the said district, all the drainage and sewage from the said property and houses now belonging to him, the said Arthur Vansittart, at Clewer aforesaid, and any houses hereafter to be erected on the said property, and will afford free passage to all the drainage and sewage from the said barrel drain into their main sewer.

At the date of the said indenture there were upon the Clewer estate only about fifty houses, but the laying out of the whole for building was in contemplation. Before the date of the commencement of the action many more houses had been erected, and the whole of the estate was being laid out for building, and intended to be rapidly built over. At the date of the indenture the main sewer of the board of health drained into a brook communicating with the Thames. Subsequently the plaintiffs were compelled by proceedings under the Thames Navigation Act 1866, and the Rivers Pollution Prevention Act 1876, to construct works for the interruption of their sewage, to convey it some distance from the borough, and there deodorise and deal with it in a way involving considerable expense in pumping and otherwise.

The plaintiffs brought this action in September 1877, asking that the indenture of the 3rd Aug. 1857 might be declared *ultra vires* and void, and for an injunction restraining the defendants from sending any sewage into the plaintiffs' system of sewers.

Sect. 48 of the Public Health Act 1848, under which the Board of Health purported to act in executing the indenture in question, provides:

"That any owner or occupier of premises adjoining or near to, but beyond the limits of any district, may cause any sewer or drain of or from such premises, to communicate with any sewer of the local board of health, upon such terms and conditions as shall be agreed upon between such owner or occupier, and such local board, or in case of dispute as shall be settled by arbitration, in the manner provided by this Act.

By the interpretation clause it was provided that the word premises shall include messuages, buildings, lands, and hereditaments of any tenure.

The plaintiffs also claimed to have the deed rectified on the ground that it was only intended by the parties to apply to the sewage from existing houses, but the Court held that there was no evidence of any ground for such rectification.

*Davey, Q.C., Everitt, Q.C., and Chadwick Healy* for the plaintiffs.—The local board had no power to make a contract except with respect to existing buildings. The right given by the Act is for the owner or occupier of premises to connect a sewer or drain, that is, for the owner or occupier of existing premises, and the board's right to make terms must be correlative to the right to connect. The local board were trustees to make the best terms they could for the ratepayers, and had no more right to contract for the future than a trustee for sale has to give an option to purchase at a future time:

*Clay v. Rufford*, 5 De G. & S. 768;  
*Oceanic Steam Navigation Company v. Sutherland*,  
43 L. T. Rep. N. S. 743; 16 Ch. Div. 236.

Even if this deed had been the grant of an ordinary easement the grantee could not materially increase the burden, but would be restricted to a reasonable use for the purpose of the land in the condition it was when the grant was made:

*Wood v. Saunders*, 32 L. T. Rep. N. S. 363; L. Rep. 10 Ch. 532.

Here the local board contracted to grant an easement, and it must be construed in the same way. At least we are entitled to an injunction as to future houses:

*Attorney-General v. Acton Local Board*, 47 L. T. Rep. N. S. 510; 22 Ch. Div. 221.

The effect of the agreement as it stands is to compel the ratepayers of New Windsor to incur a constantly increasing expense in disposing of the sewage of the Clewer estate, while its inhabitants bear no share of the increased expense, and pay only the original sum of 10*l.* a year, however much the cost of dealing with their sewage may increase. The agreement was entered into upon the understanding that the local board would be allowed to go on turning the sewage into the Thames. It cannot be maintained now that circumstances have altered.

The *Solicitor-General, Barber, Q.C., and De Castro* for the defendants, the trustees of the will of Arthur Vansittart.—It is not correct to say that the Act of 1848 vests in the local board a trust, or a power in the nature of a trust, to make these arrangements. The section gives the adjoining owner a right to connect his sewer. The terms are to be agreed with the board, and no doubt it is their duty to see that the terms are fair, but they cannot refuse to allow the connection. If the parties cannot agree the terms are to be settled by arbitration under the Act of 1848, and by the court under the Act of 1875, which is now substituted for that Act; an agreement settled by the court could hardly be *ultra vires*. The Act gives the board no power to regulate the amount of sewage to be sent down the sewer, but only to give leave to connect it. When it is

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connected the board must deal with all the sewage which can be properly sent down it:

*Newington Local Board v. Cottingham Local Board*, 40 L. T. Rep. N. S. 58; 12 Ch. Div. 725.

It is not true there is no limit, the limit is the capacity of the sewer connected, it cannot be enlarged without fresh terms. On the construction contended for by the other side it would be impossible to construct a sewer till all the houses were built, or a fresh agreement must be made on the erection of every new house. We only ask for the grammatical construction of the Act. There is no ground for reading into it the words "in its present state."

*B. B. Rogers and Druce* for different parties beneficially interested under the will.

*Davey*, Q.C. in reply.—The board must have some definite basis upon which to decide what terms to exact, and the only basis is the state of the property at the time. It is impossible to know what would be a fair compensation for permission to send down the sewage of a wholly indefinite number of houses. [NORTH, J. referred to *Newcomen v. Coulson*, 36 L. T. Rep. N. S. 385; 5 Ch. Div. 142.] There the court came to the conclusion, on the construction of the deed, that there was a grant of a general right of way for all purposes, and the case of *United Land Company v. Great Eastern Railway Company* (L. Rep. 17 Eq., 158) was decided on the same grounds. In *Newington Local Board v. Cottingham Local Board* (*ubi sup.*) the contract was between two local boards, and the only point decided was that it must be read subject to the Act. The Newington Board agreed to take all sewage properly coming down the sewers of the Cottingham Board, and it was held they must take the sewage from persons outside the district which the Cottingham Board were under a statutory obligation to take. Mr. Vansittart is under no statutory obligation to connect the drains of new houses with his sewer. Every time he does so he indirectly connects them with the board's sewer, and that needs a fresh agreement.

NORTH, J.—There are three questions raised in this case. The first I will deal with is the question whether the deed as it stands now is correct or not, or whether the intention of the parties really was something different, and the deed must be put into a right shape so as to represent what was their intention. [His Lordship then, after stating the facts as above, went through the evidence as to the negotiations between the parties, and stated his conclusion that no rectification could be directed on that ground.] Then it is said—and this is the second point—that the deed itself was *ultra vires*, because the board were in effect entering into a bargain which amounted to a settlement of the price to be paid for every future communication made with the sewer of the board, and that this was outside their powers. That would not enable me to say the deed was void. As regards the surface drainage, and as regards the existing houses, it is clear beyond all question that it was most certainly and entirely within their powers. The only question therefore is whether it can be said that they were doing what was beyond their powers as regarded houses that were not in existence at that time, but should be erected afterwards. The words of the section are: [His Lordship read the section set out above.] Now

it is said that that conferred a discretionary power upon the board as trustees, or *quasi* trustees, and that they would not exercise that with respect to the sale of property or agreeing for communications to be made, or anything of that sort, except with respect to what was actually being done at the time, and it is said, in effect, that that arrangement was a bargain made with respect to every connection made after its date, of a drain from a house not then existing to the board's sewer either mediately or immediately. It does not seem right to say that under that section the board are acting as trustees in the sense in which it was put. No doubt it is left to them to settle the terms and conditions on which this is to be done, and inasmuch as those terms and conditions were not affecting them individually or personally, but affecting the rate-payers, they were acting on behalf of all persons as to that, but the power to make an arrangement given is to make an arrangement as to the terms and conditions upon which the thing is to be done. There is nothing whatever which enables them to say it shall not be done at all. Under this Act, in case the terms should not be agreed upon, they might be settled by arbitration. Under the Public Health Act, passed in the year 1866, for the first time an additional power was given of having disputes settled by two justices, and that clause in effect is added to the Public Health Act of 1875; but instead of two justices a court of summary jurisdiction is put in, which means the same thing. That being so, it is a case in which, in my opinion, the owner of the adjoining property has a right to have this communication made, and that was decided by Malins, V.C. in the case I have referred to of *The Newington Local Board v. The Cottingham Local Board* (*ubi sup.*). He says (12 Ch. Div. p. 733): "I have paid great attention to the case, which has been ably argued, and I feel bound to come to the conclusion that it is the right of every owner without the district to consider what will be most convenient to him. It cannot I think be better illustrated than by the case of the Botanic Garden, which lies immediately contiguous, so that nothing could be more advantageous to them, nothing more obvious to them, when building upon their ground, than to do that which it would be their duty to do, and drain into the nearest sewer; and that sewer is the sewer of the Cottingham district." I should say that as regards the Botanic Gardens they were the proprietors of I think fifty-five acres of land, which they were proceeding to lay out for building ground with villa residences, so that there was a building estate of a considerable size. Then he proceeds: "That is the right which they have proceeded to exercise, and that is the right which according to my view is clearly conferred upon them by sect. 22 of the Act of 1875, or by the Act of 1866, to which I have just referred, or in the present case by the Public Health Act of 1848, sect. 48 of which I have just read. If that is so there is a right on the part of Mr. Vansittart here to have this sewer made to communicate with the land. The terms no doubt are to be settled and fixed upon by the parties, and, if they cannot agree, the terms are to be settled by arbitration, and when settled by arbitration, notwithstanding any opposition on the part of the board, would be binding, and upon those terms being complied with the right to connect the sewer is to take

place. As soon as that is done everything contemplated by the section has been done. The terms and conditions have been agreed upon by the parties, or have been settled for them by a power which has the right to settle them, the connection has taken place, and I do not see how after that anything further remains to be done. It is said the board would be in a difficulty in seeing what terms to settle on, because they could not know what would be done with the land, how many houses might be built on it, or what burthen might be cast on them. That is one of the difficulties they have to deal with, and they must deal with it by taking care that the terms which are provided limit the number of houses, or require a payment in respect of them which will be a fair remuneration for what is done. As Malins, V.C. pointed out in the same case, that is the position of the board. He says, "It appears to me that when the Newington Board entered into this arrangement with the Cottingham Board, they were bound to consider what under the existing law was the chance of the drainage being increased by persons other than those who had a strict right to drain into the Cottingham sewer. They were bound to enter into a calculation how far the sewage would be increased, and to make their sewer of the size which was calculated not only to dispose of the actual sewage, but of that sewage which would be added to it in the exercise of the powers which appear then to have existed, and which undoubtedly exist under the subsequent Act of Parliament. Therefore it is an inconvenience which, as it appears to me, they are bound to suffer, and the right is perfectly clear." Therefore Mr. Vansittart having a right to have this connection made immediately, and all the terms of the section carried out immediately, the board must do the best they can for the purpose of fixing the terms, and they must fix them fairly and reasonably, and those terms must be complied with, or else the connection cannot be made, and, as soon as these terms and conditions have been complied with the connection is to be made, and as it seems to me, there is an end of the matter. Under those circumstances the section is equivalent, in my opinion, to the conferring of a right upon the owner of the adjoining land to have this communication made, and for that purpose to use the communication when made for the purpose for which the sewer is made. There are no express words directing it, but I consider that the direction that the communication may be made carries with it the right to do what was the only purpose in contemplation when the arrangement to make the communication is made. Then it is said that this must be limited in some way to the property, in the state in which it actually existed at the time, and that the occupier of premises here, that is to say, the occupier of lands, buildings, or hereditaments who has put the section into play must have this right conferred on him simply with respect to the land as it stood at the time, and so as not to be capable of any alteration, and it was said the case of *Wood v. Saunders (ubi sup.)* was an authority for that. I do not think it is anything of the sort. If the judgment of Hall, V.C. is looked at in the 23rd vol. of the Weekly Reporter, where it is fully set out, instead of in the short note in the Law Reports, it will be seen that what he went on was the terms of the express grant as construed by the various surrounding

circumstances disclosed on the face of the deed. It is sufficient to mention one. He considered that the grant of a right of sewage was limited to the present house, because among other reasons the power to alter or convert or make any material or substantial change in that house was expressly negatived by the terms of the deed itself; that is to say, the deed required the house to remain as it was, and the grant of a right of sewage must be considered with reference to the house so remaining. In the present case I do not see anything in the section in terms mentioning the house or premises being in the state in which they were at the time. In the case of an easement, where you have to consider the extent of the easement not by the terms of the grant, because the grant is *ex hypothesi* lost, but simply from what has been done, there is no way of ascertaining the grant except by what has been done under it; but where you have the grant in existence before you, then you do not require to measure it by what has been done under it, you leave the terms of the grant to speak for them selves. In *Williams v. James* (16 L. T. Rep. N. S. 664; L. Rep. 2 C. P. 577) Willes, J. says: "The distinction between a grant and a prescription is obvious. In the case of proving a right by prescription the user of the right is the only evidence. In the case of a grant the language of the instrument can be referred to, and it is of course for the court to construe that language, and in the absence of any clear indication of the intention of the parties the maxim that a grant must be construed most strongly against the grantor must be applied. Accordingly in *South Metropolitan Railway Company v. Edin* (16 C. B. 42), where a grant was produced without stating the object of the grant, it was the opinion of the judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted." Then again, in the case which Mr. Davey mentioned this morning of the *United Land Company v. Great Eastern Railway Company* (29 L. T. Rep. N. S. 498; L. Rep. 17 Eq. 158) it was held that a right of way over a railway was *prima facie* general, and not restricted to purposes to which the land was applicable at the time the right was granted. [His Lordship read the head-note in that case.] Then again, in the case of *Newcomen v. Coulson*, to which I referred Mr. Davey this morning, and which was read, the Master of the Rolls put a very clear interpretation on the word "lands." It was said there that he was dealing simply with the construction of the Inclosure Act, and the award in that particular case, and so he was; but the observations he made on the meaning of the word lands did not turn on its meaning as used there, but on the general meaning of the word lands, just as the word "lands" is used in the interpretation clause as one of the things to which the word "premises" in the 48th section extends. He pointed out there that land meant land in its condition for the time being, and it is not less land in the meaning of the award or the Act because afterwards persons proceed to build houses upon it. That was a case of a right of way to land. In the present case I am dealing with a right to have sewage flowing away from land. It seems to me, for the reasons given by the Master of the Rolls, that the right to have sewage flow from land means a right to have it flow from



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the land with such houses upon it as may be existing at the time the right is being exercised, and we have nothing to do with the houses existing upon it at the time the grant is made. Then in a more recent case which I will refer to without going into detail (*Finch v. Great Western Railway Company*, 41 L. T. Rep. N. S. 731; 5 Ex. Div. 254), the whole law was fully gone into, and *Newcomen v. Coulson* recognised and followed. Those cases satisfy me beyond all doubt that the proper construction to be put on the word "premises" as used in this section is not premises in the state in which they are at the time the grant was made, the Act passed, or the arrangement come to, but that it means the premises in all time according to the state in which they are at the time. It was said that it was almost impossible to believe that such can be the true construction of the Act, because the result is so disastrous to the board. To begin with, if it was within their powers its turning out badly for them would not affect it, but it seems to me that in reality there was nothing imprudent or unreasonable about it. Whether the terms arrived at were good or bad I have no means of judging, but it seems to me the board were in a position to judge what burden the existence of the sewer would under all the circumstances under which it might be used cast upon them; and I see no reason to doubt that they considered that 10l. a year, coupled with the cost, which must have been considerable, of making the drains stipulated for was a fair payment in return for what was required. It is quite true that events have taken place afterwards which were not in the contemplation of the parties that would make it desirable to throw a larger burden upon the person who owns the houses here which drain through this system of sewage of the local board, but it does not appear to me that that affects the question in reality at all. There is one other observation which I wish to make. At the time when this Act was passed other Acts were passed giving similar powers under similar circumstances. Of course it may be said that the construction of one Act does not throw much light on the construction of other Acts. But I think it not immaterial to refer to the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), which was passed in 1847; the 34th section contains a provision that "any owner or occupier of any lands beyond the limits of the special Act . . . may with the consent of the commissioners first obtained in writing, upon payment to them of a reasonable sum of money to be agreed upon between them . . . cause to branch into and to communicate with any sewers belonging to the commissioners any sewer or drain in respect of the said property which may be lawfully made therefrom, of such size and manner of communication as the commissioners approve of." Now the reasonable sum referred to there must necessarily be a reasonable sum to be paid at the time once for all, satisfying everything that would have to be paid to obtain the privileges conferred by the Act. And though the words of that section are different from the 48th section of the Public Health Act, yet they show that at that time what was contemplated was a provision made once for all like the provision which I consider was contemplated by the 48th section of the Public Health Act. [His Lordship then examined the evidence upon the

point whether the agreement had been entered into on the footing that the local board would be permitted to continue to discharge their sewage into the Thames, and concluded:] It seems to me that the operation of the deed was not in any way limited or intended to be limited to the time when the sewage flowed into the Thames by the old outfall, and therefore that that part of the contention cannot be supported. Under these circumstances the action must be dismissed with costs.

Solicitors for the plaintiffs, *A. Scott Lawson*, for *C. T. Phillips*, Windsor.

Solicitors for the trustees of Mr. Vansittart's will, *G. L. P. Eyre and Co.*, for *Long, Durnford*, and *Lovegrove*, New Windsor.

Solicitors for the other defendants, *Longbourne, Longbourne*, and *Stevens*; *Markby, Wilde*, and *Burra*.

### QUEEN'S BENCH DIVISION.

Tuesday, March 25, 1884.

(Before DAY and SMITH, JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER. (a)

*Highways—Maintenance of main roads—Contribution by county authority—Borough having no separate court of quarter sessions—"County"—The Highways and Locomotives Act 1878 (41 & 42 Vict. c. 77), ss. 13, 14, 38—The Highway Act 1862 (25 & 26 Vict. c. 61), s. 2.*

By the 13th section of the *Highways and Locomotives Act 1878* (41 & 42 Vict. c. 77) it is provided that "for the purposes of this Act and subject to its provisions any road which has, within the period between the 31st day of December 1870 and the date of the passing of the Act, ceased to be a turnpike road, and any road which, being at the time of the passing of the Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."

By the 38th section "in this Act 'county' has the same meaning as it has in the *Highway Act 1862* and *1864*."

By the 2nd section of the *Highway Act 1862* (25 & 26 Vict. c. 61) "the word 'county' in this Act shall not include a 'county of a city' or 'a county of a town,' but where a county, as herein-before defined, is divided into ridings or other divisions, having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county, and for the purposes of this Act all liberties and franchises, except the liberty of St. Alban's, which shall be considered a county, and except boroughs

(a) Reported by J. SMITH, Esq., Barrister-at-Law.



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*as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or, if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary; the word 'borough' shall mean a borough as defined by 5 & 6 Will. 4, c. 76."*

*A part of a road which ceased to be a turnpike road in 1877, being situate within the limits of the borough of O. D., a highway area within the meaning of the 13th section of the Highways and Locomotives Act 1878, the highway authority of O. D. sought to recover from the county authority of the county of L., in which O. D. is geographically situate, one-half of the expenses of the maintenance of the said road, which they alleged to be due to them under the 13th section of the Act of 1878.*

*Held, on special case stated by consent, that the word "county" in the said section was used in a geographical sense, and not in the sense assigned to it in the 2nd section of the Highway Act 1862 (excluding boroughs), and that the piece of road in question being situate in the county of L. within the meaning of the section, the county authority were bound to contribute to its maintenance.*

THIS was a special case stated for the opinion of the court by agreement between the parties in an action in which the mayor, aldermen, and burgesses of the borough of Over Darwen sought to recover from the justices of the peace for the county of Lancaster the sum of 185*l.* 13*s.* 6*d.*, being one-half of the total amount of expenses incurred by the said corporation as highway authority of the said borough in the repair of a certain road within their area, which they alleged they were entitled to recover from the said justices under the 13th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77).

The special case was, so far as material, as follows:—

The plaintiffs in this action are the mayor, aldermen, and burgesses of the borough of Over Darwen, in the county of Lancaster (hereinafter called "the corporation") and are the highway authority of the said borough, and the said borough is a highway area within the meaning of the Highways and Locomotive Amendment Act 1878.

The defendants are the justices of the peace for the county of Lancaster (hereinafter called the "county authority"). The said justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, are the county authority as defined by the Highways (and Locomotives) (Amendment) Act 1878, and the said justices assembled as aforesaid at the annual general session held on the 26th Dec. 1878 did by order declare under the powers in them vested by the 20th section of the last-mentioned Act, that the contributions towards the expenses incurred in repairing the main roads within the hundred of Blackburn should be paid out of a separate rate to be raised and charged upon the said hundred of Blackburn.

The parties have agreed to concur in stating the facts and circumstances in the form of a special case for the opinion of the High Court of Justice, Queen's Bench Division, in manner hereinafter appearing.

The town of Over Darwen was incorporated on the 22nd March 1878, prior to which time, and as from the year 1854, it was a local board district under the Public Health Acts 1848 to 1875; at the time of its incorporation it consisted solely of the township of Over Darwen, but by the Over Darwen Improvement Act 1879 the borough boundaries were extended so as to include part of the township of Lower Darwen.

The Bolton and Blackburn turnpike road was constructed by turnpike trustees under an Act passed in the eleventh year of the reign of His Majesty King George the Fourth, intituled "An Act for more effectually repairing and improving the road from Bolton-le-Moors to Blackburn, in the County Palatine of Lancaster, with two branches of road therefrom, and for making and maintaining a branch of road to or near the village of Lower Darwen," which Act was renewed in 1862 by an Act intituled, "An Act for repairing and maintaining the road from the borough of Bolton to the borough of Blackburn, and a branch road connected therewith in the County Palatine of Lancaster."

The said Bolton and Blackburn road passes through the borough of Over Darwen.

The whole of the said roads constructed under the provisions of the Acts in the fourth paragraph hereof mentioned have ceased to be turnpike roads, the last collection of tolls having taken place on the 20th July 1877, and the last meeting of the trustees on the 19th Dec. 1877.

The said borough has no separate court of quarter sessions, but the townships or parts of townships comprised within its boundary are assessed and contribute to the said separate rate raised and charged upon the said hundred of Blackburn.

The Towns Improvement Act 1847 has not been incorporated with any local Act in force within the borough.

In 1878 was passed the Highways and Locomotives Amendment (41 & 42 Vict. c. 77), s. 13 of which enacts that:

*For the purposes of this Act and subject to its provisions any road which has within the period between the 31st day of December 1870 and the date of the passing of the Act ceased to be a turnpike road, and any road which being at the time of the passing of the Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.*

The said corporation, as such highway authority as aforesaid, have, under sect. 13 of the said Act, 41 & 42 Vict. c. 77, demanded from the said justices payment of one-half of the expenses incurred by the said corporation as such highway authority as aforesaid for the year ending the 25th March 1883 in the maintenance of so much of the said Bolton and Blackburn main road as is situate within the borough aforesaid.

For the purposes of this case it is admitted that the said road has been and is satisfactorily maintained within the said borough. It is also agreed that no objection shall be taken to an order for

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payment as hereinafter mentioned, upon the ground that no formal certificate of such satisfactory maintenance has been in fact given.

The total amount of expenses incurred by the corporation as such highway authority upon the said road within their area within the said period is 37*l.* 6*s.* 11*d.*, and one-half thereof amounts to the sum of 18*l.* 13*s.* 6*d.*

The county authority refuses to pay the said sum or any part thereof.

The question for the opinion of this honourable court is: Whether the said county authority, under the circumstances above stated, is liable by virtue of the Highways and Locomotives Amendment Act 1878, or otherwise, to pay out of the said county rate the said sum above demanded, or any part thereof.

In case the court shall be of opinion that the said county authority is so liable, judgment with costs is to be entered for the plaintiffs; otherwise for the defendants with costs.

The 38th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77) is, so far as material:

In this Act "county" has the same meaning as it has in the Highway Acts 1862 and 1864, except that every liberty not being assessable to the county rate of the county or counties within which it is locally situate shall, for the purposes of this Act, other than those relating to the formation and alteration of highway districts, and the transfer of the powers of a highway board, be deemed to be a separate county.

The 2nd section of the Highway Act 1862 (25 & 26 Vict. c. 61) is:

The word "county" in this Act shall not include a "county of a city" or a "county of a town," but where a county, as hereinbefore defined, is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding and not the entire county, and for the purposes of this Act all liberties and franchises, except the liberty of Saint Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded, or if partly surrounded by two or more counties, then as forming part of that county with which they have the longest common boundary; the word "borough" shall mean a borough as defined by the Act of the session holden in the fifth and sixth years of King William the Fourth, chapter seventy-six, "for the regulation of municipal corporations in England and Wales," or any place to which the provisions of the said Act have been or shall hereafter have been extended.

*Henn Collins*, Q.C. for the plaintiffs.—The borough of Over Darwen is clearly entitled under the 13th section of this Act to be paid by the county authority one-half of the expenses incurred in the maintenance of this road, since it is admitted in the case that it is a road which ceased to be a turnpike road between the 31st Dec. 1870 and the passing of the Act. [DAY, J.—On what point do the defendants rely?]

*Gorst*, Q.C. (with him *Blair*).—The defendants rely upon the interpretation clause of the Act of 1878. The 38th section says that the word "county" is to have the same meaning as in the Highway Acts 1862 and 1864, and the meaning of the word in those statutes is given in the 2nd section of the Act of 1862, the Act of 1864 making no alteration on this point. That section excepts boroughs from liberties and franchises which are to form part of the counties by which they are surrounded, and says that boroughs shall not form part thereof. This piece of road in respect of which the plaintiffs are claiming is in the borough of Over

Darwen, and, as the borough of Over Darwen does not form part of the county of Lancaster, the road which is part of the borough is not situate in the county, and therefore the county authority are not under the section liable to make any payment in respect thereof. At the time the Act of 1878 was passed the turnpike trusts were expiring, and the rural highway areas through which the old turnpikes passed were becoming liable for the expenses of their maintenance. The object of the Act was to relieve these rural areas, and to effect this it provided that half the expense was to be paid to them by the county and half of the rest from the Consolidated Fund, leaving them only one-fourth of the expense. This intention of the Legislature is quite clear and intelligible, and it is equally clear that no Act would ever be passed with the object of relieving populous boroughs from the expense of the maintenance of their own streets. The borough of Over Darwen is here seeking to receive a contribution from the county in order to be relieved from all but one-fourth of the expense of the maintenance of its main streets. The court will therefore look narrowly at these statutes, and if possible exclude boroughs from the operation of this 13th section of the Act of 1878. The 2nd section of the Act of 1862 excludes boroughs from their counties. [DAY, J.—The section seems to treat boroughs as either liberties or franchises. Otherwise it is ungrammatical.] It is ungrammatical, but there looms out of the section an intention to exclude boroughs from counties, and that being so, this road is not situate in a county within the meaning of the 13th section. If Over Darwen were in the county the county authority could make bye-laws as to this road within it, so as, for instance, to erect a gate across it in the main street; but they have no such power, the right to make bye-laws resting with the Over Darwen authorities.

*Henn Collins* in reply.—In the 13th section of the Act of 1878 the word "county" is used as a geographical expression, and not in any technical sense such as is suggested. It was not the intention of the Legislature to exclude such boroughs as Over Darwen from the operation of this section. The whole of the section is not set out in the case. It goes on, "Provided that no part of such expenses shall be included in (1) any precept or warrant for the levying or collection of county rates within the metropolis, subject and without prejudice to any provision to be hereafter made; or (2) any order made on the council of any borough having a separate court of quarter sessions under sect. 117 of the Municipal Corporation Act 1835." Therefore, if the borough of Over Darwen is excluded from getting a contribution from the county under this section, it will be compelled, as it has no separate court of quarter sessions, to contribute fully to the county rate, and will at the same time have to bear all the expense of the maintenance of its own streets, and this could never have been intended by the Legislature. Further, this case is concluded by the case of *The Justices of Lancashire v. The Mayor, &c., of Rochdale* (44 L. T. Rep. N. S. 316; 45 Ib. 425; 49 Ib. 368; 6 Q. B. Div. 525; 8 Ib. 12; 8 App. Cas. 494). There this point was taken in argument and disregarded by the noble and learned Lords who decided the case. [DAY, J.—If, in reading this Act, the word "county" is taken as a geographical expression, would it not include all

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boroughs, including those having separate quarter sessions, which cannot be called on to contribute to the county rate? No, the 13th section applies only to every part of such road "which is within the limits of any highway area," and the 14th section describes highway areas as follows: "The following areas shall be deemed to be highway areas for the purposes of this Act; that is to say, (1) urban sanitary districts, (2) highway districts, (3) highway parishes not included within any highway district or any urban sanitary district. Then the 38th section says that "urban sanitary district" means in the Act the districts declared to be urban sanitary districts by the Public Health Act 1875, "except that for the purposes of this Act no borough having a separate court of quarter sessions, and no part of any such borough, shall be deemed to be or to be included in any such district." The streets, therefore, of boroughs having separate courts of quarter sessions are not within the limits of any highway area, and so not within the operation of the 13th section. Such boroughs therefore neither contribute anything to nor receive anything from the county authority or the county rate. Lastly, the decision of the House of Lords in *The Justices of the West Riding of Yorkshire v. The Mayor, &c., of Sheffield* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781) is inconsistent with the plaintiffs' argument, although it is true that the point does not appear to have been taken in that case.

DAY, J.—This case comes before the court in the form of a special case stated by agreement between the parties, and raises for our consideration a point which is by no means free from difficulty, and in this case the difficulty does not arise from the intricacy of the facts set out in the special case, but from the inconvenient language used and the inconvenient form of legislation adopted by the Legislature in the enactments which we have to consider in connection with the facts. In endeavouring to find out their meaning we are directed from one statute to another, and, as if this were not complicated enough, the individual sections to which we are directed are difficult to understand on account of the badness of the grammar in which they are expressed. On the best construction I am able to put upon these statutes and these sections I think that the plaintiffs are entitled to judgment. The claim put forward by the plaintiffs is based on the 13th section of the Act of 1878 set out in the special case, and they allege that they are the highway authority of the highway area within the limits of which is a part of a road—being one of the roads with which the section was intended to deal—in the maintenance of which they have as such highway authority incurred certain expenses, and they further say that the defendants are within the meaning of the section the county authority of the county within which such road is situate, and that they are therefore entitled under the section to be paid by them one-half of the expenses so incurred in the maintenance of the road. Now *prima facie* no question arises at all if the defendants are really the "county authority of the county in which such road is situate," but the learned counsel for the defendants very properly at the commencement of the argument called attention to the fact that the Legislature have later on in the statute said what they meant by the word

"county" therein. It is interpreted by the 38th section of the Act, in which we find that the word is in this Act to have the same meaning as it has in the Highway Acts 1862 and 1864. We have, therefore, to turn back to the Act of 1862 to find its meaning, and in the 2nd section of that Act we find these words, which we have to construe and, if possible, discover what they mean. "The word 'county' in this Act," says the section, "shall not include a 'county of a city' or 'a county of a town,' but where a county as hereinafter defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county." So far this is a definition by saying what the "word" is not to mean, which is, as far as it goes, intelligible; but then the section goes on, "and for the purposes of this Act all liberties and franchises, except the liberty of St. Albans, which shall be considered a county, and except boroughs as hereinafter defined, shall be considered as forming part of that county by which they are surrounded." Therefore boroughs, it seems, are excepted from the class called "liberties and franchises," which are to be considered as forming part of the county by which they are surrounded, and, difficult as it really is to come to the conclusion that this is an enactment of the Legislature to the effect that boroughs are not considered as forming part of the counties in which they are situated, I suppose that that was the meaning of the Legislature. I am not able to put any other meaning upon the words, nor can I guess what they mean other than this. I can only suppose that the Legislature did pass this Act meaning that boroughs were not to be included in the counties by which they are surrounded. The words really have no meaning in the strict sense of the term, but I am constrained to attempt to guess what the persons who framed this section meant and have utterly failed to convey. Boroughs then are not for the purposes of that Act to be deemed parts of the counties by which they are surrounded. Assuming that to be the meaning of the section, what bearing has it on this case? Does it mean that, whenever the word "county" is used, we are in construing the passage to eliminate boroughs from its meaning? It seems to me that it is not necessary to put so large a meaning as this on this definition section. I think that the use of the word "county" as a geographical expression may notwithstanding this section have still been retained by the Legislature, and that, where it is necessary that the word should have its ordinary geographical meaning, that meaning may nevertheless be assigned to it. Although then, where boroughs are spoken of in these Acts, they are not to be considered as forming parts of their counties, we may still assume, where it is necessary so to do, that the word "county" is used in a geographical sense, because it is difficult to see how a borough can be county at all except in a geographical sense, and the words used in the section show that the Legislature contemplated that both "a county of a city" and "a county of a town" might both be supposed to be in a county in some sense of the word, that is to say, in its ordinary geographical sense. Boroughs according to the section are not to be considered parts of their counties, but the section does not

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say that they are not to remain where they found themselves before the Act, or that this borough was after the passing of the Act no longer to be situate in the county of Lancaster. How does this affect the present case? I turn to the 13th section of the Act of 1878, and there I find that in the case of the roads there mentioned "one-half of the expenses incurred from and after Sept. 29, 1878, by the highway authority in the maintenance of such road shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate." I think that this means the county authority of the geographical county in which the road is situated; that is, in the present case, the county of Lancaster. This seems to me to be an intelligible meaning to put upon the words, and I think it is possible to reconcile this view with the meaning of the Legislature, since a borough may very well be no part of a county but may still be together, of course, with its roads within it. This view seems to me to reconcile the difficulties raised upon the one side and upon the other, for, further, on looking at the 14th section of the Act, we find a description of what areas are to be deemed highway areas, among them being "urban sanitary districts," and on turning to the 38th, the interpretation section, we find under the heading of "urban sanitary district," that for the purposes of the Act "no borough having a separate court of quarter sessions, and no part of any such borough, shall be deemed to be or to be included in any such district," while the latter part of the 13th section provides that no part of the expenses of these roads is to be included by the county in any order made on the council of any borough having a separate court of quarter sessions. A borough, therefore, having a separate court of quarter sessions would not on the one hand be called upon to contribute to the county burdens, and on the other would not be within a highway area, and so at liberty to recover from the county a portion of the cost of repairing the roads within its limits. On the other hand, it would be very unreasonable that a borough which has no separate court of quarter sessions, and therefore does contribute to the county rate in respect of these expenses, should not have the benefit of getting its due contribution from the county towards mending the roads which pass within its limits. In this way I think it is possible to get a reasonable construction of the section, and on these grounds I think that the plaintiffs are entitled to our judgment in their favour.

SMITH, J.—This is an action brought by the mayor, aldermen, and burgesses of the borough of Over Darwen against the justices of Lancashire to recover 185*l.* 13*s.* 6*d.*, which is one-half of the expenses they have incurred in the maintenance of a road which passes through the borough. The plaintiffs make their claim under the 13th section of the Highways and Locomotives Amendment Act 1878, and the sole point which arises for our decision is, whether the county authority of the county of Lancaster are within the meaning of this section the county authority of the county in which this road in question is situate, the objection taken being, that the road being situate in a borough, and a borough being excluded from the meaning of the word "county"

as defined by the 2nd section of the Act of 1862, the road is not situate in the county. Now this very point was taken in the case of *The Justices of Lancashire v. The Mayor, &c. of Rochdale* (44 L. T. Rep. N. S. 316; 45 L. T. Rep. N. S. 425; 49 L. T. Rep. N. S. 368; 6 Q. B. Div. 525; 8 Q. B. Div. 12; 8 App. Cas. 494), a case which went to the House of Lords, and there is no doubt that the learned counsel who appear for the respondents in this case, and who also took part in the Rochdale case, argued this point before the House of Lords, the result being that Lord Blackburn, in giving judgment in favour of the justices, said that he did not attribute much weight to it, while the other three members of the court discarded it altogether. Again, in the case of *The Justices of the West Riding of Yorkshire v. The Mayor, &c. of Sheffield* (49 L. T. Rep. N. S. 786; 8 App. Cas. 781) this point would have been decisive, but it does not appear on the face of the reports that the point was taken there, which is the more possible, as the learned counsel for the respondents took no part in that case. It becomes necessary, therefore, for us to determine the meaning of this 13th section with regard to this point that has been raised, and the view which recommends itself to me is this: The 38th section of the Act says that the word "county" is to have therein the same meaning as it has in the Highway Acts 1862 and 1864. We then turn to the 2nd section of the Act of 1862, and it seems to me that the difficulty raised by it is not insuperable. "The word 'county' in this Act," it is there said, "shall not include a 'county of a city,' or 'a county of a town,' but where a county as hereinbefore defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county." I think that we may pause there, and say that that is the meaning to be attached to the word "county" by the Act of 1862, and that all the rest of the section refers only to what is to be done for the purposes of that Act, and is not really part of the definition of the word "county." Whether this is or is not a correct view I quite agree with all that my brother Day has said, and I think that the justices of Lancashire are the county authority of the county in which this road is situate within the meaning of this section, and are rightly called upon to pay the half share of the expenses of its maintenance which the section says is to be paid by them.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Pritchard, Englefield, and Co.*, for *C. Costeker*, Over Darwen.

Solicitors for the defendants, *Ridsdale and Son*, for *Wilson and Hulton*, Preston.

Thursday, June 26, 1884.

(Before STEPHEN and WILLIAMS, JJ.)

*Re AN INTERPLEADER ISSUE BETWEEN THOMPSON AND WRIGHT AND OTHERS; RICHARDSON AND ROPER, applicants.* (a)

*Practice—Interpleader—Indemnity to auctioneers—Objection to interpleader by claimant giving indemnity—Interpleader Act (1 & 2 Will. 4, c. 58), s. 1—Order LVII., r. 2.*

*By Order LVII., r. 2, it is provided that the appli-*

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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*cant (seeking relief by way of interpleader) must satisfy the court or a judge by affidavit or otherwise (inter alia) that he does not collude with any of the claimants.*

*T. and W. both claimed certain goods. W. ordered auctioneers to sell. T. gave the auctioneers notice of his claim, and that if they sold he would hold them responsible. W. being informed thereof by the auctioneers replied that he would hold them indemnified. The auctioneers having sold the goods applied for an interpleader order that an issue should be directed to be tried between T. and W., which having been made at chambers, W. appealed on the ground that the auctioneers had colluded with one of the claimants, and were therefore not entitled to the order.*

*Held, that the auctioneers had not colluded with either of the claimants within the meaning of Order LVII., r. 2, and were therefore entitled to the order prayed.*

*Tucker v. Morris (1 C. & M. 73) discussed.*

THIS was an appeal on behalf of one Jesse Wright, against an order of Denman, J. at chambers, ordering an interpleader issue to be tried between one Thompson, on the one part, and the said Jesse Wright, together with James Wright and George Wright, on the other part, to decide the right to the ownership of the proceeds of the sale of certain goods.

It appeared that on the 28th Feb. 1879 one Caldwell gave a bill of sale on the goods in question to one Parker, who on the 17th Nov. 1879 assigned it to Jesse Wright. On the 23rd April 1879 Caldwell gave another bill of sale to Thompson, who on the 18th July 1879 made a declaration of trust with respect to it in favour of John William Wright (whose title subsequently devolved upon James Wright and George Wright).

On the 26th April 1884 George Wright received notice that a man was in possession of Caldwell's goods on behalf of Thompson, and, finding that this was so—Thompson having seized under the bill of sale of the 23rd April 1879—thereupon gave instructions to Messrs. Richardson and Roper, a firm of auctioneers, to go into possession and sell.

The auctioneers having in due course announced the sale, received a notice from Thompson's solicitors to the effect that in the event of their (the auctioneers) selling, Thompson would hold them (the auctioneers) responsible.

The solicitor acting for George Wright being informed of this by letter, replied that the auctioneers were to take no notice, and that George Wright would hold them indemnified. The auctioneers thereupon sold the goods, and applied to a master at chambers for an interpleader order to decide the right to the ownership of the proceeds of the sale, and, the master having dismissed the application, appealed to Denman, J., who ordered an interpleader issue between Thompson on the one part, and Jesse Wright, James Wright, and George Wright on the other part.

From this order Jesse Wright appealed.

Order LVII., r. 2, is as follows:

The applicant must satisfy the court or a judge, by affidavit or otherwise—(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges and costs; (b) That the applicant does not collude with any of the claimants; and (c) That the

applicant is willing to pay or transfer the subject-matter into court, or to dispose of it as the court or a judge may direct.

*Charles, Q.C. (with him Seward Brice) for Jesse Wright.*—The order for an interpleader issue in this case ought to be rescinded, as the applicants accepted an indemnity from one of the claimants, and therefore cannot satisfy the court, in accordance with Order LVII., r. 2, that they do not collude with any of the claimants. The point has already been decided in the case of *Tucker v. Morris* (1 C. & M. 73), which was indeed decided under 1 & 2 Will. 4, c. 58, s. 1, but, as the provisions of this section are incorporated in Order LVII., r. 2, it still applies, and is a clear authority for the position that the applicants in this case, having accepted an indemnity, have colluded with one of the claimants within the meaning of the rule, and therefore are not entitled to interplead.

*Henn Collins, Q.C. and English Harrison for Richardson and Roper.*—The case of *Tucker v. Morris* (*ubi sup.*) is distinguishable from the present, the objection to the interpleader being there taken, not by the party indemnifying the auctioneer, but by the other claimant, and there is no case in which a party who has himself given an indemnity to an auctioneer has been heard to say that the auctioneer ought not to have the benefit of the Interpleader Act. If this were so, no auctioneer could in any case interplead, for there is always an implied contract of indemnity between auctioneers and their employers. So far, however, from this being the case, auctioneers are always allowed to, and constantly do, interplead, notwithstanding this implied indemnity. The real facts of the case are, that Messrs. Wright were the beneficial owners under the bill of sale, and Thompson their trustee, and now Thompson, who never desired to stop the sale, but only wishes to have his right to the proceeds tried, desires an interpleader, and Messrs. Wright, after giving Messrs. Richardson and Roper an indemnity, now oppose an interpleader, and say that Messrs. Richardson and Roper ought to fight out with Thompson the question as to the ownership of this money, which, if Messrs. Richardson and Roper succeed, will belong to them. The point at issue then being between the beneficiaries and the trustee, the giving of the indemnity under such circumstances can make no difference to this question, and therefore Messrs. Richardson have not colluded with any of the claimants within the meaning of the rule, and are entitled to interplead.

*Holl, Q.C. (with him Forman), for Thompson,* appeared in support of the order.

*Charles, Q.C. in reply.*—The auctioneers having accepted the indemnity are not entitled to interplead. It was in their power to have refused to accept it, but they did not do so, and having done so they colluded with one of the claimants within the meaning of the rule. The meaning of the word "collusion" in this context is explained in *Belcher and others v. Smith* (9 Bing. 82), where it is said: "Without applying the word 'collude' in an offensive sense, we cannot avoid seeing that the defendant has placed himself in the situation in which he now stands, at the request and with a view to the interest of his nephew." Collusion therefore in this rule does not necessarily involve any advantage to the person colluding, but is

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satisfied by the voluntary substitution of himself by one man for another, at the request of the other. This Messrs. Richardson and Roper have done in the present case, and are therefore not entitled to an interpleader order.

STEPHEN, J.—I am of opinion that this order ought to stand, and that the appeal must be dismissed with costs. The only question is whether by taking an indemnity the defendant has put himself in a position from which the court will not extricate him. I do not think that that is so. It is true that in *Tucker v. Morris* (1 C. & M. 73) it was held that a defendant who had been indemnified by a third party for not delivering up property in his possession had no right to relief under the Interpleader Act, but the circumstances of that case were different. It was an action of trover for two mares, and the defendant had obtained a rule under the 1st section of the Interpleader Act (1 & 2 Will. 4, c. 58) for relief against the claims of the plaintiff and one Taylor. (a) But it appeared from the plaintiff's affidavits (Taylor did not appear) that the defendant had taken an indemnity from Taylor for not delivering them up, and on demand being made by the plaintiff, with a tender of the expenses of their keep, he refused to deliver them up. Under these circumstances the Court refused to allow the defendant to interplead, Bayley, J. saying: "As the defendant has thought proper to take an indemnity, he has no right to apply for relief under the Act. By so doing he has identified himself with Taylor. It seems to me therefore that the justice of the case is clear. An application is made to the defendant to deliver up the property, and he refuses on the ground that he is indemnified by Taylor . . . The rule must be discharged." There then the person objecting to the interpleader order being made was not the person who gave the indemnity to the applicant, but the person against whom the indemnity was given. Here it is the person who gave the applicant the indemnity, who now comes to us to deny their right to interplead. In my opinion the taking of the indemnity under such circumstances in no way identifies the auctioneers with them, and I think that, as between the two claimants, they have a right to interplead. I do not see that under such circumstances interpleader can have any other effect than that of saving circuity of procedure and multiplicity of actions, because, if we say that the auctioneers are not entitled to interplead, the effect will be that they will be sued at the same time by the two parties claiming the fund. Their only defence against either will be that the other is entitled to

it, and so that in the result, if Messrs. Wright are entitled to it, there would be judgment against Messrs. Richardson and Roper in the action brought by them; while, if Thompson is entitled to it, Messrs. Richardson and Roper would succeed against Messrs. Wright, and fail against Thompson. It is obvious, therefore, that this issue would be more suitably decided by allowing Messrs. Richardson and Roper to interplead; and on these grounds I am of opinion that this appeal must be dismissed.

WILLIAMS, J.—I have come to the same conclusion, although not without some hesitation, and I think that, when the facts are looked at in their true light, this is a case for interpleader within the meaning of the rule which bears upon this point. The short facts of the case are these: Wright had possession of a bill of sale of certain goods, of which Thompson under the same bill of sale alleged that he was the legal owner, Wright being the beneficial owner and his *cestui que trust*. That being the state of affairs, Wright employed the firm of auctioneers, who are now applying for an interpleader order directing an issue to be tried between Thompson and Messrs. Wright, and instructed them to enter and take possession of the goods in question and sell them by auction, and in accordance with these instructions the auctioneers did enter and take possession of the goods, and advertised them for sale. Thereupon Thompson gave notice to the auctioneers that the goods were his property and not Wright's, and warned them that if they sold the goods he should claim the proceeds of the sale at their hands. This notice the auctioneers passed on to the solicitors who were acting for Wright, who replied: "Take no notice of it. We will give you an indemnity against the consequences of proceeding with the sale." Accordingly the auctioneers proceeded with the sale, and whatever objection Thompson may have made to the sale at first, he afterwards ratified and was a consenting party to it, and can now therefore claim the proceeds thereof only. That being the state of things, the auctioneers now come to the court and say that they received the money which the sale produced, but that they have no interest in it, and are therefore willing to pay it into court, and leave the parties to fight out the question on which they are at issue. To this course Thompson does not on his part object, but on the contrary acquiesces and is perfectly willing that they should do so, and that he should be directed to fight out the question with Wright. Messrs. Wright, however, do not acquiesce, but one of them appears before us and disputes the auctioneers' right to pay the money into court on the ground that they come within condition (b) of Order LVII., r. 2, by reason of their having acted in collusion with one of the parties. The 2nd rule of Order LVII. runs thus: "The applicant (i.e., the applicant for relief by way of interpleader under the 1st rule of the order) must satisfy the court or a judge by affidavit or otherwise—(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; (b) That the applicant does not collude with any of the claimants; and (c) That the applicant is willing to pay or transfer the subject-matter into court or to dispose of it as the court or judge may direct." Now, in my opinion, quite apart from the cases cited, this rule is intended to provide

(a) 1 & 2 Will. 4, c. 58, s. 1, contained the same conditions as have now been embodied in Order LVII., r. 2, providing that: "Upon application made by or on behalf of any defendant . . . in any action of *assumpsit*, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear, &c., &c."



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against the case of a person who has entered into a contract with one of the rival claimants, and in consequence of that, or in some other way, has entangled himself in the matters in dispute, and so placed himself in a difficult position, coming to the court and by professing to be quite impartial and a mere stakeholder, getting the court to make an order for two other parties to fight out an issue which may perhaps be an entirely different issue from that on which his rights depend, and which when decided would not bring an end of the whole matter, but might still leave some point to be decided between the successful party and himself. It seems to me that this rule does not apply in the present case, for I think when we understand the facts that the true question in it will be properly decided between Thompson and Messrs. Wright without any difficulty. I am of opinion, therefore, that the applicants are entitled to the order they desire, and that this appeal ought to be dismissed with costs.

#### Appeal dismissed.

Solicitors for the applicants, *Sole, Turner, and Knight.*

Solicitor for Thompson, *J. Watson Stocker.*

Solicitors for Wright, *Bellamy, Strong, and Baker.*

### House of Lords.

March 27 and 28, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, BRAMWELL, and FITZGERALD.)

MERSEY STEEL AND IRON COMPANY v. NAYLOR, BENZON, AND CO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Sale of goods by instalments—Condition precedent—Rescission of contract—Set-off—Judicature Act 1875 (38 & 39 Vict. c. 77), s. 10.*

*The effect of sect. 10 of the Judicature Act 1875 is to import into the winding-up of companies the rules of bankruptcy as to a set-off for unliquidated damages.*

The respondents agreed to purchase from the appellant company a quantity of steel to be delivered on board ship in five monthly instalments, payment to be made within three days after the receipt of the shipping documents. After a portion of the first instalment had been delivered, but before payment, a petition was presented to wind-up the company, and the respondents wrote that they were advised that they could not safely pay for the steel delivered while the petition was pending. The company replied that they should treat the refusal to pay as a repudiation of the contract. The liquidator, after some further correspondence, refused to make any further deliveries, and brought this action for the price of what had been delivered.

Held (affirming the judgment of the court below), that payment was not a condition precedent to the delivery of the next instalment, and that the respondents had not acted in such a way as to show any intention of repudiating the contract, so as to release the company from their liability to deliver, and that they were entitled to set off

*the damages for non-delivery against the price of the instalment sued for in this action.*

This was an appeal from a judgment of the Court of Appeal (Jessel, M.R., Lindley and Bowen, L.JJ.), reported in 9 Q. B. Div. 648 and 47 L. T. Rep. N. S. 369, which had reversed a judgment of Lord Coleridge, C.J. in a case tried before him without a jury.

The facts, which were not disputed, appear briefly in the head-note above, and are set out in full, with the correspondence, in the report in the court below.

Cohen, Q.C. and French (C. Russell, Q.C. with them) appeared for the appellants, and argued that two questions arose: first, as to the effect of the refusal to pay for the instalment on the right of the purchaser to require further delivery; secondly, as to whether the mutual credit clauses of the Bankruptcy Act apply to the winding-up of companies. On the first point, the payment was a condition precedent to the delivery of the next instalment; this must be implied, otherwise the transaction is broken up into five separate contracts. The rule is laid down in the notes to *Pordage v. Cole* (1 Wms. Saund. 548). We cannot go into the motives of the respondents, for a default in payment for any reason gives a right to put an end to the contract. If it is broken in any material part the other party is absolved:

*Turnbull v. McLean*, 1 Ct. Sess. Cas. 4th series, 730.

It must be a default in a material point, that is, a point going to the root of the matter, the absence of which would make the contract a different thing. The Court of Appeal did not apply the true principle. See

*Withers v. Reynolds*, 2 B. & Ad. 883.

Punctual payment, if not expressed, is implied as a condition precedent in the contract:

*Graves v. Legg*, 9 Ex. 709.

They also cited

*Coddington v. Paleologo*, L. Rep. 2 Ex. 193; 15 L. T. Rep. N. S. 531;

*Bradford v. Williams*, L. Rep. 7 Ex. 259;

*Reuter v. Sala*, 4 C. P. Div. 239; 40 L. T. Rep. N. S.

475;

*Boone v. Eyre*, 1 H. Bl. 273n;

*Hoare v. Rennie*, 5 H. & N. 19;

*Houck v. Muller*, 7 Q. B. Div. 92; 45 L. T. Rep. N. S.

202;

*Freeth v. Burr*, L. Rep. 9 C. P. 208; 29 L. T. Rep. N. S.

703.

On the second point, before the Judicature Acts there could have been no set-off of unliquidated damages in the winding-up of a company, and we contend that sect. 10 of the Judicature Act of 1873 has not the effect of importing the bankruptcy rules of set-off as alleged. See

*Re Withernsea Brickworks Company*, 16 Ch. Div. 337; 43 L. T. Rep. N. S. 714;

*Re Albion Steel and Wire Company*, 7 Ch. Div. 547;

38 L. T. Rep. N. S. 207;

*Thomas v. Patent Lionette Company*, 17 Ch. Div. 250;

44 L. T. Rep. N. S. 392.

The Solicitor-General (Sir F. Herschell, Q.C.) and Bigham, Q.C., who appeared for the respondents, were requested to confine their argument to the second point, as to the right of set-off, and contended that the effect of the section must be that which the Court of Appeal held, otherwise different debts would be provable in the winding-up and in bankruptcy. See

*Re Compagnie Générale de Bellegarde*, 4 Ch. Div. 470; 35 L. T. Rep. N. S. 900.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



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At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: In this case I will deal first with the last point which has been argued, and it appears to me that it lies within a very narrow compass. The Act of 1875 has said that for certain purposes "the same rules shall prevail and be observed" in winding-up under the Companies Acts "as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt;" and I cannot help pausing to observe upon what is a little remarkable in that enactment. It is not the rules that *were* in force when the Act of 1875 was passed, but the rules which "*may be* in force for the time being;" marking very strongly the principle on which the Legislature in this enactment proceeded, namely, that they treated the cases as *in pari materia*, governed, as the former clearly are, by the same principles which govern the law of insolvency or bankruptcy; that it was safe not only to apply the then existing rules upon that subject, but to apply them with any future addition or alteration which in legislation as to bankruptcy might be thought fit. That I think very distinctly confirms the weight which otherwise might be due to a consideration of the principle and reason of the enactment. But I do not think that any aid from that consideration is really necessary, because we find that among the rules which are to be imported from bankruptcy there are included the rules "as to debts and liabilities provable." Is not the rule in question one as to debts and liabilities provable? It occurs in that division of the Bankruptcy Act 1869 which is under the sub-heading, "Payment of debts and distribution of assets." The first section under that head is one which, following a series of earlier statutes, makes demands in the nature of unliquidated damages, arising by reason of contract, provable in bankruptcy; and similar demands which do not so arise, and which are not of that nature, not provable. The Act defines what are to be proved, all debts and liabilities and obligations, except certain things which are excepted; there are two or three clauses dealing with special matters, and we then come to the 39th, which occurs under the same division of the statute: "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively." Your Lordships observe that it is not that it *may be*, it is not a thing which is optional, but it is a positive absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy. That being so, how is it possible to say that this is not a rule both within the general spirit and intention of the section, and within the express words "as to debts and liabilities provable?" I do not think it necessary to say more upon that subject. Upon the other

point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge, C.J., in *Freeth v. Burr* (L. Rep. 9 C. P. 208; 29 L. T. Rep. N. S. 773), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so, of course there would be an end of the case; but to me it is plain beyond the possibility of controversy that, upon the proper construction of this contract, it is not, and cannot be, a condition precedent. The contract is for the purchase of five thousand tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery: "Delivery one thousand tons monthly commencing January next;" and as to the time of payment, "Payment net cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, or of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times, and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment, and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel. But quite consistently with that view it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these: The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act

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1862 (sect. 153) which appeared to the advisers of the purchasers to admit of the construction that, until in those circumstances the petition was disposed of by an order for the company to be wound-up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did evidently *bona fide*, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist, namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On the 10th Feb., which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct, and thinking rightly) that the objection was not well founded in law; and they added, "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part, and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion; and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances. The company, until they were wound-up, never receded from that position which they took up on the 10th Feb. 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it; and that the repudiation of the contract on insufficient

grounds on the part of the company, which had taken place while the petition was pending, and before the winding-up order was made, was adhered to after the winding-up order was made on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon the 17th Feb. 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and according to the view which has been taken in the Court of Appeal of the effect of the 10th section of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages"—a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part. Therefore I think that the judgment of the court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

LORD BLACKBURN.—My Lords: I am of the same opinion. On the effect of the 10th section of the Act of 1875 I will only say that I perfectly agree with what the court below have said, and with what has been said by the Lord Chancellor. As to the first point, I myself have no doubt that *Withers v. Reynolds* (2 B. & Ad. 882) correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract, I will not perform mine" (in *Withers v. Reynolds* it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say: "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster v. De la Tour* (2 E. & B. 678) in the Queen's Bench, and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived. That is the law as laid down in *Withers v. Reynolds* (*ubi sup.*). That is, I will not say the only ground of defence, but a sufficient ground of defence. In

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*Freeth v. Burr* (*ubi sup.*) it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that, for reasons which they thought sufficient, they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bonâ fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of *Withers v. Reynolds* and *Freeth v. Burr*, and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that, where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole*, 1 Wms. Saund. 548, ed. 1871), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the nonpayment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends on the construction of the contract. With regard to the case of *Hoare v. Rennie* (5 H. & N. 19) it has been said that Pollock, C.B. there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that, when in the present case the January ship-

ment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole, and no less, is the essence of it. And again in *Honck v. Muller* (7 Q. B. Div. 92; 45 L. T. Rep. N. S. 202), which has been referred to, it is expressly and pointedly shown that that was the ground taken, and Bramwell, L.J. stated that in his opinion the contract of the one party was to deliver, and of the other to take 2000 tons of iron, and that, inasmuch as it was to be by three instalments and the first was gone and there never could be more than two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. Brett, L.J. seems, if I understand him rightly, to have thought that that was not the true construction of the contract—whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract, and that being so, these cases have really no bearing upon the matter. The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD WATSON.—My Lords: I am of the same opinion. I think it would be impossible for your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure whatever from the terms of the contract by one of the parties must be sufficient to entitle the other to set it aside. I think the correspondence shows that the delay in making payment of that part of the contract price which ought to have been paid on the 5th Feb. was due to these two causes: in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make a second payment of the price; and in the second place, an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstance that there had been a change in the constitution of the company, because they had gone into liquidation on the 2nd Feb., and the respondents' firm were advised by their law agent that they were not in safety to pay until the liquidator was appointed. That brings us down to the 15th Feb. At that date this had taken place: the company had given notice on the 10th Feb. of their resolution to repudiate the contract in consequence of the failure of the respondents to pay, and to that repudiation the liquidator I think consistently adhered. In these circumstances it appears to me that the judgment appealed from must be affirmed.

LORD BRAMWELL.—My Lords: I am of the same opinion, and shall say but very few words. Lord

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Coleridge says that the defendants, the now respondents, positively refused to pay for the iron already delivered, and for all which might be subsequently delivered. Now, whether, if they had positively refused to pay for that already delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not; but, if they had positively refused to pay for all which might be subsequently delivered, it would undoubtedly be an answer upon the authority of *Withers v. Reynolds* (*ubi sup.*) and the reasoning which you have heard. But I really cannot, with great submission to the noble lord, find any evidence of that, and Mr. Cohen certainly did not attempt to prove it; but he set up a new ground, which was that the payment of the debt due was a condition precedent to the further performance of the agreement, with which I cannot at all agree. I have just one other word to say. I cannot tell why *Honck v. Muller* (*ubi sup.*) and *Hoare v. Rennie* (*ubi sup.*) should be brought forward upon this occasion. I do not think that I said in *Honck v. Muller* what in this case Jessel, M.R. supposed me to have said, namely, that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case. What I was busy upon in that case was in showing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck v. Muller* was wrongly decided, how does it bear upon this case? Not in the least. Nor indeed does the case of *Hoare v. Rennie*, which, in my opinion, was decided upon the considerations which I have mentioned, and which I think should be supported.

Lord FITZGERALD.—My Lords, I concur.

*Appeal dismissed with costs.*

Solicitors for the appellants, *W. W. Wynne and Son*, for *Simpson and North*, Liverpool.  
Solicitor for the respondents, *Clements*.

## Supreme Court of Judicature.

### COURT OF APPEAL.

Wednesday, Dec. 10, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

EMERY v. SANDES. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Practice—Costs—Action ordered to be tried in County Court—Jurisdiction of High Court—19 & 20 Vict. c. 108, s. 26—R. S. C. 1883, Order LXV., rr. 1, 4.*

*By R. S. C. 1883, Order LXV., r. 4, "Where an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 108, s. 26,*

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

*the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the registrar's certificate of the result of the trial it shall appear that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court, in which case no costs shall be recovered unless ordered by the court or a judge."*

*An action in which the defendant paid money into court was ordered to be tried in a County Court. At the trial the judge found that the plaintiff was entitled to recover for certain work done, and determined the rate at which the work was to be paid for, leaving it to the registrar to ascertain the amount due by calculation. The result was that the plaintiff recovered 2s. 3d. beyond the sum paid into court. The County Court judge expressed no opinion on the question of costs.*

*The defendant applied to a divisional court for an order that the plaintiff should pay to the defendant his costs of the action, or that each party should pay his own costs.*

*The Court held, that they had no jurisdiction to make an order, and refused the application on appeal.*

*Held, that the words "subject to the provisions of the principal Act and these rules" in Order LXV., r. 4, incorporated the provision in rule 1, that costs shall be in the discretion of the court or judge, and therefore the court had jurisdiction; order made, that the plaintiff should recover costs only up to the time of payment into court, and each party should pay his own costs of the trial.*

*Decision of Stephen and Mathew, JJ. reversed.*

This was an action commenced in the High Court of Justice to recover a sum of 52*l.* 8*s.* 6*d.*, being the balance of a builder's account. The defendant paid 37*l.* 2*s.* 6*d.* into court.

An order was made under the County Courts Act 1856 (19. & 20 Vict. c. 108), s. 26, that the cause should be tried in the County Court of Kent holden at Rochester. The balance of the claim, after payment into court, amounting to 15*l.* 6*s.*, consisted of two items: as to one of these items, amounting to 11*l.* 2*s.* 6*d.*, the judge of the County Court decided in favour of the defendant; the remaining item consisted of a claim for 4*l.* 3*s.* 6*d.*, in respect of the cartage and stacking of certain bricks, for which the plaintiff claimed to be entitled to be paid at the rate of 10*s.* per thousand.

The judge came to the conclusion that the plaintiff was entitled to payment at the rate of 4*s.* 6*d.* per thousand, and left it to the registrar to ascertain by calculation the amount due. The result of the calculation showed that the plaintiff was entitled to 2*s.* 3*d.* beyond the sum paid into court, and he therefore recovered judgment for that amount.

The judge expressed no opinion as to costs.

An application was made on behalf of the defendant to the Divisional Court for an order that the plaintiff should pay to the defendant his costs of the action, or that each party should pay his own costs.

The Court (Stephen and Mathew, JJ.) held that they had no jurisdiction to make an order, and refused the application.

The defendant appealed.

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*Morton Smith* for the defendant.—Before the Rules of the Supreme Court 1883 came into operation the practice was clear. The County Court had no jurisdiction over the costs in cases sent down under 19 & 20 Vict. c. 108, s. 26, and the Divisional Court had power to deal with costs in the exercise of its discretion :

*Farmer v. May*, 44 L. T. Rep. N. S. 148.

The decisions in *Myers v. Defries* and *Siddons v. Lawrence* (40 L. T. Rep. N. S. 795; 4 Ex. Div. 176) also support the defendant's argument that the court has an independent jurisdiction over the costs. There is nothing in the Rules of 1883 to take away this jurisdiction, for, although by Order LXV., r. 4, the practice is altered to the extent of giving a certain discretion to the County Court judge with regard to costs, still the whole of the rule must be read together, and the effect of the words "subject to the provisions of the principal Act and of these rules" is to incorporate the provision contained in Order LXV., r. 1, by which costs are in the discretion of the court or a judge. Rule 4 must be read together with rule 1, and therefore does not take away the independent jurisdiction of the court. It can never have been intended to make the expression of opinion by the County Court judge, which is referred to in rule 4, a condition precedent to the exercise of discretion by the High Court.

*Malden* for the plaintiff.—The court below was right in declining jurisdiction, for Order LXV., r. 4, gives absolute power to the County Court judge to deal with the costs, either by allowing them to follow the event, or by referring the question to a judge of the High Court, and if he does not so refer the question the High Court cannot interfere. The words "subject to the provisions of the principal Act and these rules," in rule 4, only incorporate the proviso in rule 1 as to costs of executors, administrators, trustees, and mortgagees, and not the general provision as to costs; rule 4 is inconsistent with that general provision, and was intended to establish an exception to it.

*Morton Smith* replied.

BRETT, M.R.—There are two points in this case which require some notice: first, as to the alleged practice in the County Court; and secondly, as to the construction of Order LXV., r. 4. As to the first point, it is quite plain what ought to have been done. The judge thought he could not give judgment until there had been an inquiry by the registrar to ascertain the amount, but the judgment is the judgment of the judge, not of the registrar; the judge only stated the principle on which the calculation was to be based; when the calculation was worked out it was found that 2s. 3d. too little had been paid into court; this being so, the judge should have dealt with the question of costs; the registrar ought to have told the judge the result of the calculation, and let him decide the question of costs. The judge either might have let the costs follow the event, or he might have expressed his opinion that the question of costs ought to be dealt with by a judge of the High Court. If he had done so the case would have gone to chambers, and the judge at chambers would have considered on the certificate how the question of costs ought to be dealt with, but he would not be bound by the certificate. The defendant here seems to have

made a mistake, for he should have asked the registrar to mention the question of costs to the judge when the calculation was made out. As to the second point to which I referred, it is suggested that, because no certificate was given showing the opinion of the County Court judge, the High Court has no power to interfere, but must leave the costs to follow the event. The Divisional Court held, on the construction of Order LXV., r. 4, that they had no power to deal with the costs, apparently on the ground that the reference at the beginning of that rule contained in the words "subject to the provisions of the principal Act and these rules" only incorporates a part of rule 1 of the same order, for, if these words incorporate the whole of rule 1, it would seem that the court has power to deal with the costs in a particular way. We have therefore to decide as to the proper interpretation of Order LXV., r. 4, and we must then consider what the consequence ought to be in this particular case. Is it possible to read the rule as if the words were "subject to the provisions of . . . part of these rules?" I am of opinion that "the provisions of these rules" means all the provisions contained in the rules, and therefore rule 4 incorporates the whole of rule 1. Then as to the result in this case: if this were a trial in the High Court, the judge at the trial might or might not deal with the costs; but Order LXV., r. 1, says that the costs shall follow the event "unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order." These words show that there may be an original motion to the court on the subject of costs, and it follows that, if the whole of rule 1 is incorporated into rule 4, although the judge of the County Court does not express any opinion, there may be an original motion on the subject of costs, and therefore the Divisional Court in this case had jurisdiction. It is said that this interpretation gives rule 4 no effect, but I am of opinion that this is not so; if the registrar's certificate does not show that the County Court judge was of opinion that the question of costs ought to be referred to a judge of the High Court, the costs would follow the event, unless it were very clearly made out that this ought not to be the result, for the effect of the rule would be to stop an application to the court to deal with the costs, except under very peculiar circumstances. Having decided that the Divisional Court had jurisdiction to deal with these costs, we must now do what we think they would have done if they had taken the view which we take, and had exercised a proper discretion. If a certificate expressing the opinion of the County Court judge had been obtained, as I think it ought to have been, the case would have gone to chambers, and therefore there will be no costs of the motion in the Divisional Court; but when the order was refused below it was right to come to this court, and therefore the defendant will have the costs of this appeal. As to the costs of the trial the plaintiff was right originally in bringing his action, but after the money had been paid into court he ought to have calculated the amount due to him, and as only 2s. 3d. too little was paid into court it was vexatious to go on with the action. The plaintiff, therefore, ought to recover his costs of the action up to the time of payment into court, while as to the costs of the trial no costs

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ought to be awarded either way. I think this is the fairest result at which we can arrive.

COTTON, L.J.—I agree that the proper order to be made is that suggested by the Master of the Rolls. If rule 4 of Order LXV. were added to the end of rule 1, it would be a qualification of what went before, and would be restrictive of the power of the court to deal with costs, but, as it stands, it is not a proviso, but a substantive rule, and, if rightly construed, the effect is that, not only a part of rule 1 is introduced, but the whole. I think the first part of rule 1 must be regarded as much as what follows. If this is so, then there is a discretion given to the court to deal with costs, and, although the judge at the trial has expressed no opinion, the court has jurisdiction to say how the costs should be dealt with; and therefore in this case the Divisional Court should have exercised their discretion as to the costs. For the reason given by the Master of the Rolls, I think we ought not to give the appellant his costs in the court below.

LINDLEY, L.J.—I am of the same opinion. In order to construe Order LXV., r. 4, correctly, we must bear in mind the old practice under 19 & 20 Vict. c. 108, s. 26, which was, that the question of costs was determined by the High Court. Notwithstanding the words at the end of the section, "after such hearing the registrar shall certify the result to the master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court," the practice was that the successful party could not get his costs without the order of a judge of the High Court. When the new rules were drawn it was thought convenient to dispense with the necessity for a summons, and to give the costs to the successful party, unless some reason were shown why he should be deprived of them. There might be such a reason, which might be apparent to the judge at the trial, and therefore the words at the end of rule 4 were put in, so that the County Court judge can express an opinion, which will appear from the registrar's certificate. Looking at the words in Order LXV., r. 4, "subject to the provisions of the principal Act and these rules," I cannot say that rule 4 has thrown the duty on the County Court judge of deciding how the costs are to be dealt with; I think there is still power in the High Court to deal with this question. Here no certificate was given showing what the County Court judge thought ought to be done with the costs, although I think there ought to have been one. The question now is, whether the court can do what is fair between the parties. I cannot read rule 4 so that only part of rule 1 is incorporated into it. I think the whole of that rule is incorporated, and that the High Court still has power over the costs. As to the order which ought to be made, I concur with the Master of the Rolls.

*Appeal allowed.*

Solicitors for plaintiff, *Clarke and Calkin.*

Solicitors for defendant, *Wm. Taylor and Son,* for *R. B. Hill,* Ipswich.

July 29 and 31, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

WELDON v. WINSLOW. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1 (2)—Cause of action before Act—Right of married woman to sue alone.*

*The Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1 (2), which provides that a married woman shall be capable of suing in all respects as if she were a feme sole, and her husband need not be joined as plaintiff, deals with procedure only, and therefore applies where the cause of action arose before the Act came into operation.*

*Plaintiff, a married woman, brought an action for assault, libel, and trespass, and her husband was not joined as plaintiff.*

*The alleged causes of action arose before the Married Women's Property Act 1882 came into operation.*

*At the trial plaintiff was nonsuited.*

*Held (affirming the judgment of Denman and Manisty, JJ.), that plaintiff was entitled to maintain the action without her husband being joined, and therefore the nonsuit was wrong, and there must be a new trial.*

THIS was an action for libel, assault, and trespass, brought by the plaintiff, a married woman, in her own name without joining her husband as a plaintiff.

The alleged causes of action arose in 1878.

The action was commenced after the 1st Jan. 1883, when the Married Women's Property Act 1882 (b) came into operation.

The action was tried before Huddleston, B., and the plaintiff was nonsuited.

A new trial was ordered by Denman and Manisty, JJ., and the defendant appealed.

At the hearing of the appeal it was objected that the plaintiff was not entitled to sue alone to recover damages for a cause of action arising before the Married Women's Property Act 1882 came into operation.

July 29.—*C. H. Anderson (E. Clarke, Q.C. with him),* for the defendant, argued in support of this objection, and referred to

*Summers v. The City Bank*, 31 L. T. Rep. N. S. 268;

*L. Rep. 9 C. P. 580;*

*James v. Barraud*, 49 L. T. Rep. N. S. 300;

*Severance v. The Civil Service Supply Association*, 48

*L. T. Rep. N. S. 485;*

*Weldon v. Rivière*, since reported 58 L. J. 448,

*Q. B.;*

*Lynch v. Knight*, 9 H. L. C. 577;

*Wardman v. Société Générale d'Electricité*, 45 L. T.

*Rep. N. S. 514; 19 Ch. Div. 246;*

*Richbell v. Alexander*, 10 C. B. N. S. 324; 30 L. J.

*268, C. P.;*

*Beckham v. Drake*, 2 H. L. C. 579;

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

(b) By 45 & 46 Vict. c. 75, s. 1 (2): A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

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*Ramsden v. Brearley*, 32 L. T. Rep. N. S. 24; L. Rep. 10 Q. B. 147;  
*Re March; Mander v. Harris*, 49 L. T. Rep. N. S. 168; 24 Ch. Div. 222.

The Court took time to consider whether the plaintiff, who appeared in person, should be called on to argue.

*Cur. adv. vult.*

July 31.—The following judgments were delivered:—

BRETT, M.R.—We need not call on Mrs. Weldon to argue this point. The question is this: Assuming that the jury will be justified in finding that the defendant is responsible for the publication of a libel and for an assault on the plaintiff, can she maintain an action against him without joining her husband as a plaintiff? In my opinion she can. The alleged causes of action are personal injuries to her, for which no action could ever have been brought by the husband alone without joining his wife as a plaintiff. What is done to her is the cause of action, for which even before the Married Women's Property Act she might have sued in her own name without her husband, and could have recovered if the defendant had not pleaded in abatement; he could not have pleaded the plaintiff's coverture in bar of the action. The wife was the meritorious cause of action, and if she had died after the wrong had been committed, but before the action was brought, the husband could not then have sued. When damages were given they belonged in the first place to the wife alone, and if they were not reduced into possession by the husband, and he died, the damages would then have belonged to the wife, and would not have gone to the personal representative of the husband. It is true that the husband could have taken the damages, but it seems to me that by the law of England the action was always the wife's action, subject to the right on the part of the defendant of insisting on the husband being joined. The question now turns on the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1 (2), and it is whether that Act entitles her to sue alone, and makes the damages her separate property. The effect of sect. 1 (2) is, that it deals with an action of tort, and provides that after the Act comes into operation a married woman may bring such an action in her own name, and her husband need not be joined as a plaintiff. The action here is for tort, and is brought after the statute came into operation. According to its grammatical construction the statute means that she shall bring an action, in which her husband has no right, and the damages shall be hers. It is said that to hold this is to make the statute retrospective, because the cause of action accrued before the statute came into operation; but the statute does not mention the cause of action, but speaks of bringing the action; there is nothing to limit its operation to causes of action arising after the statute. Therefore any action brought after the statute came into operation comes within the plain words of sect. 1 (2), and we should have to distort the grammatical meaning of the words in order to arrive at the interpretation proposed on behalf of the defendant; I see no reason why we should do so. I am therefore of opinion that by that section alone the action is rightly brought by the plaintiff in her own name, and the damages, if she recovers,

will be hers. There is nothing in sect. 22 to alter this result.

BOWEN, L.J.—This is an action of tort for alleged injuries to a married woman during her coverture. Before the Supreme Court of Judicature Acts the husband could not have sued alone for such a cause of action, and if the wife had sued alone the only way to object would have been by plea in abatement. If the defendant did not plead in abatement the plaintiff's coverture was not a substantial bar to the action. The Supreme Court of Judicature Acts came in, and pleas in abatement were abolished, but this did not deprive the defendant of the right to object that the plaintiff was a married woman, but left the objection to be enforced by summons to stay, or as a defence on the pleadings, which the plaintiff would have to meet at the trial, subject to the power of the court to amend or not as might seem fit. Therefore, if the case were not affected by the Married Women's Property Act 1882, the defendant could take this point, but the Married Women's Property Act puts a different complexion on the case. Sect. 1 (2) alters the capacity of the wife, and makes her capable of suing without any power on the part of the defendant to insist that the husband must be joined. It is said that the cause of action arose before the Act came into operation, and it is said that we should give the statute a retrospective operation, and affect the vested right of the husband to be joined as plaintiff, and to reduce the damages into possession, if we were to adopt the plaintiff's construction. I agree that it is not desirable to construe statutes so as to affect vested rights, but the words of this section seem to me to alter the capacity for procedure rather than to affect any rights, until one comes to the provision as to damages, and that also I think is rather on the side of the line of statutes dealing with procedure. The statute does not destroy the husband's right, but only relieves the woman from incapacity, and the damages which are made her separate estate are not such damages as would be recoverable by the husband and wife jointly, but are the damages recovered "in such action," that is, in an action brought by the wife as if she were a *feme sole*. The effect is only to destroy the wife's disability for the purpose of procedure. It is not at variance with the canons of construction to say that a married woman can sue alone in such a case, and I am therefore of opinion that the plaintiff can sue alone in this action.

FRY, L.J.—I take the same view, but I am not insensible to the difficulties attendant on the case, for the Act has made the damages, which before the Act might be reduced into possession by the husband, the separate property of the wife. But the words of the Act are too plain, and are not confined to actions for torts committed after the Act came into operation. It was pressed on us that sect. 22 saved the rights which existed before the Act, but it appears to me that the object of sect. 22 is to save rights which existed under the Married Women's Property Acts of 1870 and 1874, and that it does not extend to the rights of the husband which existed independently of those Acts. I am of opinion that the case is within sect. 1 (2), and therefore Mrs. Weldon is entitled to sue alone.



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BRETT, M.R.—I wish to add that I reserve my opinion as to whether the damages would be the separate property of the wife if the husband were joined as plaintiff.

*Appeal dismissed.*

Solicitor for defendant, B. H. Van Tromp.

Aug. 9 and 11, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

HAINES v. GUTHRIE. (a) .

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Evidence — Hearsay — Declaration of deceased member of family — When admissible to prove birth — Pedigree.*

*The declarations of deceased members of a family, though admissible in cases of pedigree, as evidence to prove pedigree, are not admissible to prove the facts which constitute a pedigree, such as birth, death, or marriage, where the case is not one of pedigree.*

*In an action for goods sold, an affidavit made by the deceased father of the defendant in another action, to which the plaintiff was not a party, stating the defendant's age, was given in evidence to support the defence of infancy.*

*Held (affirming the judgment of Stephen and Mathew, JJ.), that the evidence was wrongly admitted, and there must be a new trial.*

THIS was a motion by the plaintiff for a new trial, on the ground of improper reception of evidence, in an action tried before Grove, J., with a jury.

May 29, 1884.—The motion was supported by H. D. Greene (with him McIntyre, Q.C.) for the plaintiff, and opposed by Willis, Q.C. (with him L. Glyn) for the defendant.

The facts, the nature of the evidence admitted, and the arguments, are stated in the judgment of the Divisional Court.

*Cur. adv. vult.*

July 7.—The judgment of the Court (Stephen and Mathew, JJ.) was delivered by,

STEPHEN, J.—This was an action for the price of certain horses. The defence was infancy, and the verdict was for the defendant. A new trial, or entry of judgment for the plaintiff, was moved for on the ground of the improper reception of evidence in favour of the defendant. The evidence alleged to have been improperly received was an affidavit made in a Chancery suit, to which the plaintiff was not a party, by the deceased father of the defendant, in which he stated that his son was born "on or about the 20th May 1862." There was some other evidence as to the defendant's infancy, but the evidence in question must, we think, have greatly influenced the result of the trial. The objection to the reception of the evidence was, that it is not within any of the exceptions to the general rule excluding hearsay evidence. The argument in favour of its reception was, that the rule which admits hearsay in pedigree cases applies to proof of the facts which constitute a pedigree—birth, death, and marriage—whenever those facts are in issue, whatever may be the purpose for which they are proved. It was also suggested that the case fell within a rule supposed to be laid down by Lord Ellenborough

in *Roe d. Brune v. Rawlings* (7 East, 279). The rule according to which hearsay is admitted in cases of pedigree is first stated by Lord Mansfield in *Goodright v. Moss* (2 Cowp. 591), decided by the Court of King's Bench in 1777. In that case Lord Mansfield said: "Tradition is sufficient in point of pedigree. Circumstances may be proved. For instance, suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of Buckingham's was), are all good evidence. So the declarations of parents in their lifetime." The principle upon which the rule depends is stated in *Vowles v. Young* (13 Ves. jun. 140), decided in 1806, and in *Whitelocke v. Baker* (13 Ves. jun. 511), decided shortly afterwards. In *Vowles v. Young* (*ubi sup.*) Lord Erskine said: "Courts of law are obliged, in cases of this kind, to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated; requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, the best the nature of the subject will admit, establishing the descent from the only sources that can be had." In *Whitelocke v. Baker* (*ubi sup.*) Lord Eldon said that statements to be admissible must be made by persons having such a connection with the family that it is natural and likely that they should know and speak the truth, so that the statement might be presumed to be the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position. Lord Blackburn, in 1880, in *Sturla v. Fredeia* (5 App. Cas. at p. 641; 43 L. T. Rep. N. S. at pp. 213, 214), stated the rule in the same way, and puts it on the same principle. The rules dependent on these principles have been elaborated and subjected to qualifications which need not here be minutely stated. One series of cases has decided the degree of relationship in which a declarant must have stood to a family in order that his declarations may be received in evidence. Another series of cases, of which *Kidney v. Cockburn* (2 Russ. & My. 167), decided in 1831, and *Shields v. Boucher* (1 De G. & Sm. 40), decided in 1847 by Knight Bruce, V.C., are the latest, and have most bearing on the present case, have been concerned with the question what statements may be given in evidence. It was supposed at one time that the bare fact of relationship, e.g., that A. was son, brother, or cousin to B., was all that might be so proved, and on this ground in *Kidney v. Cockburn* (*ubi sup.*), Tindal, C.J., in the trial of an issue from Chancery, refused to allow the ages of certain persons to be proved by such evidence. Lord Brougham thought that the evidence was improperly rejected, and said that Allan Park and Littledeale, JJ. agreed with him, and sent a case for their opinion to the Court of King's Bench. The matter, however, was compromised. In *Shields v. Boucher* (*ubi sup.*) the question arose also in an issue from Chancery, whether a witness who had said that he had heard his father say that his (i.e. the father's) uncle married Miss Hollins,

(a) Reported by DUNLOP HILL and P. B. HUTCHINS, Esqrs., Barristers-at-Law.

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might be further asked. "Did you ever hear him say of where?" This question was disallowed by Wilde, C.J., but Knight Bruce, V.C., in an elaborate judgment, gave his reasons for thinking that it ought to have been admitted. Its principal importance in reference to the present case is, that the Vice-Chancellor never once refers to the question of the admissibility of such evidence without introducing into his statement of the rule the expression "in cases of pedigree," or an equivalent. The whole judgment, indeed, goes upon the assumption that whatever declarations may be admissible, they are admissible in cases of pedigree. For instance, he says (pp. 52-3): "The reasons and grounds upon which births, and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, &c.;" and similar expressions occur in other parts of the judgment. These cases show clearly that in a pedigree case, that is, in the case of a purely genealogical controversy, the father's affidavit as to his son's age would have been admissible, though this cannot be said to have been established till 1831, when *Kidney v. Cockburn* (*ubi sup.*) was decided, if indeed that case can be said to have amounted to a decision; but it is also to be observed that each of these cases was a pedigree case—that is, it was a case in which the controversy between the parties was whether or not a certain line of genealogy could be established. It is also to be observed that the principle of the exception to the rule excluding hearsay, as laid down in the earlier cases, applies to pedigree cases only. We now proceed to examine such authorities as there are, and they are not many, as to the admissibility of such evidence in cases not relating to pedigree. The earliest in point of time is *Herbert v. Tuckal* (Sir T. Raym. 84), decided in 1663. The whole report is as follows: "Upon evidence in a trial at bar the question was if one was of full age at the time of his will made by him, and upon evidence it appears that he was born the 14th Feb. 1608, and he made his will when he was of the age of twenty-one years within two days, and to prove his nonage the defendant produced an almanac in which his father had writ the nativity of the devisor, and it was allowed to be strong evidence." This report is so concise that it is practically useless. It leaves it a matter of mere conjecture whether the case was or was not one of pedigree. It is probable from the dates that it was. It was decided in 1663. The will was made in 1608. The testator must have been born and the entry must have been in 1587. The next is the case of *Re v. Eriswell* (3 T. R. 707), decided in 1790. The question in this case was whether the deposition of a pauper, who had become a lunatic after making it, as to his place of settlement, was admissible many years afterwards in support of an order of removal. The court were equally divided, Grose, J. and Lord Kenyon thinking it inadmissible, and Buller and Ashurst, JJ. thinking it admissible. All the judges agreed that the case was the same as if the party were dead. Buller and Ashurst, JJ. thought the deposition admissible as a judicial act, and they also thought that hearsay was admissible in settlement cases as well as in pedigree cases. Grose, J. and Lord Kenyon thought the deposition was not a judicial act, and they

said that, if the case was regarded as one of a declaration, it was within no known exception to the rule which excludes hearsay. "I admit," said Lord Kenyon, "that declarations are received in evidence as to pedigree. This, however, has always been understood to be an excepted case, and to stand on reasons peculiar to itself." All the judges in this case agreed that, to be admissible as a declaration, a statement must be brought within some recognised exception to the rule excluding hearsay. The question between them was whether there was such an exception in cases of settlement. The next is the case of *Re v. Erith* (8 East, 539), decided in 1807. In that case a deceased father's statement that his bastard child was born at Erith was held to be inadmissible as evidence of the child's birth settlement. Lord Ellenborough said: "The controversy was not, as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact, involving no question but of locality, and therefore not falling within the principle of or governed by the rules applicable to cases of pedigree, and is to be proved therefore as other facts generally are proved, according to the ordinary course of the common law—that is, by evidence to which the objection of hearsay does not apply." This case comes very near to the one before us. Substitute "time" for "place" and "locality," and every word of Lord Ellenborough's judgment would apply to it. It was a considered judgment of the whole Court of King's Bench and is binding on us. There are two cases which are directly in point, one of which is identical with the present case, and they would be decisive of the question if we could regard them as entirely satisfactory; but one is a *Nisi Prius* case, decided apparently without argument, and the other scarcely amounts to more than the expression of an opinion, and though it is a decided opinion of a most eminent judge, it appears to proceed to some extent on a ground which cannot now be taken. The first case is a *Nisi Prius* decision in 1830, by Allan Park, J. (*Whittuck v. Waters*, 4 C. & P. 375). In that case evidence that one of the *cestui que vie* of a lease was said in his family to be dead was rejected on the ground that the case was not one of pedigree. The other case, *Figg v. Wedderburn* (11 L. J. 45, Q. B.) is identical with the present case, but it is not conclusive, as it was not decided on the question now before us. The judgment was delivered, after consideration, by Patteson, J. It states the facts, which were that the infancy of the defendant being pleaded, a letter from his deceased father was given in evidence, which, for a purpose unconnected with the action, stated the precise age of the defendant. Patteson, J. said he considered this evidence so weighty that if it were properly received it ought to have been decisive in favour of the defendant, so that after a verdict for the plaintiff a new trial ought to have been granted on the ground that the verdict was perversely contrary to the evidence; and he added: "I confess I have a strong opinion that it was not receivable, but the cases upon this subject are conflicting;" and he goes on to give an account of the case of *Kidney v. Cockburn* (*ubi sup.*), in which he says Tindal, C.J. rejected such evidence,

but in the opinion of the Lord Chancellor (Brougham), and Park and Littledale, JJ., improperly. This account of *Kidney v. Cockburn* omits to notice the distinction on which the present question turns. *Kidney v. Cockburn* was clearly a pedigree case, as the question was whether two brothers, who were born 140 years before the case was tried, were or were not of the whole blood, and the question was whether the exception admitting hearsay in such cases included hearsay as to the age of deceased persons as well as hearsay as to their relationship. The doubt of Patteson, J. would thus seem to have been whether hearsay as to age was admissible even in pedigree cases. The opinion that it is has in more modern practice prevailed, but the question is whether the exception applies to cases which cannot be called in any sense pedigree cases. The cases referred to all seem to us to show that it does not. There is, however, one other case to which considerable importance was attached by the plaintiff, and which it is necessary to notice, as it appears rather to suggest than to lay down a broader principle on this subject than has been recognised elsewhere. This is *Roe v. Brune v. Rawlings* (*ubi sup.*). In that case the question was, whether a lease had been granted pursuant to the terms of a power which enabled the successive tenants for life under a settlement to let "at the ancient yearly rent." The first tenant in tail sued in ejectment the lessee of a tenant for life, on the ground that the lease was void because the rent reserved was only 14s. a year instead of 14l.; and he put in evidence, to prove the amount of the ancient yearly rent, a letter written in 1728 by the steward of an earlier tenant for life, stating, amongst other things, the rent at which the premises in question had been usually let. The letter was indorsed by the tenant for life to whom it was addressed:—"A particular of my estate in Cornwall," and was kept with the title-deeds of the estate. This document was admitted as evidence against the lessee of the later tenant for life and in favour of the tenant in tail. Lord Ellenborough pointed out that, if the tenant for life who made the lease had derived title from the tenant for life who made the indorsement, the case would have been clear, but as this was not so the admissibility of the document was put upon other grounds. One ground stated is that the statement was against the interest of the person who made it, as his interest was to diminish the amount of the ancient rent in order that he might obtain as large a fine as possible; but it seems that the court were not wholly satisfied with this, as Lord Ellenborough goes on to say: "Then at this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury. There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus the written memorandum of a father as to the time when his child was born has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will. And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all

interest in him, at the time of the memorandum or declaration made, to falsify the truth in respect to it. So an entry of the receipt of ecclesiastical dues in the books of a deceased rector is evidence for his successor, which must also be upon the same ground of an absence of all interest to misstate the fact in the rector making such entry, which could not possibly be evidence for himself. Now this paper might, if it had ever met the eye, have been used adversely to the former tenant for life by whom it was authenticated, and could not have been evidence in his favour: he could not, therefore, have had any undue motive for preserving it. In like manner ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved; and the reason given is 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty.' The paper, therefore, having been found amongst the muniments of the family, accredited by one who could not have used it in his own favour, and preserved by him and by the succeeding tenant for life, against whom it might have been used adversely, we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date." It was pressed upon us, on the authority of this case, that the declaration of a person having knowledge of a fact, and no interest to falsify it, ought as a rule to be admitted as evidence of it after his death. The context, however, shows that Lord Ellenborough was very far from laying down any such rule. He confines it to "some cases," and none of those which he enumerates meet this case, except possibly *Herbert v. Tuckal* (*ubi sup.*), upon which we have already remarked that for aught that appears it was a pedigree case. The case of the rector's books is treated as an anomalous rule, the reasons for which have now been forgotten. The case of title deeds (to which the paper in *Roe v. Rawlings* (*ubi sup.*) appears to have most affinity) stands on grounds of its own, to which we need not here refer. The rule suggested to have been laid down by Lord Ellenborough cannot possibly be accepted in its generality, for since *Roe v. Rawlings* many cases have been decided which are in complete opposition to it: such—to mention two only amongst many—was *Stobart v. Dryden* (1 M. & W. 615), decided in 1836, which decided that a dying declaration that the declarant had forged a deed sued upon was inadmissible. The second case (which was not mentioned in the argument) closely resembles the case now before us. It is *Sturla v. Freccia* (*ubi sup.*) decided in 1880 by the House of Lords. In that case the question was as to the place of birth and the age of one Mangini. The report of an official committee called a Giunta, which sat at Genoa, stating that Mangini was in 1790 a native of Quarto, aged about forty-five, was rejected; though, as Lord Selborne said, it was proved to be "an authentic public document of the Genoese Government, to which, so far as the good faith of those who made it is concerned, credit might be justly given." The only remaining point in the case is the suggestion that the facts which collectively make up pedigree, birth, death, and marriage may be proved by declarations whenever they are in dis-

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pute, but this contention cannot prevail. It is enough to say that there is not a shadow of authority for it, and it appears to us that in many cases it would be extremely dangerous to admit such evidence. For instance, suppose the question were whether a girl, made the subject of an offence, was under twelve or under sixteen at the time, a declaration of a deceased parent neither would be, nor as it appears to us ought to be, admissible to prove it. For all these reasons we are of opinion that the father's affidavit in this case was improperly admitted, and that there must be a new trial. We cannot enter judgment for the plaintiff as there was other evidence of infancy.

*Order for a new trial.*

The defendant appealed.

*Aug. 9 and 11.*—*Willis, Q.C. (Glyn with him)* for the defendant.—It is true that if the defendant's father had been alive and sane this evidence would have been inadmissible, but as he was dead, the evidence was properly received. The fact to be proved was the birth of the defendant, which brings the case within the rule applicable to pedigree cases, in which hearsay evidence can be received. He cited the following additional authorities:

*Vulliamy v. Huskisson*, 3 Y. & C. (Ex.) 8;

*Plant v. Taylor*, 7 H. & N. 211;

1 *Phillips & Arnold on Evidence*, 199, 10th ed.

*Lumley Smith, Q.C. and H. D. Greene*, for the plaintiff, were stopped by the Court.

BRETT, M.R.—This is an action to recover the price of certain horses sold by the plaintiff to the defendant, and the defendant has pleaded that at the time of the sale he was under the age of twenty-one years. The question raised is important, depending as it does upon a rule of evidence which may have to be considered in other cases. The evidence which was admitted at the trial was a declaration in an affidavit (and therefore a solemn declaration) by the deceased father of the defendant, giving what is alleged to be the date of the defendant's birth. No doubt, if it is admissible, it is strong evidence of the true date of the birth; but the question is whether, in such an action, as to such question, and on such an issue as the present, it is admissible. It is unimportant what the family of the defendant may be, or whose son he is, or whether he is a legitimate or an illegitimate son, or whether he is an elder or a younger son; all these questions are immaterial, for no question of family is raised in the case. The problem to be considered is whether this evidence, with regard to the question here at issue, can be received against the plaintiff. It certainly cannot be received unless there is some rule which makes it evidence as against all the world. This is clearly hearsay evidence, and, according to the general rule, such evidence is not admissible; therefore, if it is to be made admissible, it must be brought within some recognised exception. The question cannot be decided on principle alone, but we must look at the decisions in order to ascertain whether evidence such as this in a case such as this has ever been admitted as coming within any of the exceptions to the general rule. There might be much to be said on both sides if it were sought now for the first time to establish the exception; but it is no part of the province of the court to consider

whether the original rule is good or bad, nor to enunciate the principle of the exceptions; we have only to see what the exceptions are. In *Sturla v. Freccia* Lord Blackburn enumerates them in the following terms: "It is not disputed that the general rule of English law is that hearsay evidence is not receivable; one reason probably is the want of the safeguard of cross-examination. However, undoubtedly the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say exactly why so much should be admitted and no more; probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those. Now, my Lords, the first and one of the most important exceptions is briefly expressed in a dictum in *Higham v. Ridgway* (10 East, 109) that documents, on the face of them appearing to be against the interest of a deceased person who stated the matter, are evidence. I need not enter into the qualifications of that farther than to point out that in no point of view can this Giunta di Marina who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests. Then, my Lords, there is a second class of cases, of which *Price v. Lord Torrington* (1 Salk. 285; 2 Ld. Raym. 873) may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There, again, I do not go into the qualifications, or express any opinion upon the different matters introduced, farther than to point out that in no sense can it be said that the Giunta di Marina was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle. Then, my Lords, comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible. Where it is a public right or a quasi-public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it, and had stated it. Upon that, again, I merely say that the question we are now inquiring into—viz., the history of a private individual—is not a matter in which, in any sense, reputation generally can be received. Then, my Lords, there is another class of cases which comes nearer to it. It has been established for a long while that in questions of pedigree—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but for whatever reason the statements of deceased members of the family, made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved, not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did

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anything that amounted to showing that they recognised them:” (43 L. T. Rep. N. S. at pages 213, 214; 5 App. Cas. at pages 640, 641.) Lord Blackburn there intended to give an exhaustive definition of the exceptions to the rule against the admission of hearsay evidence, and in doing so he distinctly states that “in questions of pedigree” statements of deceased members of the family “are evidence to prove pedigree.” If this be correct, and if what I have stated (that no question as to family is at issue in the present case) is right, it is impossible to say that this evidence was given on a question of pedigree to prove pedigree, and if it was not it does not come within the exception. A strong opinion was expressed by Patteson, J. in the case of *Figg v. Wedderburns* (11 L. J. 45, Q. B.) that, in a case like the present, such evidence as this cannot be admitted, and the same view was taken by Pollock, C.B. in *Plant v. Taylor*, where he said, “In an action for goods sold and delivered, declarations of a deceased parent are not admissible to prove the defendant is an infant. It is different where the question is one of pedigree:” (7 H. & N. at page 227.) I am of opinion that the evidence which the defendant seeks to give in the present case does not come within any of the recognised exceptions to the rule, and therefore is inadmissible; and, if this be so, it follows that the order of the Divisional Court directing a new trial was right. I have listened with great interest and satisfaction to the able argument of Mr. Willis, who has taken every point which could have been taken; he has, however, failed to convince me that this affidavit of the defendant’s father was rightly received as evidence against the plaintiff.

BOWEN, L.J.—I am of the same opinion, notwithstanding the able argument of Mr. Willis. The exact point appears to me to be this. In such an action as the present, and on such an issue, the declaration of a deceased person is inadmissible, because the question at issue is not one of family, but is merely a question of the age of a particular young man.

Fry, L.J.—I am of the same opinion. The exceptions to the general rule excluding hearsay evidence have been explained by Lord Blackburn in *Sturla v. Freccia* (*ubi sup.*), and the rule is stated by Lord Kenyon, C.J.: “The evidence should be given under the sanction of an oath legally administered, and in a judicial proceeding depending between the parties affected by it, or those who stand in privity of estate or interest with them. . . . I admit that declarations of the members of a family . . . are received in evidence as to pedigrees. . . . That, however, has been always understood to be an excepted case, and to stand on reasons peculiar to itself:” (*R. v. Eriswell*, 3 T. R. at pages 621, 623.) This view has been followed down to the present time. I am of opinion that this is not a question of pedigree, for whose son the defendant is, or who his relations are, or any other question as to his family, would be wholly immaterial. I therefore agree that there must be a new trial.

*Appeal dismissed.*

Solicitors for plaintiff, Wakeford, May, and May.

Solicitors for defendant, Cookson, Wainwright, and Pennington.

Thursday, Nov. 13, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY v. HARRISON. (a)

APPEAL FROM THE QUEEN’S BENCH DIVISION.

*Fixtures—Machinery—Driving belts—Mortgage.*

*Plaintiffs, who were mortgagees of certain works and plant, sued defendant, the trustee in liquidation of the mortgagor, to recover certain driving belts which were included in the mortgage deed, and which defendant had removed from the premises. Each belt passed over two drums on different parts of the machinery, and being joined at the ends, and fitting tightly to the machine, communicated the motion from one drum to the other. The belts could be slipped off the drums, and would then hang loose over the shaft, but they could not be taken off the machines without cutting the belts, or unfastening the joinings. The machines were fixed to the premises.*

*Held reversing (the judgment of Field, J.), that the belts, being part of the machines, were fixed to the freehold, so as to pass by the mortgage deed, and therefore plaintiffs were entitled to recover.*

*Longbottom v. Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 123) approved and followed.

THIS was an action for the conversion and detention of certain driving belts to which the plaintiffs claimed to be entitled as mortgagees, and which the defendant had removed from the mortgaged premises.

In 1875 Messrs. Robinson and Hughes, the owners in fee of certain wheel works at Derby, mortgaged the works and plant to the plaintiffs.

Among the property included in the mortgage deed were “the things contained in the second schedule,” including the belts in question, which were described in the schedule as “72 Driving Belts,” and were attached to the machinery in the manner described in the head-note.

In 1879 the mortgagors dissolved partnership, and Hughes continued to carry on the business. In 1880 Hughes filed a petition for liquidation of his affairs by arrangement, and the defendant was appointed trustee, and continued to carry on the business for some months.

In 1881 the plaintiffs agreed to sell their interest under the mortgage, but before the sale was completed it was discovered that the defendant had removed the belts in question from the premises.

Thereupon this action was brought.

At the trial before Field, J. without a jury, it was agreed that, if the plaintiffs were entitled to recover, the verdict should be for 50l.

Judgment was given for the defendant, and the plaintiffs appealed.

*Waddy, Q.C.* (*Wilberforce* with him) for the plaintiffs.—This case is governed by *Longbottom v. Berry* (22 L. T. Rep. N. S. 385; L. Rep. 5 Q. B. 123), which shows that belts such as these, when attached to fixed machinery, pass with the freehold. The description of the belts there given in paragraphs 49 and 50 of the special case (22 L. T. Rep. N. S. at page 391; L. Rep. 5 Q. B. at pages 134, 135) is the same as the description given by a witness at the trial in the present case. The decision of the Exchequer Chamber in *Holland v. Hodgson* (26 L. T. Rep. N. S. 709; L. Rep. 7 C. P.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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328) upholds that of the Court of Queen's Bench in *Longbottom v. Berry* (*ubi sup.*). The result of the cases is that anything which is a necessary part of the machine, without which it cannot be worked, will pass by the freehold if the machine itself is a fixture. [He was stopped by the Court.]

*Bosanquet*, Q.C. and *W. Roe Smith* (*A. T. Lawrence* with them) for the defendant.—These belts are not such fixtures as to pass with the freehold, but are personal chattels, and therefore the mortgage deed ought to have been registered as a bill of sale.

BRETT, M.R.—It seems to me that this deed does not require, as regards the belts which are the subject of the action, to be registered as a bill of sale, unless we are to hold that the belts are separate and distinct chattels. It is admitted that the machinery is fixed to the freehold, and that it passed by the mortgage deed, and it is contended on behalf of the plaintiffs that the belts are part of the machinery—that is, that, although by altering them they can be taken away from the machine, yet while they remain unaltered they are part of the machine and therefore are fixed to the freehold, for if the machine is fixed every part of it is fixed. The machinery is described in the evidence which was given at the trial, from which it appears that the belt is that by which the whole of the machinery is made to work. When the machine is in gear the belt goes over the drums, and it must fit the particular machine accurately; to throw the machine out of gear the belt is thrown off the drum, but it still remains on the machine, and is fitted to the machine, of which it is a necessary part. The belt will not fit any other machine, unless one which happens to be exactly similar to that to which it belongs. The question is as to the application of the law to these facts, and I am of opinion that this question was dealt with in *Longbottom v. Berry* (L. Rep. 5 Q. B. 123), as anyone who understood the subject might be expected to deal with it. In that case it was held that such belts as these were in law (as they clearly are in fact) part of the machine, and the machine is so fixed as in consideration of law to be part of the land. The next proposition is that every necessary part of the machine passed by the mortgage, and that these belts are part of the machine, and therefore are to be regarded as fixed to the freehold, and therefore passed by the mortgage. I think this is a true proposition, and if so it follows that the mortgage does not require to be registered as a bill of sale. This was settled by *Longbottom v. Berry* (*ubi sup.*), which was decided nearly fifteen years ago, and no doubt ever since then every deed by which machinery like this has been mortgaged in the north of England has been made on the faith of that decision. We are asked now to say that that case was decided on admitted facts, and that those facts were wrongly admitted, and that we should interpret such deeds differently from the way in which the Court of Queen's Bench interpreted the deed. For my own part, I should decline now to alter the interpretation if I thought the decision in *Longbottom v. Berry* (*ubi sup.*) was wrong; but, on the contrary, I think that the view taken by the court in that case is obviously the view which any business man would adopt. I am of opinion that this view

and the decision of the court in that case are right, and therefore this appeal must be allowed.

COTTON, L.J.—I am of the same opinion. Field, J. appears to have thought that he was not bound by *Longbottom v. Berry* (*ubi sup.*) because that case was decided on admissions which were wrongly made. No doubt the court is not bound by admissions which were made in another case; but the law is there laid down, and the evidence in the present case shows that what was admitted in *Longbottom v. Berry* is true here. Therefore the law should be applied to that state of facts, and it follows that this case comes within the decision in *Longbottom v. Berry* (*ubi sup.*). Even if we thought that decision were doubtful or erroneous it would be a serious thing, after so many years, to depart from it, but I think the decision was right. These belts, in my opinion, are an essential part of the machine, and therefore they passed by the mortgage, because they are fitted for use on these machines; and if anything is part of and fitted to a machine, and is not capable, except under accidental circumstances, of being used with another machine, it will pass by any document by which the property in the machine is transferred. It is like the case of a key which passes with the door, and many other similar instances might be given.

LINDLEY, L.J.—I am of the same opinion. The question is whether this deed required registration under the Bills of Sale Acts which were then in force (17 & 18 Vict. c. 36 and 29 & 30 Vict. c. 96), under which personal chattels included fixtures. The answer is that those Acts were held only to apply where the fixtures were capable of being dealt with as separate chattels, which is not the case here, for I have looked into the provisions of the mortgage deed and the power of sale which it contains, and I can find no power to sever these belts and sell them apart from the rest of the machinery. I agree, therefore, that the appeal ought to be allowed, and the plaintiff is entitled to judgment for 50l.

*Judgment reversed.*

Solicitor for plaintiffs, *E. Warriner*, for *Mole and Stone*, Derby.

Solicitors for defendant, *Broomhead, Wightman, and Moore*, Sheffield.

Nov. 25 and 26, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE DORDOGNE. (a)

ON APPEAL FROM BUTT, J.

*Collision—Regulations for Preventing Collisions at Sea 1880, arts. 13 and 18—Moderate speed—Dense fog—Steamship—Sailing ship.*

*Where those in charge of a steamship in a dense fog hear a whistle and then others following it and getting nearer, even though the whistles get broader on their bow, it is their duty on hearing the first whistle to reduce their speed, and as the vessels get nearer to bring their ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse their engines.*

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.



*Art. 13 of the Regulations for Preventing Collisions at Sea requiring "moderate speed" in a fog, requires the speed to become more moderate as the two vessels get closer together.*

*Semble, that it is the duty of those in charge of a sailing ship, when in a dense fog they hear a succession of whistles approaching closer and closer, to reduce her speed by taking off sail so as to bring her to as near a standstill as possible while retaining command over her.*

THIS was an appeal by the defendants in a damage action from a decision of Butt, J., finding the steamships *Edith* and *Dordogne* both to blame for a collision off Ushant. The plaintiffs admitted that the *Edith* was to blame.

The collision occurred about 5.30 a.m. on Aug. 26, 1883. At the time of the collision the wind was light from the north-east, and there was a dense fog. The steamship *Edith* was of 448 tons register, and was bound on a voyage from Swansea to Clarente in France. The *Dordogne* was a screw steamship of 463 tons register, and was bound on a voyage from Bordeaux to Cardiff. The facts alleged on behalf of the plaintiff were as follows:—While the *Edith* was proceeding at half speed, her whistle being constantly sounded, and heading about S. by W., half W., the whistle of the *Dordogne* was heard on the port bow of the *Edith*. The engines of the *Edith* were thereupon put to dead slow and her helm was ported. The *Dordogne* was, however, heard to be rapidly approaching, and the helm of the *Edith* was put hard-a-port, but the *Dordogne* was immediately sighted at about a ship's length off and bearing about four or five points on the port bow, approaching at a high rate of speed. An order was given to set the *Edith's* engines full speed ahead, but before the order could be executed the *Dordogne* with her stem struck the *Edith* on the port side. The plaintiffs charged the defendants (*inter alia*) with navigating at too great a rate of speed and with failing to ease and stop and reverse their engines.

The facts alleged on behalf of the defendants were as follows:—About 5.30 a.m. on the 26th Aug. 1883 the *Dordogne* was about ten miles S. W. by S. of Ushant. There was a light air from the N. E. and a dense fog. The *Dordogne* with her engines at dead slow was heading N. half E., and was making about one knot or one and a half knots an hour. Her regulation lights were duly exhibited and burning, the whistle was being duly sounded, and a good look-out was being kept on board her. In these circumstances those on board the *Dordogne* heard the whistle of the *Edith* on the starboard bow. The engines of the *Dordogne* were stopped and her own whistle was blown; the engines of the *Dordogne* were then moved on slowly. The whistle of the *Edith* was again heard broader on the starboard bow, the engines were again stopped, and the whistle was again blown. The whistle of the *Edith* was heard a third time. It was answered by the whistle of the *Dordogne* and the engines were stopped. The *Edith* was almost directly afterwards seen and the engines were reversed full speed and the helm put hard-a-port, but the *Edith* coming on at a considerable speed and at a considerable angle to the course of the *Dordogne*, struck with her port side, near the engine-room, the starboard bow of the *Dordogne*, doing much damage to herself and the *Dordogne*.

The defendants' evidence was that at the time the *Edith* was seen their engines were stopped, and had been stopped some two or three minutes.

At the trial Butt, J. found that the *Edith* was "to blame for not having at least stopped her engines not perhaps when she heard the whistle the first, or second, or third, or fourth time, but at some time or other before the vessels got so close that they sighted each other, and the collision became inevitable." With regard to the *Dordogne* he found that she was going faster than alleged at the moment of collision, and that her engines were going ahead when the *Edith* came into sight.

Arts. 13 and 18 of the Regulations for Preventing Collisions at Sea are as follows:

18. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed.

18. Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

*Cohen, Q.C.* and *Dr. Phillimore* for the defendants in support of the appeal.—According to the evidence the engines of the *Dordogne* were stopped at the time the *Edith* came into sight. If so she had brought herself practically to a standstill in the water:

*The Frankland and The Keelral*, 1 Asp. Mar. Law Cas. 489; 27 L. T. Rep. N. S. 633; L. Rep. 4 P. C. 529.

*The Kirby Hall*, 5 Asp. Mar. Law Cas. 90; 43 L. T. Rep. N. S. 797; L. Rep. 8 P. Div. 71;

It has never been laid down that a vessel on hearing a whistle, or even a succession of whistles, is to take all way off, which would have the effect of throwing herself out of command and so increase the dangers of navigation:

*The Beta*, 5 Asp. Mar. Law Cas. 276; L. Rep. 8 P. Div. 134; 51 L. T. Rep. N. S. 154;

*The John McIntyre*, 5 Asp. Mar. Law Cas. 278; L. Rep. 8 P. Div. 135; 51 L. T. Rep. N. S. 185.

According to the decision in *The Beryl* (51 L. T. Rep. N. S. 554; 9 P. D. 137) art. 18 is only obligatory when the circumstances are such as would lead an officer of reasonable care and skill to the conclusion that there was risk of collision. Here, although the whistles were coming closer, yet they were getting broader on the bow, and would therefore indicate a position of safety.

*Hall, Q.C.* and *Baden-Powell*, for the respondents, were not called upon.

BRETT, M.R.—It seems to me that in these cases of vessels, whether steamers or sailing vessels, which find themselves in a fog, we must hold them very strictly to the regulations. As I ventured to say in *The Beryl* (*ubi sup.*), these regulations are made not only for the purpose of preventing collisions, but of preventing danger of collision, and we must take care to hold vessels in thick fogs strictly to the regulations so as to avoid danger of collision. I still am of opinion that we cannot condemn or relieve these ships by the proof of what were the actual facts. We must judge them by what an officer of care and skill ought to have judged the facts to be. That the *Edith* was sorely to blame is obvious, and we need not trouble ourselves about her. The question is as to the *Dordogne*, whether she was also to blame. That question must be solved by what ought to have appeared to be the circumstances of risk of collision to an officer of reasonable care and skill in command of the *Dordogne*. Now the circum-



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stances, in fact, were that there was so dense a fog that you could not see another ship until within a ship's length off, until, when you did see her, a collision was almost inevitable. Whilst the *Dordogne* was in this fog she was at sea, in a place where it would not be extremely probable that she would meet another vessel. It is not like the case of a vessel going up or down a river, or up or down a somewhat narrow arm of the sea like a channel. In such a case, whether an officer hears a whistle or not, he ought to contemplate the probability of meeting with other vessels, because he is in a narrow channel where vessels that are meeting would almost inevitably be in the same line as himself. Take, for instance, the Thames: before an officer hears a whistle I think he ought to have brought his vessel, in such a fog as this, as nearly as possible to a standstill, so as only just to have command over her. But in the open sea, where it is not very probable that he will meet another vessel, I think that that would be a moderate speed, which, if he was in a river and likely to meet a vessel the next minute, ought not to be his speed. But even when at sea, before he hears a whistle, he ought to reduce his way to a moderate speed, though what his speed is to be must of course differ under different circumstances. Now when at sea an officer hears a whistle he is brought to the conclusion that there is a vessel in the neighbourhood. A good deal must of course depend upon the indication which is given by the other vessel of her presence. I cannot doubt myself but that the sound of a whistle must give some indication of where the vessel is. It is impossible to my mind to say that a whistle sounded at a mile and a half off would sound the same as a whistle sounded one hundred yards off. Personally I cannot believe that. Therefore, if a ship at sea in such a fog hears a whistle which would indicate that another vessel is a mile or a mile and a half off, she ought at once to reduce her speed to a more moderate speed, though moderate speed under these circumstances would be very different to moderate speed when the vessels came closer together. This case is not to be determined by what was done at the time the first whistle was heard. Here we have three, and perhaps more, successive whistles, all coming closer. What must be the conclusion to be derived from those whistles? We know that in fact these vessels were coming closer and closer to each other. We, however, have to judge of what ought to have been the conclusion or suspicion of the officer in charge of the *Dordogne*. What would that succession of whistles tell him? For myself I should have had no doubt, when you have a succession of whistles, each one coming closer, that each whistle would show him that the other vessel was coming nearer. It is said that the whistles showed him that she was coming in a particular direction, that is, that she was getting broader on his bow. I do not think it signifies whether the whistles get broader on the bow or not, if they show that the vessel is coming closer. If it is coming nearer and nearer in a dense fog (and every one knows that in dense fogs you cannot tell where exactly a vessel is from the sound of her whistle), and you cannot tell the direction in which it is coming, are not those such circumstances as should lead a prudent officer to suppose that if he went on as he was there would

be danger? The moment the whistles show him that a vessel is really coming substantially nearer and nearer to him, he not being able to tell the direction in which she is coming, the truth of which observation is in this case shown by the ultimate fact, I have not myself any doubt that he ought to obey not only the 13th article, but also the 18th article if his vessel is a steamer. If it is only the 13th article which he ought to obey, as the other vessel comes nearer and nearer, "moderate speed" becomes more moderate and more moderate. That which is moderate speed, when the vessels are two or three miles apart, is not moderate speed when the vessels are within half a mile of each other. As the vessels get nearer and nearer he must bring his ship to as complete a standstill as is possible without putting himself out of command. If his vessel is a steamer she must go at least dead slow. If the other is really coming anything like near to him he ought to obey art. 18 and stop and reverse. To a sailing ship art. 18 does not apply, because she cannot stop and reverse, but she ought, if she is under full sail, to take sail off till she brings herself as nearly to a standstill as will give her command of herself. Now what ought the officer of the *Dordogne* to have concluded? Upon that I have asked the following question of the gentlemen who assist us: "Considering the way in which these vessels were approaching each other, would each successive whistle tell the officer in charge of the *Dordogne* that the other ship was approaching nearer and nearer to him?" They agree with the view I should have come to and say "yes." If so, he ought to have brought his ship to a standstill at an early period, and when the other vessel was coming near to him he ought to have stopped and reversed. Certainly at the time the last whistle was sounded he ought immediately to have stopped and reversed, whereas, I think, the order was only given when he saw the other vessel. He therefore broke art. 18. The learned judge of the Admiralty Court relied upon another circumstance to show that the *Dordogne* was going at a very considerable pace at the time of the collision. I think it only right to state that upon this point I have asked our assessors the question: "Does the severity of the injuries suffered by the *Edith* lead to any conclusion as to the speed of the *Dordogne* at the moment of collision?" I do not know what the advice of the Trinity Masters to the judge of the Admiralty Court was, but I am bound to say that the gentlemen assisting us do not think it would lead to any conclusion as to the speed of the *Dordogne* at the moment of collision. I therefore do not rely upon the severity of the blow at all. But I rely upon the facts I have stated and the rule I have stated. I am therefore of opinion that in this case the *Dordogne* broke art. 13 by not going at a moderate speed sooner than she did; and I am further of opinion, which is quite sufficient to decide this case, that she broke art. 18 by not reversing sooner than she did. The decision of the learned judge of the Admiralty Court must therefore be supported and this appeal dismissed.

COTTON, L.J.—We have not to consider what was the conduct of the *Dordogne* when the first whistle was heard. It is clear that there was a succession of whistles, that the vessels were

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coming nearer and nearer, and were, in fact, getting very near one another. Now it was the duty of the *Dordogne* to stop and reverse her engines if there was risk of collision. But it is said that, inasmuch as these whistles were getting broader and broader on the bow, the officer on the *Dordogne* might reasonably conclude that there was no danger. However, in my opinion, that will not excuse the *Dordogne* for disobedience to art. 18. In a fog in which a man can see nothing he cannot form any safe opinion as to the direction of another vessel, and he should in such circumstances follow the course stated by the Master of the Rolls.

LINDLEY, L.J.—I take the same view and think that the *Dordogne* ought to have obeyed art. 18 sooner.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Ingledeu, Ince, and Colt.*

Solicitors for the defendants, *Botterell and Roche.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Friday, July 4, 1884.

(Before PEARSON, J.)

Re PRICE'S PATENT CANDLE COMPANY. (a)

*Trade mark—Distinctive label or device—Name of manufacturer—Name combined with words in common use—46 & 47 Vict. c. 57, ss. 64, 72.*

*A mark consisting of the name of a manufacturer, printed in ornamental type, in combination with words in common use, is not a trade mark within the requirements of sect. 64 of the Patents, Designs, and Trade Marks Act 1883.*

THIS was an application by Price's Patent Candle Company for an order that the comptroller might be directed to register a trade mark, No. 35,858, consisting of an oblong label surrounded by a blue border and bearing the words "Price's Patent Candle Company" in ornamental type within the lines of the border, the address of the company in ordinary type upon the inner lines of the border, and in the centre, upon a white tablet, with scalloped edges, the words "National Sperm" in red capital letters of ordinary type.

The mark was to be used for candles, being goods in class 47. It had been in use by the applicants for some years subsequent to the passing of the Trade Marks Registration Act 1875.

The comptroller had refused to register the mark upon the ground that it so nearly resembled another mark already on the register as to be calculated to deceive within the meaning of the Patents, Designs, and Trade Marks Act 1883, s. 72. That mark, No. 25,446, had been registered by J. Pepler and Co., on the 1st Jan. 1884, also for use on candles, and had been accepted under sect. 10 of the Trade Marks Registration Act 1875 as having been in use by John Pepler and Co. since 1873. It consisted of a green oval label surrounded by two black lines, and bore between the lines the name and address of the firm, and within the inner lines the words "National Sperm" in black capital letters.

The following statutory provisions are material to be stated:—

Patents, Designs, and Trade Marks Act 1883:

Sect. 64 (1.) For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars: (a) a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; (c) a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

(2.) There may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or of any of them.

Sect. 72 (1.) Except where the court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods.

Trade Marks Registration Act 1875:

Sect. 10. For the purposes of this Act, a trade mark consists of one or more of the following essential particulars: that is to say, a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or a written signature or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also, any special and distinctive word or words, or combination of figures or letters used as a trade mark before the passing of this Act, may be registered as such under this Act.

T. Aston, Q.C. for the applicants.—The mark in question does not so nearly resemble that of Pepler and Co. as to be calculated to deceive. In substance it is "Price's National Sperm," as contrasted with "Pepler's National Sperm," and it is a distinctive mark. We had used our mark before Pepler and Co.'s registration. Their registration does not give them any exclusive right as against us:

*Mouson and Co. v. Boehm*, 26 Ch. Div. 398.

The label itself is distinctive, and has been used on our goods since 1877. "National Sperm" are fancy words.

Stirling for the comptroller.—Pepler and Co.'s mark was registered under sect. 10 of the Act of 1875 as an old mark. It would not have been registered under that Act as a new mark. The mark now proposed is not distinctive within sect. 64 (1) (c) of the Act of 1883. There is nothing distinctive in the manner in which the applicant's name is printed, and the title "National Sperm" is in common use in the trade. The comptroller was bound to refer the matter to the court under sect. 72 of the Act of 1883.

PEARSON, J.—I simply have to construe the Act which is before me. I cannot agree with what Mr. Aston says, that you can deal between two rival firms in this court without any reference to the Act at all. If a man has been selling soap for a great number of years which has become known as "Pears' Soap," this court would have jurisdiction, and would probably exercise that jurisdiction, to restrain another person from selling another soap as Pears', without any reference to the Act; but the question before me is this: whether or not a trade mark can be registered—whether a device or a design, or anything you may propose to call it, can be registered under this Act—except in strict conformity with the regulations laid down. The Act says this: for

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the purpose of this Act a trade mark must consist of, or contain at least one of the following essential particulars; that is to say, for the purposes of the Act the owner of it may be registered under the Act, not at all with reference to the case as to whether or not a man may so use a mark which his neighbour has been using as to defraud the public and defraud his neighbour, but with reference to a register of trade marks, first, "a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner." It is admitted that in this particular label the name of Price's Patent Candle Company is neither printed, impressed, nor woven in any distinctive manner. Then, omitting sub-sect. 1 (b), which it is unnecessary to read, sub-sect. 1 (c) says there must be a "distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Now, unless I can hold that this is a distinctive label or ticket, which I am not prepared to hold in this case, then undoubtedly the words "National Sperm," which are the words in the largest type here, are not "fancy words not in common use;" because the words "National Sperm" are *ex concessis* in common use, and perfectly well known in the trade. The consequence is this, that I have a mark which does not contain either of the particulars which are essential to a trade mark under this Act, because it does not contain the name of the company printed in a distinctive manner, and it does not contain any fancy word or words which are not in common use. Mr. Aston says, at all events this is a distinctive label or distinctive ticket. I very much doubt whether this is a distinctive label or ticket, and certainly, unless I had something very strong to show that it was so distinctive from other labels purely by reason of the colours in which it is printed, and the design of it, I am not prepared to hold that this is what is intended under this Act to be a distinctive label or device. I do not say those words are not hard to construe, because I think they are. I should conceive that on a label of this kind the name of the firm being printed in common letters would not be a distinctive label. The intention seems to me not that it is to be a design in this shape, but a design practically to constitute a trade mark apart from the words "Price's Patent Candle Company" and "National Sperm" and so forth. I do not think Mr. Aston would contend that really this label was what was being registered. It is not the label alone. You might have the label alone as a trade mark if it was a distinctive trade mark absolutely unlike all other labels, but what the comptroller is here asked to register is, not the label, but the label with all manner of words upon it which do not conform to the regulations under the Act. Then the 72nd section is no doubt very important [his Lordship read it]; and speaking as at present advised, in answer to Mr. Stirling, I am of opinion that the comptroller would be perfectly justified in saying, and it would be the course he ought to adopt, "Inasmuch as there is already a trade mark on the register either the same as or nearly identical with the one you are proposing to register, I cannot register yours until you have got the opinion of the court authorising me so to do." Under these circumstances I cannot direct this mark to be registered. Mr. Aston does not admit that the words "National

Sperm" are in common use, but I took a great deal of pains to ascertain whether they were or not, and I certainly thought they were. If I gave an order for "National Sperm" candles everybody would know what I wanted; Pepler and Co. sell them as well as the applicants, and for aught I know there may be hundreds who do so. All I can say, however, is that I am not satisfied that they are fancy words. The application will be refused with costs.

Solicitors: Wilson, Bristows, and Corymael; Hare and Co.

Monday, July 7, 1884.

(Before PEARSON, J.)

Re ROBERTS; TARLETON v. BRUTON. (a)

*Will—Construction—Gift to nephews and nieces nominatim—Settlement of share of niece—Death in lifetime of testator—Lapse.*

*A testator gave his personal estate upon trust for his nephew and nieces by name in equal shares, and directed that the share of each niece should be retained in trust for her separate use for life without power of anticipation, with trusts over, in default of her appointing by will, in favour of her sons and daughters equally at twenty-one years or marriage respectively. One of the testator's nieces married and died in the testator's lifetime intestate, but leaving an infant daughter.*

*Held, that there was an intestacy in respect of the share of such niece.*

*Re Speakman; Unsworth v. Speakman (4 Ch. Div. 620) not followed.*

*Stewart v. Jones (3 De G. & J. 532) approved.*

CHRISTOPHER ROBERTS, who died on the 11th Feb. 1880, by his will dated the 25th Aug. 1869, gave all his residuary personal estate to trustees upon trust for conversion and investment, and, subject to due provision for an annuity, to stand possessed of the trust funds upon trust for the testator's nephew and nieces, Edward T. L. Roberts, Harriet M. B. Roberts, Josephina Grigg, the wife of Edward Grigg, and Clara Roberts, equally between them share and share alike, and in case any or either of them should die under the age of twenty-one years, then the testator directed that the share or shares of him, her, or them so dying, whether original or accruing, should go to the others or other of them, and if more than one in equal shares; and the testator further declared that his trustees or trustee should retain the share of each of his nieces of and in the said trust funds upon trust to pay the income to her during her own life for her separate use without power of anticipation, and after her decease, as to the capital, upon trust (in default of appointment, which occurred) for her child or children who being male should attain the age of twenty-one years, or being female should attain that age or marry, equally between them if more than one, and if there should be no child of such niece who being male should attain the age of twenty-one years, or being female should attain that age or marry, then upon trust for the next of kin of such niece at her decease according to the statutes and as if she had died intestate and a spinster.

Harriet M. B. Roberts was married in the testator's lifetime, but predeceased him, leaving

(a) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

an infant daughter, Rosetta C. Tarleton, her surviving. Rosetta C. Tarleton was still living, and the question was now raised upon the further consideration of an action to administer the testator's estate, whether or not the share given to Harriet M. B. Roberts had lapsed, or whether her daughter was entitled to the same contingently on attaining twenty-one years.

*Cookson, Q.C. and Speed* for the infant Rosetta C. Tarleton.—There has been no lapse. There was in effect a settlement by the testator upon his nieces and their children:

*Unsworth v. Speakman*, 4 Ch. Div. 620.

*Cozens-Hardy, Q.C. and L. Ryland* for Josephine Grigg and her children.—There was an intestacy in respect of the share in question. The case cited is no authority. The decision in *Stewart v. Jones* (3 De G. & J. 532) should be followed.

*Warmington, Q.C. and Charles Browne* for Edward T. L. Roberts.

*W. W. Karelake, Q.C. and W. Phipson Beale* for the trustees of the will.

PEARSON, J., after reading the provisions of the will, and stating the other facts, proceeded to give judgment as follows:—The question is, whether the child of the dead niece of the testator takes any interest under the will. Now that which the testator directed to be settled was "the share" of each of his nieces. This niece died before him, and she could not therefore take any share under his will. Consequently, in her case there was no share to settle, and her child can take nothing under the will. This is really the effect of the decision in *Stewart v. Jones* (*ubi sup.*), in which Lord Chelmsford said: "Then follows the proviso as to daughters' share, which appears to me merely to settle the shares of daughters who would take under the preceding gift. For what does the testator dispose of in this proviso? Why the shares to which his daughters shall become entitled 'under the trusts aforesaid.' Mr. Bevir said that we are not to look to the gift alone, but to the subsequent part of the will also. I quite agree with him. The terms in which the daughters' shares are settled must be regarded, but they must be applied to a share in existence." In opposition to this decision, *Unsworth v. Speakman* (*ubi sup.*) is cited, in which Malins, V.C. refused to follow *Stewart v. Jones*. I do not feel myself able to disregard the authority of the Court of Appeal, and it would be utterly impossible for me to accede to the canons of construction laid down by the Vice-Chancellor. I hold, therefore, that the share of the deceased niece has lapsed, and that there is an intestacy in respect of it.

Solicitors: *Tucker and Lake; Spencer Whitehead*, agent for *Brittans, Livett, and Millet*, Bristol; *Irwin and Nash*.

Tuesday, Aug. 12, 1884.

(Before PEARSON, J.)

Re KNOWLES' SETTLED ESTATES. (a)

*Settled Land Act 1882* (45 & 46 Vict. c. 38), ss. 2, 38 (1)—*Settlement—Derivative settlements—Trustees for purposes of the Act.*

*The settlement, as defined by sect. 2 of the Settled Land Act 1882, means the original settlement under which a given interest is taken, and does not include instruments engrafted on that settlement.*

*Persons who are related to each other ought not to be appointed the trustees of a settlement for the purposes of the Act.*

THIS was an application by way of summons under the Settled Land Act 1882, whereby Maria Knowles asked that trustees of a settlement might be appointed for the purposes of the Act.

By an indenture of the 15th April 1837 a freehold property, known as the Spread Eagle public-house, was vested in trustees upon trust during the life of Maria Knowles to pay the rents to her for her separate use, or to her assigns, and after her decease upon trust for the child and children of John Knowles by the said Maria Knowles, his wife, or any one or more of them, exclusive of the other or others, in such proportions and manner as John Knowles should by deed or will appoint, and in default of appointment as therein mentioned.

By deed-poll of the 9th Oct. 1865 John Knowles appointed that the property should, after the death of Maria Knowles, be held in trust for his daughter Mary E. Knowles in fee.

By an indenture of the 10th Oct. 1865 the property was, in contemplation of the marriage of Mary E. Knowles, conveyed in fee to trustees upon trust for Mary E. Knowles in fee until the marriage, and after the solemnisation thereof upon trust to pay the rents to John Knowles and his assigns during his life, and after his death to pay the rents to Mary E. Knowles for her separate use without power of anticipation, and after her decease to pay the rents to John Clarke and his assigns during his life, and after the death of the survivor to John Knowles, Mary E. Knowles, and John Clarke, upon trust for the issue of the marriage, with remainder to Mary E. Knowles in fee.

The present applicant came to the court as tenant for life under the deed of the 15th April 1837. The summons was entitled only in the matter of that deed and of the Act, and it had been served only upon the trustees of that deed, one of whom was the solicitor of the applicant.

The persons whom it was proposed to appoint as trustees for the purposes of the Act were the other trustee of the deed and his brother.

*P. S. Gregory*, for the summons, submitted to the court whether it was necessary to entitle the summons in the matter of the deeds subsequent to the deed of the 15th April 1837, and to serve the trustees of the settlement of the 10th Oct. 1865.

PEARSON, J.—The original settlement is a complete settlement in itself, and in my opinion it is "the settlement" under the Act. I have nothing to do with any derivative settlement. I object to

(a) Reported by J. F. WAGGITT, Esq., Barrister-at-Law.

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appointing two relatives as trustees. Independent trustees must be obtained, and the summons will stand over for that purpose.

Solicitors: *Hanbury, Hutton, and Whitting.*

Oct. 27 and 30, 1884.

(Before PEARSON, J.)

Re JOHNSON AND TUSTIN. (a)

*Vendor and purchaser—Expenses of abstract—Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), s. 3 (6)—Open contract—Abstract of document not in vendor's possession.*

*The provisions of sect. 3 sub-sect. 6 of the Conveyancing and Law of Property Act 1881, are to be construed strictly.*

*A vendor under an open contract furnished an abstract of title commencing with a deed of conveyance dated in 1860.*

*The purchaser required to be furnished with an abstract of an earlier deed forming part of the title, but not in the vendor's possession.*

*Held, that the expense of such further abstract must be borne by the purchaser.*

This was a summons under the Vendor and Purchaser Act 1874, raising the question whether the expense of furnishing an abstract of a document of title ought to be borne by the vendor or the purchaser of the property to which it related.

On Jan. 17, 1884, the purchaser by his agents executed a contract for the purchase of a parcel of land comprising two acres or thereabouts at Woking, in the county of Surrey, at the price of 1100*l.*, subject to the title being approved by the purchaser's solicitors.

An abstract of title was furnished by the vendor commencing with a deed of conveyance dated Dec. 12, 1860, from the London Necropolis and National Mausoleum Company, together with the incorporating Act of the company. The purchaser's solicitors thereupon required the vendor to show a title for the statutory period of forty years, and a further abstract was furnished commencing with a deed of conveyance to the company dated Oct. 14, 1854.

The latter deed related to other lands adjoining that which was the subject of the purchase, and was not in the vendor's possession, but was included in a covenant for production contained in the conveyance of Dec. 12, 1860.

The vendor contended that, according to the true construction of the Conveyancing and Law of Property Act 1881, s. 3, sub-sect. 6, the cost of the abstract of the earlier deed ought to be borne by the purchaser.

*H. J. Hood* for the purchaser.—The question is of great importance, inasmuch as it very frequently arises in conveyancing business. The vendor entered into an open contract, and was therefore bound to show a statutory title of forty years. He was also bound to supply a perfect abstract of that title. He was able to procure production of the deed in question under the covenant for production which ran with the legal ownership of the land. The wording of sect. 3, sub-sect. 6, contemplates the circumstance of a proper abstract having been furnished. "The

abstract" means such an abstract as is required by the contract, not an abstract only of such documents as are in the vendor's possession. If the vendor's contention is correct, a purchaser would have to bear practically the whole expense of showing a *prima facie* title in the case of an open contract for sale, whether the vendor had parted with his deeds to a mortgagee, or had nothing but the conveyance to himself of six months' date and a covenant for production. The words "for any other purpose" must be construed as referring to purposes *ejusdem generis* with verification of the abstract; for example, the purpose of ascertaining that there has been no omission, or that what is stated is correct.

*Swinfen Eady* for the vendor.—The words of the sub-section must be strictly construed. The meaning is, that the vendor is to provide an abstract of all documents in his possession which are material to the title; an abstract of any deed not in his possession is to be paid for by the purchaser. The sub-section clearly contemplates the case of the purchaser paying for some abstract. The very purpose of the Act was to remedy the grievance as to the expense which formerly fell upon the vendors in many cases.

*Hood* in reply.—The purchaser's contention is for the more reasonable construction, having regard to the consequences which must follow in many cases if the opposite construction is pronounced to be correct.

*Cur. adv. vult.*

Oct. 30.—PEARSON, J.—This case raises a question for the first time, under the 6th sub-section of the 3rd section of the Conveyancing Act of 1881. By that section it is declared, amongst other things, that the expenses of all attested stamped office or other copy, extracts of or abstracts from, any Acts of Parliament or other documents aforesaid, which include all deeds not in the vendor's possession, if any such production, inspection, journey for the procuring, making, or informing is required by a purchaser, either for verification of the abstract or for any other purpose, shall be borne by the purchaser who requires the same. The question is, whether the expense of a particular abstract of a particular deed, which was required by the parties in this case, is to be borne by the purchaser or by the vendor. Now, in order to understand the case properly, I think we must look a little at the abstract which was delivered. The piece of land is situated at Woking; and, as the abstract was originally delivered, the abstract began with the deed of the 12th Dec. 1860, by which the piece of land, according to the vendor's statement, was conveyed by the Necropolis Company (to call it so for brevity's sake) to a Mrs. Ritchie. Mrs. Ritchie appears afterwards to have mortgaged the property, the mortgage was assigned, and the assignee sold, under the power of sale in this mortgage deed, to the present purchaser. The present purchaser getting this abstract, and seeing that it began in 1860, and finding, as I understand, some difficulty in identifying the parcels, finding also some difficulty in knowing whether the Necropolis Company had power to sell, because there was a restriction upon the power of sale in this Act, required the deed which was abstracted, and the expense of the abstract of which is now in question. Now, looking at the very first deed,

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which is set out in the abstract which was delivered, I find it includes a covenant to produce certain deeds; and the first deed which is mentioned is the deed of the 14th Oct. 1854, which is a conveyance to the company, not only of this piece of land, but of a considerable quantity of adjoining land which was purchased at that date. That is the deed the abstract of which was required. It is said that, according to the terms of the section of the Conveyancing Act which I have just read, inasmuch as that deed was not in the possession of the vendor, and inasmuch as the purchaser required an abstract of it according to the literal meaning of the Conveyancing Act, the purchaser must pay the expenses of procuring the abstract. On the other hand, it was argued by Mr. Hood that, under the Vendor and Purchaser Act 1874, the purchaser, on an open contract—as this was—is entitled to a forty years' title; and being entitled to a forty years' title, he was therefore authorised to say to the vendor: "I am not satisfied with the abstract you have produced; produce to me a forty years' title, and if in order to verify that title, when you have stated a forty years' title, I require any abstract of a deed which is not in your possession, I admit I must pay you the expense of getting it; but you cannot simply present me with a blank sheet of paper and say, I have no deeds in my possession, I have got covenants for the production of all the deeds, but the only deed which I have is a deed dated six months ago, under which I purchased, and if you want abstracts of the other deeds you must pay the expenses for them." No doubt, if you put the case as strongly as I have put it, there is a purchaser getting nothing but a conveyance to the vendor himself six months before the sale, having no abstract of any other deeds, having no attested copy in his possession, and calling on the purchaser to pay the expense of obtaining the abstract of the earlier deeds; you make probably a strong case of Mr. Hood's argument, but I am bound to say I think the words of the Act of Parliament are too strong for me to get over. I think that on the present occasion, at all events, there is not a very strong case for saying it will work any injustice at all, because a twenty years' title was shown, and twenty years' title being shown, the very first deed containing the covenant in the schedule of deeds showed the purchaser that this deed was not in the vendor's possession. The purchaser required it to be produced. I think I am bound to adhere to the plain words of the section, which say that if the purchaser does require an abstract of a document which is not in the vendor's possession, the purchaser must pay the expense of it; and I am the more unwilling to depart from what seems to me the literal meaning of the section because, if I did so, I could not help seeing that I should get into a sea of difficulties, and then almost every question would have to be determined not upon the words of the section, but upon a consideration as to whether or not there was anything reasonable or unreasonable in the requisition—a question of more or less convenience which it would be almost impossible for the court to decide safely or fairly. Under these circumstances I must decide, upon this summons, that the purchaser was bound to bear the expense of procuring the abstract of the earlier deed.

Solicitors for the purchaser, *Lee and Pemberton*.  
Solicitors for the vendors, *Hicklin, Washington, and Pasmore*.

Monday, Nov. 3, 1884.

(Before PEARSON, J.)

*Re DENNE and SECRETARY OF STATE FOR WAR. (a)*  
*Solicitors' Remuneration Act 1881 (44 & 45 Vict. c. 44)—General Order of Dec. 1882—Scale of charges—Matters commenced prior, but completed subsequently, to the 31st Dec. 1882.*

*The General Order made under the Solicitors' Remuneration Act 1881, regulating the scale of charges in respect of a purchase of land, applies to any matter taken up by a solicitor after the order came into operation, although the contract was entered into before that time.*

*By a contract for the sale of land, dated the 16th June 1882, the purchaser agreed to pay to the vendor all reasonable and proper costs of making out and verifying his title and of execution. The vendor changed his solicitors during the transaction, and the solicitors whom he employed therein, from and after April 1883 until completion made out their bill of costs upon the footing of the General Order under the Solicitors' Remuneration Act 1882 not being applicable.*

*The General Order came into operation on the 31st Dec. 1882.*

*Held, that, inasmuch as the purchaser was under liability to pay to the vendor only such costs as his solicitors could recover against himself, and those costs as from April 1883 must be according to the scale of the General Order, the purchasers' liability was correspondingly limited.*

*Dicta in Re Lacey and Son (49 L. T. Rep. N. S. 755; 25 Ch. Div. 301) approved and followed.*

THIS was an application on behalf of Her Majesty's Principal Secretary of State for the War Department, asking that it might be declared that the costs of a contract for the sale of real estate made between himself and Mr. R. A. Denne, agreed to be paid to the vendor, of making out and verifying his title to the hereditaments therein comprised, and of executing to the purchaser such assurances thereof as he should require, were regulated by the General Order made in pursuance of the Solicitors' Remuneration Act 1881, and were such as are prescribed in part 1 of schedule 1 to that order.

The contract in question was dated the 16th June 1882, and related to the sale of certain freeholds at Lydd in Kent to the Secretary for War, purchasing under the Defence Act 1842. By the contract it was provided that the purchaser should pay to the vendor all reasonable and proper costs of making out and verifying his title to the land and of executing to the purchaser all such assurances thereof as he should require, and the Treasury Solicitor was entitled to have produced to him or his nominee all documents in the vendor's possession or power relating to the title or evidence of title to the hereditaments contracted to be sold, and to have delivered to him, if he required it (but not otherwise), an abstract of all or any of the aforesaid documents whereof he should require an abstract. The amount of the purchase money was 325l.

(a) Reported by J. F. WAGGETT, Esq., Barrister-at-Law.

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The Treasury Solicitor called for an abstract of title commencing with a will proved in 1862. The abstract was delivered by the vendor to the Treasury Solicitor's nominees, and the production of certain earlier deeds was subsequently called for and procured.

The contract was prepared upon a printed form in common use at the War Office.

At the date of the contract Mr. Denne was represented by a Mr. Stringer as his solicitor, but in April 1883 the matter was placed in the hands of Messrs. Frere and Co., who carried it through to completion.

They sent into the Treasury Solicitor an account of their charges, amounting to 43*l.* 11*s.* 10*d.* exclusive of Mr. Stringer's preliminary charges, amounting to 7*l.* 12*s.* 10*d.* Messrs. Frere and Co.'s charges included an item of 13*l.* 10*s.* for "Drawing abstract of title and copy twenty-seven sheets."

The Treasury Solicitor, while admitting that Mr. Stringer must be paid in full, contended that Messrs. Frere and Co.'s charges should be regulated by the General Order, and upon the scale should amount to 18*l.* 12*s.* or thereabouts, and he offered to pay 25*l.* in discharge of their bill in the matter.

The offer being declined, the present summons was taken out under the Vendor and Purchaser Act 1874.

The General Order under the Solicitors' Remuneration Act 1881 came into operation from and after the 31st Dec. 1882.

By clause 2 (a) of that order it was provided that, in respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, was to be that prescribed in part 1 of schedule 1 to that order, and to be subject to the regulations therein contained.

By clause 6 it was provided that in all cases to which the scales prescribed in schedule 1 should apply, a solicitor may, before undertaking any business by writing under his hand, communicated to the client, elect that his remuneration shall be according to the then present system as altered by schedule 2; but if no such election be made, his remuneration shall be according to the scale prescribed by the order.

Schedule 1, part 1, prescribes the scale of charges on sales, purchases, and mortgages, the third item being "vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract, or conditions of sale, if any)."

*Stirling* for the Secretary for War.—The War Department did not proceed strictly under the Defence Act 1842, under which the vendor would get no costs. The matter is to be dealt with as an ordinary purchase. This case is within the schedule 1 to clause A, of the General Order under the Solicitors' Remuneration Act. The opinions of the Lords Justices in *Re Lacey and Son* (49 L. T. Rep. N. S. 755; 25 Ch. Div. 301) are in favour of this contention; that was an *à fortiori* case, for the transactions of the purchase had commenced before the General Order came into operation. The whole of the items of work mentioned in the schedule, and which must be done by the solicitor to bring the

case within the order, namely, deducing the title, perusing and completing the conveyance, have been done in this case. It appears from the judgment of Fry, L.J. that it is not necessary, in order to bring the matter within the order, that the contract should have been prepared by the solicitor whose charges are concerned, for the schedule refers to "the contract or conditions, if any."

*Buckley* for the vendor.—If the argument on the other side is correct, then an agreement entered into before the order came into operation is altered by the order adversely to the solicitor, and so as at the same time to deprive him of the benefit of the option conferred by the order itself. This point was not decided in *Re Lacey and Son* (*ubi sup.*); the Lords Justices merely expressed an opinion, and it was not pressed upon them that the order itself, under clause 6, gives the solicitor power of contracting himself out of the order. It was never intended that a retrospective operation should be given to the order. Here the contract was made before the order, and the length and nature of the title to be deduced were left to the discretion of the Treasury Solicitor. Such a provision would never have been assented to, had it been intended that the order should apply.

*Stirling* in reply.—The contract is to pay the costs of Mr. Denne, the vendor, and not charges which his solicitors themselves could not recover from him. He made no special agreement with them.

PEARSON, J.—On the 16th June 1882 Mr. Denne entered into an agreement, which was apparently on the face of it a voluntary agreement, to sell a piece of land to the Secretary of State for War for public purposes for the sum of 325*l.* The first term of the contract was this: "The vendor will at any time, at the request and cost of the Treasury Solicitor, produce to him all the documents in his possession, and will at any time, if and when required by the Treasury Solicitor, but not otherwise, deliver to him such abstract as he may require." Then there is a clause at the end (the 5th) that "the purchaser shall pay to the vendor all reasonable and proper costs of making out and verifying his title to the hereditaments, and of executing to the purchaser all such assurances thereof as he shall require." That agreement being entered into on the 16th June 1882, the Solicitor for the War Department in the first instance was in communication with a Mr. Stringer, on behalf of the vendor, and certain costs were incurred amounting to about 7*l.*, which are not in dispute on the present occasion, and which I may therefore dismiss from my consideration. On the 1st Jan. 1883 there came into operation the order which has been referred to, and which limited and specified in detail the costs which a solicitor would be entitled to require from his client with regard to business of this kind, subject to this, that, under the 6th section of the order, the solicitor is entitled, if he pleases, to make a special bargain with regard to his costs before he undertakes the business. That order having come into operation on the 1st Jan. 1883, it is not until some months subsequently to that that the matter is transferred from Mr. Stringer to a firm of solicitors in London, and from that time up to the completion



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of the purchase and sale the London solicitors acted for Mr. Denne. It is not disputed that the War Office must now pay the costs. The only question is how are those costs to be calculated. On behalf of the Secretary of State it is said those costs now come under schedule 1, and if this order applies there is no doubt they do come under schedule 1. That is not in dispute at all. It is said on the other side that this order cannot have any effect at all, because the contract was entered into before the order was issued, and therefore it must be assumed that the costs mentioned in the contract are the costs that were in existence, and which the solicitor was entitled to charge at the time when the contract was entered into. The question really which I have to determine is, which of those two contentions is correct. Now, with regard to the costs that I have to assess, to my mind the argument is irresistible, that I cannot give Mr. Denne any greater costs than his solicitor is entitled to charge against him. The whole meaning of the contract was, that Mr. Denne personally was to be held free from those costs. To my mind, under that contract, whatever costs the solicitor is entitled to be paid by Mr. Denne for furnishing the abstract which was required, those costs the Secretary of State must pay to Mr. Denne, so that he may discharge his solicitor's claim. As far as I can see, inasmuch as the business was commenced by the London solicitors after that order came into operation, the result is this, that the solicitors with their eyes open, knowing that those were the costs which they would be entitled to charge, abstained from making any special agreement of any sort or kind, and were content to take the business upon the terms of being paid the costs as then settled and established by this order, and if the Secretary of State were out of the way altogether, and if the matter were simply an ordinary transaction between Mr. Denne and somebody else, and Mr. Denne had to pay these costs out of his own pocket, I cannot see how the solicitors under these circumstances could require from Mr. Denne any greater costs than those which are prescribed by schedule 1 of this order. I am also referred to the authority of *Re Lacey and Son's (ubi sup)*, which has been much commented upon. Now in that case the agreement that the vendor would sell to the purchaser was contained in a contract dated the 19th Dec. 1881. By that agreement an option was given to the tenant to purchase if he pleased; if he did purchase he was to pay the vendor's costs. Notice was given in 1882. The bill came to be taxed in 1883 after the order was in operation, and although, as Mr. Buckley says, it was not necessary in that case to decide the question whether or not the proper costs came under schedule 1, yet the court, consisting of three judges, at the present moment judges of the Court of Appeal, decided that schedule 1 did apply; and I do not think, having that confident expression of opinion of all three judges that that was the proper construction of the order of 1883, that I am at liberty to depart from it, whatever my own opinion might be if the case were *res integra* before me. I think it would be disrespectful to the Court of Appeal, and as far as I can see it would be useless to the suitor, because on appeal I cannot help supposing the Court of Appeal would adhere to the opinion which it has already given. Then it is said that in the argument in

that case there was a very serious point omitted. In the first place, I should be very slow to impute to the judges of the Court of Appeal an oversight in not having seen that point if it was one that really and truly could be gravely argued. But, as it seems to me, the point does not arise here, because, inasmuch as the employment of the London solicitors did not take place until four months after the order was in force, the point that if this is decided in that way it may affect cases where the solicitor had no opportunity of contracting himself out of the order, does not apply at all, because in the present case he had the opportunity of contracting himself out of the order if he pleased, and he did not avail himself of that opportunity. On these grounds, therefore, I come to the conclusion that on the present occasion the only costs to which the solicitor is entitled must be costs taxed and assessed on the figures mentioned in schedule 1. I have told Mr. Buckley in the course of his argument that very possibly, if I had to decide this case according to my feelings, I should be very much disposed to decide it in his favour. The abstract that was delivered was delivered in accordance with the request of the Solicitor for the War Department, it is twenty-seven brief sheets; and if I were to speculate upon the matter and ask myself whether I thought 30s. was a sufficient allowance for that, I think I should come to the conclusion, speaking hastily probably, that 30s. was a very small remuneration for that. But I cannot help seeing this, that one gentleman who signed the order which is in question was the then President of the Incorporated Law Society, and I must come to the conclusion that he, who must know all these matters infinitely better than any judge can know them, agreed with the learned judges who sanctioned that order that 30s. was a sufficient remuneration, and I do not mean in any way whatever to take upon myself the presumption of overruling his opinion.

Solicitors for the vendor, *Frere, Forster, Cholmondeley, and Frere.*

Solicitors for the Treasury, *Hare and Co.*

#### QUEEN'S BENCH DIVISION.

June 19 and July 18, 1884.

(Before CAVE, J.)

CARLTON v. BOWCOCK AND ANOTHER. (a)

*Landlord and tenant—Assignee of reversion—Estoppel by payment of rent—Jus tertii.*

*Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is prima facie evidence of title, and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment.*

*Hence, in an action for rent by the alleged assignee of the reversion, where rent had been paid by the tenant to the agent of the alleged assignee, it was held to be no defence for the tenant merely to show that the alleged assignee had no title to the reversion.*

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

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CARLTON v. BOWCOCK AND ANOTHER.

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THIS case was tried before Cave, J., at Manchester, and reserved for further consideration in London.

June 19.—Sir H. Giffard, Q.C., Gully, Q.C., and Black for the plaintiff.

Bigham, Q.C. and Smyly for the defendants.

The facts and arguments are sufficiently stated in the judgment.

*Cur. adv. vult.*

July 18.—CAVE, J.—In this action the plaintiff alleges that the defendants are his tenants of a house and shop at Cheetham Hill, Manchester, and he claims six years' rent at the rate of 75*l.* per annum. The defendants deny the plaintiff's title. In 1869 one Watson, being seised in fee of the house and shop in question, let them to the defendants for five years from the 25th March 1869, at the rent of 75*l.* per annum. On the 8th Jan. 1872 Watson died in Scotland, having, shortly before his death, made his will, by which he devised the property in question to the plaintiff, whom he also appointed his executor. During Watson's life Messrs. Bridgford and Son, of Manchester, had been employed by him to collect the rents of this and other property in Manchester, and had been in the habit of applying to the tenants for the rent by means of a demand note, and upon payment of the rent of giving them receipt notes in the name and as the agents of Watson. After Watson's death Messrs. Bridgford, having heard from his solicitors that he was dead, and that Carlton was his executor and trustee, continued for some time to send out demand notes and collect and give receipts for the rent, and to account for the rent so received to the plaintiff. For the rent due from and paid by the defendants for the quarter ending the 25th March 1872, Messrs. Bridgford and Son gave a receipt, which was expressed to be on behalf of Watson's executors; and a similar receipt was given for the quarter's rent due the 29th Sept. 1872. For the rent due the 25th March 1873 the receipt was expressed to be on behalf of Watson's representatives; and for the rent due the 25th Dec. 1873 and the 24th June 1874 it was expressed to be on behalf of Watson's trustees. During all this time the defendants made no inquiry, and were not told further than what appeared from the receipts on whose behalf Bridgford and Son were collecting the rents; but, had they so inquired, I am satisfied that they would have been told that Messrs. Bridgford were collecting the rents on behalf of the plaintiff. No person other than the plaintiff has ever claimed to be entitled to the property or to the rent in question. The defendants' tenancy expired at Lady-day 1874; but they have continued to occupy the premises down to the present time; and in July 1874 they paid to Bridgford and Son a quarter's rent at the rate of 75*l.* per annum for the quarter ending the 24th June 1874. In the beginning of 1874 the plaintiff endeavoured to sell some freehold property left to him by Watson. Upon the investigation of title objection was taken that real property in England did not pass by the will. After this objection was made, Bridgford and Son ceased to account to the plaintiff for the rents they received. They did not refuse to account, but were not asked to do so, although their authority to receive the rent was not

withdrawn by the plaintiff, and in fact they have not paid over to the plaintiff the rent received by them from the defendants in respect of the three quarters ending respectively the 25th Dec. 1873, the 25th March 1874, and the 24th June 1874. After June 1874 they ceased to demand rent from the defendants, and from that time down to the present the defendants have paid no rent to anyone, nor, except the plaintiff, has anyone claimed rent from them. I should state here that both Mr. Gully, who appeared for the plaintiff at the trial at Manchester, and Sir Hardinge Giffard, who represented him on the further hearing in London, stated that they reserved the right to argue before the Court of Appeal that the will was executed so as to pass real property in England; (a) but both declined to argue the point before me or discuss the cases on the subject; and under these circumstances I must leave the Court of Appeal to deal with this point if and when it is made. For the purpose of this case I assume that the will was so executed as not to pass real property in England. It was contended for the plaintiff (1) that the defendants had attorned tenants to the plaintiff; and (2) that by continuing to occupy after their tenancy had ended at Lady-day 1874, and by paying rent for the following quarter to Bridgford and Son, the defendants had in fact become tenants from year to year of the plaintiff, and consequently were estopped from disputing his title. For the defendants it was argued, first, that there was no attornment in fact, and that, assuming that there was, it was open to the defendants to show, and the fact was, that such attornment had been made by mistake; and, secondly, that under the circumstances of the case, there was not after Lady-day 1874 any new tenancy created between them and the plaintiff. I do not think it necessary to decide whether there was or was not an attornment, or whether there was or was not a new tenancy. It cannot be denied that the defendants paid and the plaintiff received rent for the premises in question for nearly two years after Watson's death; and this fact, in the view I take of the law, is enough to decide the case. A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of his lessor by whom he has been let into possession. Receipt of the rent is *prima facie* evidence of the title as assignee of the reversion of the person to whom it is paid; but the tenant may show, if he can, that there is a third person who is in fact the assignee of the reversion, and that he paid rent by mistake or in ignorance of the facts relating to the title. Thus, in *Rogers v. Pitcher* (6 Taunt. 202), which was an action of replevin, the plaintiff, notwithstanding that he had paid rent to the defendant as assignee of the reversion, was allowed to prove that in fact one Mrs. Baker was the assignee of the reversion, and that he had paid rent to the defendant in igno-

(a) The point mentioned was that the will was not properly executed, upon the authority of certain decisions, as one of the attesting witnesses had not signed the attesting clause so as to be seen by the testator. The cases upon this point were considered binding upon the court here, and the argument proceeded upon the assumption that the will was not properly executed so as to pass real property in England.

range of the true state of the title. So, again, in *Cornish v. Searrell* (8 B. & C. 471), which was an action for use and occupation, the defendant being tenant of premises under a lease granted by B., signed a document inadmissible as an agreement for want of a stamp by which he agreed to become tenant to two persons who were named as sequestrators under a writ of sequestration against B., and it was held that, as there was no evidence that the original lease had been surrendered, the title to receive the rent was in B. and not in the sequestrators. So, also, in *Knight v. Cox* (18 C. B. 645), another action for use and occupation, the defendant, who had paid rent to the plaintiff under a distress, was allowed to prove that the rent had been claimed by the plaintiff, and paid to her as executrix and devisee of the administratrix of one of three lessors, and that one of the other lessors was still living. In all these cases—and there are other cases referred to in *Doe v. Oliver* (2 Sm. L. Cas. 8th edit., pp. 882-4) the tenant, in answer to a *prima facie* case of payment of rent, proved that a third person was in fact assignee of the reversion, and that the rent had been paid in ignorance of the true state of the title. There is, so far as I am aware, no case to be found in which the tenant has been allowed simply to pick holes in the title of the person to whom he had paid rent, without showing a better title in anyone else. Thus, in *Cooper v. Blundy* (1 Bing. N. C. 45), which was an action of replevin, the plaintiff, who had come into occupation under one who had paid rent upon a distress by the defendant, was held to be estopped from disputing the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger. In that case Tindal, C.J. says: "It is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the plaintiff should at least show that he paid the rent to the defendant by mistake, and that some other person is entitled to receive it." So again in *Doe v. Wiggins* (4 Q. B. 367)—a case in some points very like the present—the landlord of premises dying, the tenant, on being told by one Marlow that he was the landlord's devisee, paid him rent; and it was held that, in ejectment against the tenant by Marlow, the defendant could not be permitted to prove that the devise was void by reason of incapacity in the testator, no ground being shown for imputing fraud to Marlow in the communication made by him to the tenant. In *Hitchings v. Thompson* (5 Ex. 50) it was held that the payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent does not disclose his principal's name at the time. I think the conclusions to be drawn from these cases are: (1) That where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud or misrepresentation, such payment is no evidence of title, but that receipt of the rent is *prima facie* evidence of title where there is no such fraud or misrepresentation; (2) that where rent is paid by the tenant under

such circumstances as to amount to *prima facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession; and that, although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and that it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown. Applying these principles to the case in hand, it is clear that there was no fraud or misrepresentation by the plaintiff or his agents, Messrs. Bridgford and Son, and that, as the plaintiff was in actual receipt of the profits for nearly two years down to Michaelmas 1873, he has a *prima facie* title entitling him to demand and receive the rents until some claimant appears who can make out a better title. No such claimant exists in this case, and therefore I hold that the plaintiff is entitled to judgment for 450*l.*, being six years' rent, with costs.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Miller and Miller.*

Solicitors for the defendants, *Chester and Co.,* for *Chew and Son*, Manchester.

Saturday, Oct. 25, 1884.

(Before GROVE and SMITH, JJ.)

ALDERTON v. ARCHER. (a)

*Mayor's Court, London—Prohibition—Cause of action arising wholly or in part within the jurisdiction—Mayor's Court of London Procedure Act 1857 (20 & 21 Vict. c. clvii.), s. 12.*

A verbal agreement was entered into outside the jurisdiction of the Mayor's Court, London, by which the defendant was to purchase from the plaintiff the lease of a shop situate at New Cross, in the county of Surrey, together with the goodwill and stock-in-trade of a drapery business carried on there. The terms of this agreement were embodied in two counterpart documents, one of which was signed by the defendant at Bow, in the county of Middlesex, and the other subsequently signed by the plaintiff, in the city of London, and these two documents were then exchanged between the parties' solicitors within the city. Neither of the parties dwelt or carried on business within the city of London or the liberties thereof. A sum of 50*l.*, being the balance of the purchase money, remaining unpaid, the plaintiff sued the defendant for this sum in the Mayor's Court. The defendant thereupon obtained at chambers a writ of prohibition restraining the Mayor's Court from proceeding with the action.

Held, on appeal, that the prohibition was rightly granted, as no part of the cause of action arose within the jurisdiction of the Mayor's Court.

THIS was an appeal from an order made at chambers prohibiting the Mayor's Court, London, from further proceeding with the action on the ground of want of jurisdiction.

In 1883 the plaintiff and the defendant were

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

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negotiating about the sale to the defendant of a lease of a shop at New Cross, in the county of Surrey, together with the goodwill and stock-in-trade of a drapery business carried on there; and, the parties having come to an agreement in respect thereof outside the city of London or the liberties thereof, the terms thereof were embodied in two counterpart documents, one of which was signed by the defendant at Bow, in the county of Middlesex, and the other was subsequently signed by the plaintiff within the city of London.

The documents were as follows :

An agreement made this 17th day of August 1883 between Anne Cooper Alderton, of 81, Hollydale-road, Queen's-road, Peckham, in the county of Surrey, widow (hereinafter called the vendor), of the one part, and Ellen Archer, of 2 Coborn-street, Bow, Middlesex, widow (hereinafter called the purchaser), of the other part, whereby it is agreed as follows :

1. The vendor will sell, and the purchaser will purchase, the messuage, shop, and premises, situate and being No. 166, New Cross-road, in the county of Surrey, held under a lease dated 5th March 1866, for the term of twenty-one years from 25th December 1864, at the yearly rent of 25l. 10s., subject to the covenants and conditions on the lessee's part contained in the said lease, and also the right to a renewal of the said lease granted on the terms mentioned in a memorandum dated 27th May 1882, and signed by John Waple, and also the fixtures and fittings in and about the said premises, No. 166, New Cross-road, together with the goodwill of the business of a draper, carried on on the said premises by George Thorne.

2. The purchase money for the said premises is the sum of 126l., whereof 10l. is paid on the signing hereof to Messrs. Steavenson and Coudwell, the vendor's solicitors, as a deposit, and the balance of 116l. is to be paid on the 15th day of September next, when the purchase is to be completed. If the purchase shall not then be completed the purchaser is to pay interest at 5 per cent. per annum on the unpaid balance of purchase money.

3. The vendor will within four days from the date hereof deliver to the purchaser an abstract of her title to the said premises which shall commence with the said lease dated the 5th March 1866, and the purchaser shall not require the earlier title.

4. Possession of the said premises will be given to the purchaser on payment of the balance of the purchase money, when the vendor and all other necessary parties will execute a proper assurance of the said premises to the purchaser. The vendor will pay all outgoings up to the completion of the purchase, and after that date the same shall be paid by the purchaser. Such outgoings shall, if necessary for this purpose, be apportioned.

5. If the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to comply with, the vendor may by notice in writing to be given to the purchaser rescind and determine this contract, whereupon it shall become absolutely void, and the vendor will thereupon return to the purchaser the said deposit, but without any interest, costs, or other compensation whatever.

As witness the hands of the said parties.

(Signed by one party.)

These two counterpart documents were then exchanged between the solicitors of the parties within the city, and the deposit of 10l. was paid by the defendant's solicitor to the plaintiffs' solicitors within the city.

On the 29th Sept. 1883 the purchase was completed, and a conveyance of the premises executed, and there then remained a sum of 50l. of the purchase money unpaid, and it was agreed to lodge this sum for six weeks in the joint names of the solicitors to both parties in the London Joint Stock Bank, in the city, pending the settlement of certain questions. This last arrangement was come to in the city.

After the expiration of the six weeks, the plaintiff brought an action in the Mayor's Court, London, to recover the sum of 50l., balance of the purchase money, from the defendant, and the defendant thereupon obtained *ex parte* from Field, J. at chambers a writ of prohibition absolute in the first instance, on the ground that no part of the cause arose within the jurisdiction of the Mayor's Court.

The plaintiff then took out a summons at chambers to remove the prohibition, but Mathew, J. refused it.

The plaintiff appealed.

20 & 21 Vict. c. clvii. s. 12 :

Where the debt or damage claimed in any action shall not exceed the sum of fifty pounds, no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the City of London, or the liberties thereof, at the time of the action brought, or provided the defendant, or one of the defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein.

G. M. Cohen, for the plaintiff.—This appeal has already come before two Divisional Courts, first before Lord Coleridge, C.J. and Pollock, B., and it then came before Field, Manisty, and Lopes, JJ., but the case has never been decided. It now comes before this court for decision. The first point is that Field, J. ought not to have granted a writ of prohibition absolute in the first instance on an *ex parte* application, Order LXVIII., r. 2, of Rules of Court 1883 applying Order LII. to writs of prohibition. [The Court.—Mathew, J., when the summons came before him, heard both sides, and refused to remove the prohibition. You are too late to appeal from the order of Field, J., and hence you can only appeal from the order of Mathew, J. on the merits. The order of Mathew, J. must be taken as an order granting a prohibition after hearing both sides. We give no opinion upon the point of practice you have raised.] Then as to the merits. The claim is for 50l. and so comes within sect. 12 of the Mayor's Court Procedure Act 1857. Neither of the parties resided or carried on business within the jurisdiction, but part of the cause of action arose within it. The duplicate agreement was signed by the plaintiff within the city, the duplicates were exchanged and the 10l. deposit paid in the city, and the balance of 50l. was agreed to be paid into a bank within the city. Until each party signed the duplicate agreements, and they were exchanged, there was no binding contract. Hence, though the defendant signed in Middlesex, inasmuch as the plaintiff signed her duplicate in the city, and they were exchanged there, a part of the cause of action arose within the city, and the writ of prohibition should not have been granted. He cited

*Alhussen v. Magarejo*, 18 L. T. Rep. N. S. 323; L. Rep. 3 Q. B. 340.

C. E. Jones for the defendant.—As far as the liability of the defendant was concerned, that was complete upon her signing the counterpart document at Bow. The part that the plaintiff signed in the city was no part of her cause of action. The document was signed in compliance with sect. 4 of the Statute of Frauds, which says that the document must be signed by the party to be charged. The defendant here is sought to be charged, and the document so signed by her gives

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a complete cause of action. Hence, no part of it arose within the city.

Cohen in reply.—The two documents form in reality the agreement, and are not merely memoranda of the agreement drawn up to satisfy the Statute of Frauds. The part signed by the defendant was only an escrow in the hands of her solicitor, and not to take effect until the other part was signed by the plaintiff. The documents themselves show that they were intended to be the agreement between the parties, and not a mere memorandum within the Statute of Frauds.

GROVE, J.—In this case an application for a writ of prohibition was made before Field, J., and the application arose in this way: Upon the sale of a lease of a certain house, with the goodwill and fixtures of a business carried on there, part of the purchase money, namely, 50*l.*, remained unpaid. The plaintiff sued for this sum in the Mayor's Court, and a writ of prohibition was granted by Field, J. on the *ex parte* application of the defendant. An application was then made to Mathew, J., at chambers to remove the prohibition, on the ground that Field, J. had no power to grant a writ of prohibition upon an *ex parte* application. Upon this second application both parties were heard, and the case was fully discussed on its merits before Mathew, J., and he allowed the order for a writ of prohibition to stand. Hence, the original defect, if any, was cured, as this was in reality granting a prohibition after both parties had been heard. It is the order of Mathew, J. that we have now to deal with. Coming to the merits of the case, it is contended that no part of the cause of action arose within the city of London or the liberties thereof. One argument is that the 10*l.* deposit having been paid within the city, and the 50*l.* having been lodged in the bank in the city, part of the cause of action arose therein. But this seems to me not to be part of the cause of action here, as this is an action to recover money due upon the original contract of purchase and sale. Now the facts are that a verbal agreement was come to between the plaintiff and defendant outside the city, and the terms thereof embodied in two duplicate documents, one signed by the defendant at Bow and the other afterwards signed by the plaintiff within the city, and the duplicates were then exchanged between the respective solicitors within the city. Mr. Cohen contended that until both the parties signed their duplicate parts, and exchanged them, there was no complete contract, and that, as the plaintiff signed her duplicate within the city, and the duplicates were exchanged there, part of the cause of action arose within the city. The answer given to that by Mr. Jones was, that there was a verbal agreement between the parties come to outside the city, and the terms of that agreement were subsequently put into writing, and that when the defendant signed her duplicate part everything had been done that was necessary to give the plaintiff a cause of action against the defendant if the agreement were afterwards broken, the writing having been signed by the party to be charged therewith within sect. 4 of the Statute of Frauds. The plaintiff's cause of action would thereupon have been complete. I think that this last argument is a good one. What made me hesitate at first was a statement by Mr. Cohen

that the parties intended that there should be no contract until both parties had signed. Now, this is a matter of evidence, and I do not think that Mr. Cohen has made that out. It is for him affirmatively to establish this, and he has not done so. The facts rather appear to me to tend the other way. I think, therefore, that there was a complete contract upon which the defendant could have been sued before the plaintiff signed her duplicate part in the city, and that no part of the cause of action arose therein.

SMITH, J.—I am of the same opinion. I do not give any opinion as to whether my brother Field was right in granting the prohibition *ex parte* absolute in the first instance. The question is, Did the cause of action arise either wholly or in part within the city? The cause of action arises upon an agreement, the terms of which were contained in duplicate documents, one of which was signed by the defendant at Bow. It is true that the plaintiff signed her part in the City of London; but it appears to me that when the defendant signed that document at Bow there was a complete cause of action against her if she broke that agreement, and that consequently the cause of action arose wholly without the city. But Mr. Cohen argued that there was no complete contract until both parties had signed their duplicates and exchanged them, and that the document signed by the defendant was only to be an escrow until the other part was signed by the plaintiff. I can see no evidence of this. It seems to me that there was here a verbal agreement with a memorandum of it in writing signed by the defendant within the Statute of Frauds, and that therefore the plaintiffs' cause of action arose wholly without the city. Further, the payments made within the city did not in any way establish a cause of action there. This appeal must be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiff, *Stearnsen and Couldwell*.

Solicitors for the defendant, *Phelps, Sidgwick, and Biddle*.

Oct. 30 and Nov. 15, 1884.

(Before DENMAN, J.)

BISSELL AND CO. v. FOX BROTHERS AND CO. (a)

*Crossed cheques—Unauthorised signatures per pro.—Liability of collecting banker—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61), ss. 24, 25, 60, and 82.*

*Sect. 82 of the Bills of Exchange Act 1882 provides that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability by reason only of having received such payment." The plaintiffs, B. and Co., appointed S. their traveller, and S. was to remit all cash, bills, and cheques to the plaintiffs every week. S. afterwards opened an account at the defendants' bank, and paid into this account, without the sanction or knowledge of the plaintiffs, seven cheques received by him on account of the plaintiffs, and payable to "B. and Co. or order." These*

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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cheques were indorsed by S. "per pro. B. and Co., H. S." without authority. The defendants, without inquiry as to S.'s authority to indorse, and with knowledge of his position, received the cheques, as cash, and placed them at once to S.'s credit. Six of these cheques were drawn on other bankers than the defendants, three of these being crossed "and Co." when received by them, and three being uncrossed. These six cheques were crossed by the defendants with the name of their London agents for collection. The seventh cheque was drawn upon the defendants themselves, and was not crossed. S. afterwards absconded with the proceeds of these cheques.

*Held*, in an action by the plaintiffs to recover the proceeds of these seven cheques, that the defendants were liable, and were not protected by sect. 82 of the Bills of Exchange Act 1882, because, as regards the three cheques that came to the defendants uncrossed, they did not become "crossed cheques" within the meaning of that section by being crossed to a banker for collection; and further, as regards all the six cheques not drawn on the defendants, because the defendants had not merely "received payment for their customer," but had in fact under the circumstances received payment for themselves, and because the defendants had not received payment "without negligence," having made no inquiry into the authority of S. to indorse per pro. as required by sect. 24.

*Held*, also, as regards the cheque drawn upon the defendants themselves, that they were not protected by sect. 19 of 16 & 17 Vict. c. 59, or sect. 60 of the Bills of Exchange Act 1882, as they had not "paid" the cheque within the meaning of those sections.

This was an action tried by Denman, J. without a jury, Oct. 30, when the learned judge reserved judgment.

The facts and arguments are fully stated in the judgment.

Jelf, Q.C. and Whitehouse for the plaintiff.

Charles, Q.C. and F. O. Crump for the defendants.

*Cur. adv. vult.*

Nov. 15.—DENMAN, J.—The plaintiff was a manufacturer and wholesale dealer in goods, carrying on business at Wolverhampton under the name of J. G. Bissell and Co. The defendants were bankers at Taunton. The action was brought for damages for the conversion of certain cheques or for their proceeds. The defence was that the defendants were justified in what they had done, and exempted from liability by the 82nd section of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61). The facts were as follows: By a written agreement in 1879 one Shakeshaft agreed to become traveller to the plaintiff. He was to receive certain stipulated commissions upon all goods sold, and all cheques, cash, and bills were to be remitted to the plaintiff at the end of each week, and none to be retained without the consent of the plaintiff. The course of business for some years was for Shakeshaft to remit all sums received in cash directly, by postal or post office orders, to the plaintiff, and to send him all bills and cheques by post. But in June 1883 Shakeshaft opened an account of his own with the defendants' bank at Taunton as their customer, and from that time he paid the sums received in cash from customers of the plaintiff

into his own account, and drew several cheques for such sums in favour of the plaintiff to an amount on the whole of more than 300l. between June and October, when he absconded. The plaintiff never gave him any authority to pay any bills or cheques into his own or any other bank; nor was he aware that he had done so until Shakeshaft had absconded. The first cheque drawn by Shakeshaft on account of moneys which had been received by him in cash for the plaintiff and placed to his credit in his account with the defendants was one on the 29th June 1883 for 41l. 3s. 10d.; the next was one for 44l. 18s. on the 13th July. The first of the cheques, for the conversion of which the plaintiff seeks to be reimbursed in the present action, was dated the 12th July 1883, and credited to Shakeshaft by the defendants on the 14th. As regards all the cheques in dispute, they were as soon as received by the defendants placed to the credit of Shakeshaft immediately. They were all of them cheques drawn payable to "J. G. Bissell and Co., or order," and they were all indorsed by Shakeshaft in his own hand, "per pro. J. G. Bissell and Co., H. Shakeshaft." Six of them were drawn on other bankers, and one on the defendants themselves. Of the six, three were crossed generally "and Co." between transverse lines when paid into the defendants' bank (the amount of these altogether was 39l. 5s.). Three were brought uncrossed (the amount of these altogether was 31l. 1s. 6d.). That drawn on the defendants themselves was for 34l. 15s. and was also uncrossed. As regards the six drawn upon other bankers, both the crossed and the uncrossed were before they were forwarded to the bankers on whom they were respectively drawn, stamped across the face with the printed words, "To Barclay, Bevan, and Co., from Fox, Brothers, and Co., Taunton." The defendants received through Barclay, Bevan, and Co., the money for those six cheques from the respective banks on which they were drawn. The manager of the defendants' bank was called. He said "that when Shakeshaft opened an account in June 1883, he told him (the witness) that he was commercial traveller to J. G. Bissell and Co., of Wolverhampton; that he wished to open an ordinary cash banking account; that he should pay in ordinary credits and transmit them to his firm in Wolverhampton; that he was to keep a minimum credit balance of 50l. That the cheques in question were taken as cash, and immediately placed to his credit in his account as cash; that the object of placing the printed direction to Barclay, Bevan, and Co. on the cheques was to prevent anyone else from getting payment except Barclay, Bevan and Co. for the defendants; that Shakeshaft was unknown to the witness before, but was introduced by the cashier, who had known his family." The witness, on cross-examination said: "I knew that a commercial traveller sometimes receives cheques, and sometimes cash for his employers. I did not trouble my head about the balance between the cheques received from him and the cheques drawn by him. Someone at the bank would receive them and treat them as cash without referring to me. I was at the bank when those cheques came in. I soon knew they were per pro. indorsements. It did not occur to me it would be right to inquire into his authority. I would not now accept a commercial traveller's indorsement per pro. of such



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cheques. I took the risk of Shakeshaft being a dishonest person. The cheque drawn upon us was treated as cash like all the others." Upon these facts it was contended for the defendants that the case fell within sect. 82 of the Bills of Exchange Act 1882. That section is as follows: "Where a banker in good faith, and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title, thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The plaintiff's counsel contended that the section was wholly inapplicable on three grounds: (1) That payment of these cheques was not received by the defendants for a customer; (2) that there was negligence in crediting these cheques, indorsed *per pro.* as they were, to Shakeshaft; and (3) as regards four of the cheques, that they were neither specially nor generally crossed at the time at which they were cashed or treated as cash by the defendants, and were therefore not within the description of the cheques contemplated by sect. 82. Long before the Act of 1882 it was decided in *Stagg v. Elliott* (6 L. T. Rep. N. S. 433; 12 C. B. N. S. 373), and has always since been considered to be clear law, that an acceptance or indorsement of a bill *per pro.* is notice to whoever takes the bill that the acceptor or indorser has but a limited authority, and that the holder cannot maintain an action against the party who would otherwise be liable if there has in fact been an excess of the authority. That case was decided in 1862, and is recognised in the text-books as the leading authority ever since: (see Byles on Bills, 13th edit. 34.) The Act upon which the defendants rely is an Act passed for the purpose of codifying the law relating to bills of exchange, cheques, and promissory notes. By sect. 25 it adopts and stereotypes the law laid down in *Stagg v. Elliott* as follows: "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." By the words "a signature" in this section it is clear that an indorsement is included, for the preceding section (sect. 24) speaks of "a signature on a bill." That section is as follows: "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof, against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority." By sect. 60 of the Act, the banker on whom a bill payable to order on demand is drawn, who pays the bill in good faith and in the ordinary course of business, is to be deemed to have paid the bill in due course, though the indorsement has been forged or made without authority. By sect. 73 a cheque is defined as "a bill of exchange drawn on a banker payable on demand," so that it is clear that sect. 60 applies to cheques. It would, moreover, appear clear that this section would be a good defence to the other bankers on whom the

six cheques were drawn and who cashed those cheques for the defendants. As regards the seventh cheque drawn on the defendants themselves, a different question arises, which it will be convenient to dispose of first. It was decided upon a former Act (16 & 17 Vict. c. 59, s. 19) containing very similar words to sect. 60, that the bankers upon whom a cheque was drawn payable on demand to the order of S. and Co. were justified in paying a cheque indorsed "S. and Co. per S. K., agent" (*Charles v. Blackwell*, 35 L. T. Rep. N. S. 162; 1 C. P. Div. 548; on appeal, 36 L. T. Rep. N. S. 195; 2 C. P. Div. 151), on the ground that the words "which purport to be indorsed by the person to whom the same shall be drawn payable" included the case of an indorsement *per pro.*, and therefore that payment of a cheque so indorsed was payment as between the plaintiffs and the defendants, the drawers of the cheque. It was, however, pointed out by Mr. Jelf for the plaintiff, that the words of the Act there in question were not identical with those of sect. 60. The difference is this, that in sect. 19 of the former Act there were not the words "where the banker pays the bill in good faith and in the ordinary course of business." But inasmuch as that section is not repealed, and it is admitted that there was no absence of good faith on the part of the defendants, and inasmuch as *Charles v. Blackwell* expressly holds that an indorsement *per pro.* does purport to be an indorsement by the person to whom the cheque is drawn payable, I think that the defendants would, if they had paid the bill within the meaning of sect. 19, have paid it "in due course" within the meaning of sect. 60 of the later Act, and also paid its amount with the "sufficient authority" contemplated by sect. 19 of the former Act. But in the present case there was no actual payment of the cheque in question. The defendants, no doubt, placed it to the credit of Shakeshaft, and treated it as cash in their account with him. I can find nothing in either Act making this equivalent to a "payment of the bill" within the meaning of sect. 60 of the later Act, or to "payment of the amount of such draft" within the meaning of sect. 19 of the former Act, so as to bind the lawful owner of the cheque. If, the moment after they had placed the cheque to the credit of Shakeshaft, the plaintiff had appeared at the bank and claimed the cheque as fraudulently indorsed, it seems to me that they could not, with any regard to the true meaning of language, have said, "We have paid Shakeshaft the amount of that cheque," or "We have paid that cheque in the ordinary course of business." In the case of *Charles v. Blackwell* the bankers, who were held to have paid the cheque, had actually parted with cash to its amount—a very different thing from placing it to the credit of a customer without inquiry as to his authority to indorse. On these grounds I think that *Charles v. Blackwell* does not apply, and that the case of the seventh bill drawn on the defendants must be governed by the Act of 45 & 46 Vict. c. 61 (Bills of Exchange Act 1882) only. By sect. 73 of this Act all the provisions of the Act applicable to a bill of exchange payable on demand are applied to a cheque. I can find nothing in the Act to prevent the application of sects. 24 and 25 of the Act in the present case as regards the seventh cheque, and I there-



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fore think that those sections apply; and that the defendants had no right, either by virtue of sect. 19 of the earlier Act, or by sect. 60 of the Act of 1882, to hold that cheque as against the plaintiff or to deal with it in any way short of actual payment, his signature having, under the circumstances, been "wholly inoperative" within the meaning of sect. 24. I come now to sect. 82, which it is contended applies in favour of the defendants as regards all the cheques. I think it does not apply to any of them, for several reasons. First, as regards four of the cheques, they were not "crossed cheques" at all when received by the defendants. Sect. 82 applies only to a banker who receives payment of a cheque "crossed generally or specially to himself." These words are, in my opinion, only applicable when the banker who claims the benefit of the section has received a cheque already crossed, and not where he takes an uncrossed cheque and places it to the credit of a customer, and afterwards stamps it with a direction to his own bankers such as that placed on these cheques for his own purpose, and forwards it to them for collection. But there are two other objections made to the application of sect. 82, not only as regards the uncrossed cheques, but also as to those three which were crossed "and Co." First, that in the present case the defendants did not receive payment of the cheques "for a customer;" and secondly, that they did not receive payment of them for a customer "without negligence." As to the first of these objections I think the argument of Mr. Jelf for the plaintiff was well founded. I think that the Act was intended to protect bankers only in cases where they had merely received payment of a crossed cheque for a customer, but that it was not intended to cover the case of a banker making himself the indorsee of a cheque, especially of a cheque indorsed by his own customer with notice of that customer's limited authority, so as to dispense with the necessity of all inquiry in such a case. If the banker in such a case chooses at once to treat the cheque as cash as between himself and his customer, I think that when he afterwards receives payment from the banker on whom the cheque is drawn, he does so for himself and not "for the customer" within the meaning of sect. 82; and that at all events he does not "only receive such payment," but something materially different and more important as between him and the rightful owner of the cheque. But even assuming that I am wrong in this view, I am of opinion, upon the facts of this case, that there was negligence here on the part of the defendants as between them and the plaintiff. It is clear, I think, that the negligence contemplated in sect. 82 must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests, not of the customer who purports to have the authority, but of the principal whose authority he purports to have, the section being framed wholly with reference to the liability of the banker to the "true owner" of the cheque, and not with reference to his liability to his customer. It was contended by the defendants that the mere fact that the indorsement was a *per pro.* indorsement could not be considered any evidence of negligence, because *Charles v. Blackwell* decides that an indorsement *per pro.* is an indorsement purporting to be that of the person in whose favour the cheque is drawn.

But that case is not—nor is sect. 19 of 16 & 17 Vict. c. 59, upon which it was decided—applicable to any banker except the banker upon whom the cheque is drawn, nor is sect. 60 of the present Act: (see *Ogden v. Benas*, 30 L. T. Rep. N. S. 683; L. Rep. 9 C. P. 513; and *Bobbett v. Pinkett*, 34 L. T. Rep. N. S. 851; 1 Ex. Div. 368.) But without further considering whether the words "without negligence," in sect. 82, would be negatived by the mere fact that a *per pro.* indorsement was taken without inquiry as equivalent to the indorsement of the party in whose favour the cheques were drawn, I am of opinion that in the circumstances proved in the present case the defendants (even assuming that they received payment for a customer) did not "only," that is, merely, "receive such payment," but that they did so without taking due and reasonable precautions in the interests of the plaintiff, and therefore not without negligence; and so took a course which as against them left them in possession of a bill the indorsement on which was "a wholly inoperative signature" within the meaning of sect. 24. Whatever may be the effect of taking a cheque so indorsed if it stood alone, I think that the conduct of the defendants in this case was negligent. The party who indorsed it was himself their customer; they knew he was a commercial traveller; they knew the name and address of his employer; nothing would have been easier than to inquire as to the extent of his authority; the manager and the other *employés* of the bank knew that the indorsement was in his handwriting. The manager himself candidly answered that when they took the cheques they took the risk of *Shakeshaft* being a dishonest person. It did not at the time occur to him that it was dangerous, but he saw it now. In fact, the cheques were taken as cash without any reference to the manager, but he knew of it immediately, and that they were indorsed *per pro.* In these circumstances I think it would be carrying the protection of bankers far beyond the intention or the words of the Legislature, if I were to hold the defendants to be entitled to retain the proceeds of these cheques as against the plaintiff. I think that the plaintiff has never ceased to be the rightful owner, and the defendants took them without any justification. The only case which I can find which seemed to me to tell at all in favour of the defendants' contention is *Charles v. Blackwell*; but the case of *Matthiessen v. London and County Banking Company* (41 L. T. Rep. N. S. 35; 5 C. P. Div. 7) also requires notice. In that case it was held that sect. 12 of 39 & 40 Vict. c. 81, of which sect. 82 is practically a re-enactment, applies to the case of a banker who merely collects the proceeds of a cheque for a customer; but that was not the case of an indorsement *per pro.*, but of a forgery by one Maddle, who was not the customer of the defendants, for whom they had collected the money. Moreover, Lindley, J., in his judgment in that case, at p. 17, points out the very distinction relied upon by the plaintiff's counsel in this case when he says: "The Legislature says, if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible for the proceeds when you have dealt with it in the only way in which as a matter of business you could deal with it. If you have done anything more, if you have applied it to your own use, that is another

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matter." In the present case it was perfectly optional with the defendants whether they treated the cheques in question as their own or not. They chose to do so in a case where by inquiry they might have ascertained that their customer was committing a fraud, and where in my opinion they ought to have made such inquiry. I do not think that this is a case which would have fallen within the decision of *Matthiessen v. London and County Banking Company*, inasmuch as sect. 12 of the Act upon which that case was decided also requires the absence of negligence, which in that case there was no ground to impute; there being nothing in that case to call attention to the want of authority of the indorsee, and the bankers having no reason to dispute the right of the customer for whom they collected the proceeds. On these grounds I feel bound to give judgment for the plaintiff for the sum which he claims, viz., 105*l.* 1*s.* 6*d.* with costs.

*Judgment for the plaintiff.*

Solicitor for the plaintiff, *S. F. Taylor*, for *Flewker and Page*, *Wolverhampton*.

Solicitors for the defendants, *Reed and Reed*, for *Reed and Cook*, *Bridgwater*.

QUEEN'S BENCH DIVISION, IN  
BANKRUPTCY.

Monday, Nov. 24, 1884.

(Before CAVE, J.)

Re PARKER AND PARKER; *Ex parte* TURQUAND. (a)

*Disclaimer of lease—Rights of second sub-lessee—Vesting order—Sect. 55, sub-sect. 6, of the Bankruptcy Act 1883.*

P. and P., being mortgagees of certain premises, deposited the deeds with their bankers by way of security for an advance. They then acquired a sublease of the premises from the leaseholder, and then let the premises to a third person for a term of years with an option of purchase. Upon the bankruptcy of P. and P. the trustee asked for leave to disclaim, and the leaseholder asked for an order vesting the property in him.

Held, that the right order to make was one giving leave to disclaim subject to the second lessee's right to prove against the estate for any injury accruing to him through the disclaimer, and putting the mortgagees to their election whether or not they would within fourteen days take a vesting order to themselves, and, if they adopted the latter alternative, excluding them from all interest in and security upon the property.

Seem, that it is doubtful whether the words of sect. 55, sub-sect. 6, of the Bankruptcy Act 1883 are intended to apply to a landlord.

APPLICATION by the official receiver for leave to disclaim all interest and right in the lease of Fisher's Hotel, Clifford-street, Bonc'-street.

The bankrupts, Messrs. F. and W. Parker, solicitors, in Bedford-row, were mortgagees of the above-mentioned premises, and in 1879 deposited the deeds with their bankers, Messrs. Coutts and Co., by way of security for a considerable advance.

In July 1881 they acquired a sublease of the premises from the Baron d'Almeida, who held the premises under a long lease for nine and a quarter years.

Subsequently, on the 15th Sept. 1882, they entered into an agreement with a certain Mr. Imperiali to let the premises to him for a term of years, with the option of purchasing the fee. To this agreement the Baron d'Almeida was a party. By this agreement Imperiali paid 1000*l.* in ready money for the lease, the rest of the purchase money being allowed to remain on mortgage.

In the spring of 1884 the debtors became bankrupt and absconded.

*E. Cooper Willis*, Q.C. (with him *Linklater*), for the trustee, read affidavits in support of the application.

*R. V. Williams* for Mr. Imperiali.—Any order made ought to be without prejudice to my client's right of proof for any damages he may suffer through the disclaimer.

*F. C. Willis* for the Baron d'Almeida.—I am instructed to ask, that, if leave to disclaim is given, at the same time an order may be made under sect. 55, sub-sect. 6 of the Bankruptcy Act 1883. That section provides that "the court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or the delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just; and, on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for that purpose. Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt." In this case, unless a vesting order is made in favour of the Baron d'Almeida, he may be seriously inconvenienced by other persons claiming as mortgagees. [CAVE, J.—I am not quite clear whether the sub-section applies to landlords, and whether the more proper course would not be to make such an order as, without being a vesting order, would exclude them.] The words of the Act are "by any person." The latter part of the sub-section deals with persons claiming under the bankrupt, and, by implication from it, it appears as though the first part dealt with some other persons. I submit

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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[ADM.]

that, if your Lordship is of opinion that the mortgagees should be excluded, the simplest course would be to make an order vesting the property in the landlord.

CAVE, J.—I do not think on the whole that this is a case of such a character that a vesting order ought to be made, and for this reason, that I am not certain that the words of the section [his Lordship here read the words] are applicable to the case of a landlord, especially where, as in this case, the thing which is disclaimed is a lease, that is to say, a term of years in which the landlord has no interest. Turning to the special words of the Act, the section is confined to “any disclaimed property,” and does not specify or say “any property to which disclaimer may possibly relate.” Under the circumstances, therefore, I think the proper course will be to exclude the mortgagees from any and all interest in and security upon the property concerned in the present application unless they shall within a period of fourteen days make their election whether they will themselves take a vesting order under sub-sect. 6 of sect. 55. Order as follows: Leave to the trustee to disclaim, with liberty to Mr. Imperiali and the landlord to prove for any damage which they may suffer through the disclaimer, with costs of all parties out of the estate. I feel compelled, however, to remark, for the second time, that this court does not sit for the purpose of helping either the official receiver or the trustee in simple matters relating to the management of the estate, but for a judicial purpose, that is to say, to decide questions of law which may arise between the parties. When there is not any questions of law arising there is no justification for coming to the court.

Solicitors: *Linklater and Co.; Reyroux, Phillips, and Co.; H. Montague.*

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Friday, Nov. 14, 1884.

(Before BUTT, J.)

THE CLYDACH. (a)

*Collision—“Narrow channel”—Falmouth Harbour—Regulations for Preventing Collisions at Sea, 1880, art. 21.*

Art. 21 of the Regulations for Preventing Collisions at Sea 1880, providing that “in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship,” applies to a steamship entering and passing up Falmouth Harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations.

THIS was a damage action *in rem* instituted by the owners of the British steamship *Cheerful*, against the owners of the French steamship *Clydach* to recover compensation for damages sustained by reason of a collision between the two vessels on Sept. 8, 1884, in Falmouth Harbour.

The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs

were as follows:—Shortly before 4.30 a.m. on Sept. 8, 1884, the steamship *Cheerful*, of 642 tons register, and laden with a general cargo, was approaching Falmouth Harbour, at the speed of about nine knots, on a voyage from Liverpool to London, *via* Falmouth, the weather being fine and clear, the tide about flood, and the wind a light breeze from the westward. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board. In these circumstances, when the *Cheerful* was heading about N.N.E. and approaching the harbour at a short distance from Pendennis Point, making for the pier, the green and masthead lights of a steamship, which proved to be the *Clydach*, were observed by those on the *Cheerful* distant about a mile and bearing about a point on their starboard bow. About this time the engines of the *Cheerful* were reduced to half speed. When about off Pendennis Point the engines of the *Cheerful* were put to slow and her helm starboarded a little to keep along the land and make the pier. The two vessels were in a position to pass each other in safety starboard side to starboard side, but when the masthead and green lights of the *Clydach* were about three points on the starboard bow of the *Cheerful*, and were distant about 150 yards, her red light came into view and her green was shut in, rendering a collision imminent. The engines of the *Cheerful* were immediately reversed full speed, her whistle was blown, and the *Clydach* was loudly hailed to starboard her helm and reverse her engines; but she came on, and with her stem struck the *Cheerful* a violent blow on the starboard quarter, cutting her down below the water's edge and sinking her.

The facts alleged on behalf of the defendants were as follows:—Shortly before 4.15 a.m. the French screw steamship *Clydach* of 620 tons register, laden with a cargo of iron ore, was leaving Falmouth Harbour by the channel nearest to Pendennis Point, and was keeping to that side of the fairway which lay on her starboard hand. The *Clydach* was heading about S. by W., and was making about three knots an hour. The regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board her. Under these circumstances the masthead, then the red and then the green lights of the *Cheerful* were seen at almost the same moment about a mile and a half distant, bearing right ahead of the *Clydach*. The helm of the *Clydach* was ported and her whistle blown. The green light of the *Cheerful* was shut in, and the two vessels were then in a position to pass clear, port side to port side. The helm of the *Clydach* was then steadied. The vessels continued to approach each other, and would have passed port side to port side, when the *Cheerful* suddenly opened her green light and shut in her red, as if under a starboard helm, and caused imminent danger of collision. The engines of the *Clydach* were at once stopped and put full speed astern, but the *Cheerful* approached, and, with her starboard side abreast of the mainmast, struck the stem of the *Clydach*, causing much damage. The defendants charged the plaintiffs with breach of arts. 18 and 21 of the Regulations for Preventing Collisions at Sea.

Art. 21 of the Regulations for Preventing Collisions at Sea 1880 is as follows:

In narrow channels every steamship shall, when it is

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

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safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

The entrance to Falmouth Harbour is divided by Black Rock into two channels, the Western and the Eastern. Pendennis Point is at the western entrance to the harbour. It was admitted by the plaintiffs that the *Cheerful* was entering the harbour on the western side of the West Channel.

During the plaintiffs' case evidence was tendered to prove that it was the practice for vessels entering Falmouth Harbour to enter on the western side of the West Channel. In support of the evidence it was contended that it should be admitted, because it showed that it was not "safe and practicable" for the *Cheerful* to enter the harbour on the eastern side, inasmuch as by so doing she would embarrass other vessels, who, knowing the practice, would not expect to meet a vessel entering on the eastern side; and that, moreover, the existence of such a practice would tend to prove negligence on the part of those on the *Clydach*, who, knowing the practice, should therefore have been prepared to manœuvre for a ship entering on the western side.

As against the evidence being admissible it was contended that a practice contrary to the provisions contained in the Regulations is inadmissible; and that, moreover, the *Clydach*, being a French ship, those on board of her would know nothing of the practice.

Burr, J., admitted the evidence.

The plaintiffs also called evidence to prove that a considerable number of vessels anchored in the eastern portion of the harbour.

It was agreed that the place of collision was about three cables' lengths north of a line between Black Rock and Pendennis Point.

Dr. Phillimore (with him T. T. Bucknill) for the plaintiffs.—The 21st article of the Regulations ceased to apply after the *Cheerful* had passed the Black Rock, which is at the entrance to the harbour. The collision took place in the harbour, where the "narrow channel" rule is not applicable. Even assuming it to be applicable, it was necessary for the *Cheerful*, bound as she was for the pier, to cross over to the western side of the harbour. Moreover, the circumstances of the case were such as to render it unsafe and impracticable for the *Cheerful* to have entered on the eastern side. [Burr, J.—It would require very strong circumstances to excuse a departure from the Regulations.] It has been proved that a large number of vessels anchor on the eastern side of the harbour, and that there was a practice to enter on the western side, and therefore it was not "safe and practicable" to enter on the eastern side.

Myburgh, Q.C. (with him Stibbs), for the defendants, were not called upon.

Burr, J.—This appears to all of us to be a very clear case. It is a case of two steamships approaching one another from opposite directions, the *Cheerful* going in and the *Clydach* coming out of Falmouth Harbour. At the outset one of these vessels, the *Cheerful*, was to seaward of the other, and the other was inside the narrow channel between Pendennis Point and the Black Rock. The *Cheerful*, in direct violation of the international rules contained in art. 21 of the Regulations for Preventing Collisions at Sea, was entering and passing through that channel on the

wrong side; that is to say, she insisted on keeping on that side which lay on her port hand, instead of keeping on that side which lay on her starboard hand. Her own captain says that he saw the lights of the *Clydach* coming out of the harbour somewhat more than a point on his starboard bow, and about a mile distant. What was his duty under those circumstances? His imperative duty was to keep to the starboard side of the channel. There is only one way in which he could excuse his departure from following that course, i.e., by showing that under the circumstances it was not safe and practicable for him to obey the rule. Is there any reason appearing from the evidence which tends to such a conclusion? The only suggested reason offered as making it unsafe and impracticable to obey the rule was the presence of the lights of the *Clydach* on his starboard bow. Where were those lights when he first saw them? They were so nearly ahead and at such a distance that there could not have been the slightest risk in his crossing to the starboard side of the channel. Of course it is said that the lights visible were white and green, and, as the green was on the starboard bow of the *Clydach*, it was not then a position of danger. But with that I do not agree. The *Clydach* was coming out of the harbour, and, as she comes out, she would be extremely likely to show her green light to a vessel coming in; but that does not in itself show any probability or any disposition on her part to keep on that side of the channel which lay on her port hand, or to pass an incoming vessel starboard side to starboard side. Therefore, no reason has been shown why the master of the *Cheerful* should not have obeyed the directions contained in art. 21 of the Regulations for Preventing Collisions at Sea. The master of the *Cheerful* is therefore to blame at the very outset. We moreover believe the story told by the master of the *Clydach*, that he ported his helm to obey the rule, when he was at considerable distance from the *Cheerful*. We think that the wrongful starboarding of the *Cheerful* was the immediate cause of the collision: but I think the whole of the difficulty was caused by the master of the *Cheerful* wilfully disregarding the directions contained in art. 21. Under these circumstances I have no hesitation in saying that the *Cheerful* is alone to blame for the collision.

Solicitors for the plaintiffs, Pritchard and Sons.  
Solicitors for the defendants, Stokes, Saunders, and Stokes.

### Judicial Committee of the Privy Council,

June 18, 19, and July 12, 1884.

(Present: The Right Hons. Lord WATSON, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBBHOUSE.)

REG. v. DOUTRE. (a)

ON APPEAL FROM THE SUPREME COURT OF CANADA.  
*Law of Canada—Right of barrister to sue for fees—Professional remuneration.*

Where a skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must be held to employ

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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*him upon the usual terms according to which such services are rendered, in the absence of any stipulation to the contrary; and where the contract of employment is silent as to remuneration it must be taken to be an implied condition that he is to be remunerated for his services upon the same terms upon which they are usually rendered.*

*The Canadian Government at Ottawa in the province of Ontario retained the respondent, a member of the Quebec Bar, to act as their counsel before a commission sitting at Halifax in Nova Scotia. By the law of Quebec a member of the Bar is entitled to sue for his fees, but in Ontario and Nova Scotia the English rule prevails, and he cannot do so.*

*Held (affirming the judgment of the court below), that the respondent could recover as upon a quantum meruit in respect of the services rendered by him.*

THIS was an appeal from a judgment of the Supreme Court of Canada dismissing an appeal from the Exchequer Court of Canada, and confirming a judgment of that court which awarded to the respondent the sum of \$8000 and interest (in addition to \$8000 previously paid) for professional services in connection with the Fisheries Commission, under the Treaty of Washington, rendered to the Government of Canada by the respondent as a Queen's Counsel.

The main point of law involved in this appeal was whether a member of the Bar of the province of Quebec, and one of Her Majesty's Counsel, can by petition of right recover from Her Majesty, upon a quantum meruit, payment for services rendered by him as such counsel to Her Majesty under the circumstances set forth in the evidence.

This further question was also raised, viz., Whether it was the law of Quebec, of Ontario, of Nova Scotia, or of England, which governed the rights of the parties.

By art. 22 of the Treaty made in 1871 between Her Majesty and the United States of America, provisions were made for the appointment of commissioners for ascertaining the amount of compensation to be paid by the Government of the United States to the Government of Her Majesty in return for certain fishing privileges accorded by the treaty to the citizens of the United States.

By art. 23 of the treaty it was provided that the commission should meet in the city of Halifax, Nova Scotia.

The respondent was retained by the Government of Canada to act as one of the counsel for the Crown before the said commission, and he did act as such counsel.

The respondent was paid by the Government the sum of \$8000 for his services and expenses, but being dissatisfied with that amount, he filed a petition of right in the Exchequer Court of Canada, pursuant to an Act of the Parliament of Canada called the Petition of Right Act 1876, and claimed from the Crown the sum of \$10,000 for his services as such counsel, in addition to the \$8000 already paid.

The Attorney-General of Canada, on behalf of Her Majesty, filed a statement of defence, and denied the respondent's right to recover more than the amount already paid to him, and denied his right to proceed by petition of right for the recovery of fees as counsel.

On the 17th May 1880 the respondent filed his replication, and on the 19th May 1880 issue was joined.

On the 8th Sept. 1880 the matter came on for trial before Fournier, J. in the Exchequer Court.

On the 12th Jan. 1881 Fournier, J. gave judgment, declaring that the respondent was entitled to receive from the Crown the sum of \$8000 and interest thereon from the 29th Aug. 1879 (being the date when the petition of right was received by the Secretary of State of Canada) and his costs of suit.

From this judgment the Attorney-General of Canada, on behalf of Her Majesty, appealed to the Supreme Court of Canada, and on the 16th and 17th Nov. 1881 the appeal was argued before the full court, and on the 13th May 1882 judgment was given.

The Court (consisting of six judges) was equally divided, and the result was that the appeal was dismissed with costs. Ritchie, C.J. and Strong and Gwynne, JJ. were in favour of allowing the appeal, while Fournier, Henry, and Taschereau, JJ. thought it should be dismissed.

The decisions of the learned judges proceeded on different grounds.

Ritchie, C.J. held that the alleged agreement on which the petition was founded was made at Ottawa in Ontario for services to be performed in Nova Scotia, that therefore it was not subject to the law of Quebec, and that according to the law, both of Ontario and Nova Scotia, a barrister could not maintain an action for fees, and that therefore the petition did not lie, and the appeal should be allowed.

Strong, J. held that the terms of the alleged agreement showed only an honorary undertaking on the part of the Crown, that no action could be brought on this, and that therefore Mr. Doutre was entitled to recover only his actual expenses.

Gwynne, J. held that by the law of Quebec counsel can recover for fees stipulated for by express agreement, that it was doubtful whether they could do so according to the law of Ontario, that the alleged agreement was governed by the law of Ontario, but that, inasmuch as by the Petition of Right Act the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances, and by the law in force in England before 23 & 24 Vict. c. 34, counsel could not in England have enforced payment of fees against the Crown, the petition did not lie.

Fournier, J. adhered to his opinion expressed in the court below, which was to the effect that a counsel could sue for fees under an agreement according to the law both of Quebec and Ontario, and that the alleged agreement entitled him to a reasonable remuneration, which the learned judge fixed at \$8000 with interest from the 29th Aug. 1879 only. The learned judge further held that the alleged agreement was made under the authority of the 25th article of the Treaty of Washington and of the Canadian Act, 35 Vict. c. 2, which in the opinion of the learned judge incorporated the Fishery articles of that treaty, and that the 25th article imposed on each of the high contracting parties the obligation to pay the counsel retained by them to prepare and support their case. The words of the 25th article of the treaty to which the learned judge appears to refer are

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as follows: "Each of the high contracting parties shall pay its own commissioner and agent or counsel. All other expenses shall be defrayed by the two Governments in equal moieties."

Henry, J. agreed in substance with Fournier, J. Taschereau, J. also agreed in substance with Fournier, J. except that he held that the employment of the respondent was governed by the law of Quebec only.

Leave to appeal to Her Majesty in Council was given by Order in Council dated the 4th Feb. 1883.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Jeune* appeared for the appellant, and contended that the contract must be governed either by the law of Ontario or that of Nova Scotia, and that therefore the respondent could not recover. See

*Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. Div. 521; 48 L. T. Rep. N. S. 546;

*Jacobs v. Crédit Lyonnais*, 12 Q. B. Div. 589; 50 L. T. Rep. N. S. 194.

Even by the law of Quebec a counsel cannot recover upon a *quantum meruit*, and here the evidence shows that it was the intention of the parties to deal upon the footing of a honorarium. Admitting that by the law of Quebec the respondent might have sued a subject for his fees, nevertheless he cannot proceed against the Crown by petition of right.

*McLeod Fullarton*, for the respondent, argued that the case was governed by the law of Quebec.

*Jeune* was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 12.—Their Lordships' judgment was delivered by

LORD WATSON.—On the 1st Oct. 1875 the Government of Canada addressed and sent to the respondent, Joseph Doutre, a letter, signed by Mr. Bernard, the deputy Minister of Justice, in the following terms: "Sir,—The Minister of Justice desires me to state, that the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thomson, Q.C. and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject." Upon receipt of this letter, the respondent wrote, in reply, that he would act as requested. The respondent is a member of the Quebec section of a body of legal practitioners incorporated by cap. 72 of the Consolidated Statutes of Lower Canada, under the title of the "Bar of Lower Canada." By the terms of the statute, each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor, and proctor at law;" and no person, except a member of the Bar, duly admitted, is entitled to conduct business, in any of these capacities, before the courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise; and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against

professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelvemonth. It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the appellant that, by the law of Ontario, the province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to art. 23 of the treaty, the Commission was to meet. In support of that contention, counsel for the appellant referred to the opinion of Harrison, C.J. in *McDougall v. Campbell* (41 U. C. Q. B. 332), as correctly expressing the law of Ontario; but they mainly relied upon the proposition that, in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration unless that right has been conferred upon them by statute. In these circumstances, it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the *locus contractus*, or upon the law of Nova Scotia, the *locus solutionis*, and that in neither case was any suit competent to him. Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in a strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission was to sit at Halifax, it is perfectly plain that the work expected of the respondent, and actually performed by him, was by no means confined to advocacy of the Dominion claims during the sittings of the Commission. His employment was not limited to what would, in this country, be considered the proper duties of a counsel, but embraced the work of an agent or solicitor; in point of fact, he was employed to prepare the case of the Dominion Government, as well as to argue in their behalf. That such was the understanding of both parties may be inferred from the known professional status of the respondent, as well as from the fact that, in pursuance of the so-called retainer of the 1st Oct. 1875, the respondent had papers sent him, and was engaged at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the Commission. Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their Lordships are willing to assume that the law of England, so far as it concerns the right of the Bar of England to sue or make agreements for payment of their fees, was rightly applied in the case of *Kennedy v. Brown* (13 C. B. N. S. 677); but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J. It appears to them that the



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decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law. But it is unnecessary, in the view which their Lordships take of this case, to decide any of the questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was to be performed. When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration; and it is a condition dependent upon the professional status and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity. A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear and argue before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular courts were permitted to have suit for their fees, that would not give him a right of action for his honoraria. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that bar are understood to practise. The respondent is a member of the Quebec section of the Bar of Lower Canada, and it was in that capacity that he was retained by the Government as one of their counsel before the Fisheries Commission. The respondent has the rank of Queen's Counsel conferred on him by patent; but that circumstance does not appear to their Lordships to affect the present case. It gave him a certain precedence in a question with other members of his Bar, but it made no change in the duties and obligations incumbent on him as a practising member of the Bar, or in his privileges as such, including the right to sue for his fees. The retaining letter of the 1st Oct. 1875 makes no mention of fees, and their Lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged

and undertook to go to Halifax as a Quebec counsel, subject to the same rules of his Bar by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result, if, retaining his status and performing his work as a member of the Quebec Bar, he was, nevertheless, to be stripped of the privileges attaching to that status as soon as he entered the province of Nova Scotia. A few weeks after his acceptance of the letter of the 1st Oct. 1875 the respondent received a retaining fee of \$1000; and thereafter the subject of counsel's remuneration does not appear to have been considered until May 1877, when it was discussed, at Ottawa, in the course of one or two personal interviews between Sir Albert Smith, Minister of Marine and Fisheries in the Government of Canada, and the respondent. The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the respondent in his petition is: "That, on the eve of his leaving his home for Halifax, to wit, in May 1877, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid \$1000 a month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission." On the other hand, it is alleged in the defence filed for the appellant: "That the arrangement made with the suppliant, referred to in his petition, under which he was to be paid \$1000 a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the said \$1000 a month was, with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses." The Commission met at Halifax on the 16th June, and brought its labours to a close on the 23rd Nov. 1877, having sat, with occasional adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the respondent received a refresher of \$1000, and also six monthly payments of \$1000 each, during the sitting of the Commission, making a sum total of \$8000. According to the respondent, these sums were paid him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the appellant, they were paid to and received by the respondent as in full of his whole claim for fees and expenses. Both parties are agreed that, in May 1877, it was arranged that these sums (to the extent of \$7000) should be paid to the respondent; but they differ as to the footing upon which they were to be paid. Being of opinion that, by the terms of his employment in 1875, the respondent was entitled to a *quantum meruit* in respect of the services which might be required of him, their Lordships think that it lies with the appellant to make out that the respondent's original right to remuneration was varied by subsequent agreement; and they have also come to the conclusion that the appellant has failed to establish the existence of such an agreement. The evidence upon this point, which need not be referred to in detail, is very unsatisfactory. It is abundantly plain that the impression honestly derived by Sir Albert Smith, from his interviews with the respondent in May 1877, was, that the respondent had agreed to accept a refresher of \$1000, and a payment of the



same amount monthly, during the sittings of the Commission, as in full of all claims for remuneration. But, in order to alter the then existing rights of the respondent, it is not enough for the appellant to show that such was the impression created in the mind of Sir Albert Smith; he must also prove that the terms of the arrangement, as understood by Sir Albert Smith, were understood in the same sense, and were assented to by the respondent. But the respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him on account, leaving the balance payable to him for after adjustment, and there are circumstances proved in the case which seem to establish beyond question that the respondent, at the time, sincerely entertained that belief. Then the evidence of Mr. Whitcher, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made, tends to support the respondent's understanding of its terms. In that state of the evidence, their Lordships are unable to hold that the appellant has satisfied the onus incumbent on him of proving the new arrangement alleged in his defence. In the courts below, whilst the learned judges were equally divided as to the result of the case, there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision. The cause was tried before Fournier, J., who, on the 12th Jan. 1881, gave judgment in favour of the respondent, and fixed the amount of fees and expenses still remaining due to him, in remuneration of his services, at \$8000; and it is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action, and that right is not barred by the alleged arrangement of May 1877. The cause was then taken, by appeal, before the Supreme Court of Canada, who gave their judgment upon the 13th May 1882. Ritchie, C.J. and Strong and Gwynne, JJ. were in favour of allowing the appeal; but Fournier, J., who was a member of the full court, adhered to the view which he had taken as judge of first instance, and Henry and Taschereau, JJ., in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed with costs. Their Lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Gwynne, J. That point is deserving of notice, for this reason, that if the opinion of the learned judge, which is based upon the provisions of the Petition of Right Act for Canada, be well founded, the respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Gwynne, J. refers to the Act of 1875 instead of the Petition of Right Canada Act 1876 (39 Vict. c. 27), which repealed the statute of the previous year. Sect. 19 (3), which is identical in expression with the similar section of the repealed Act, provides that: Sect. 19. "Nothing contained in this Act shall— (3.) Give to the subject any remedy against the

Crown (a) in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the Imperial statute, 23 & 24 Vict. c. 34." The learned judge seems to hold that these provisions place a Quebec lawyer on precisely the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their Lordships that the process of reasoning by which the learned judge arrives at that conclusion confounds two things which are essentially different, "right" and "remedy." The statute does not say that a Quebec lawyer shall, in all cases, have only the same right, against the Crown, as a member of the English Bar. What it does enact is, that no subject in Canada shall be entitled to the "remedy" provided, unless he has a legal claim, such as could have been enforced by petition of right in England prior to the Imperial Act of the 23 & 24 Victoria. It is impossible to hold that a member of the Quebec Bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown under the Canadian Act of 1876, has no such legal claim, and that he sues under circumstances similar to those in which an English barrister is placed, who, neither by the usage of his profession, nor the law of his domicile, can maintain any action for his fees. Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the courts below, and to dismiss the appeal with costs.

Solicitors for the appellant, *Bompas, Bischoff, and Dodgson.*

Solicitors for the respondent, *Simpson, Hammond, and Co.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Friday, Nov. 14, 1884.

(Before FRY and BOWEN, L.JJ.)

HOLGATE v. SHUTT, No. 2. (a)

*Practice*—Judgment for account—Settled account—*Building society*—Audited accounts—10 Geo. 4, c. 58, s. 33.

*In an action brought by three members of a building society, on behalf of all the members except the defendant; against the secretary, for an account of all moneys and property of the society come to his hands as such secretary, an order was made by consent for an account. The order was in general terms, and contained no direction that settled accounts should not be disturbed.*

*On the taking of the account in chambers, the defendant relied upon an account, which had been audited by the auditor of the society, as conclusive. A summons was taken out by the plaintiffs asking that this account might be disregarded. By the rules of the society it was provided that, after the auditing and signing of the accounts as therein mentioned, "the secretary shall not be answerable for any mistakes, omissions, or errors that may be found in such accounts hereafter."*

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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*The Court of Appeal held that, though the audited accounts could not be disregarded, they were only *prima facie* evidence in favour of the defendant, and that the plaintiffs were entitled to impeach them on the ground of fraud.*

*The plaintiffs afterwards raised the point that the audited account on which the defendant relied had not been audited in accordance with the rules of the society, and was not therefore even *prima facie* evidence for the defendant:*

*Held, that the account had not been audited in accordance with the rules, but that the defendant had the right to show that the audited account ought to be treated as a settled account upon any ground other than that it had been audited in accordance with the rules.*

*Order of Bacon, V.C. discharged.*

THIS action was commenced on the 23rd Nov. 1883, the plaintiffs, James Holgate, Edmund Barlow, and Parkinson Heys, suing on behalf of themselves and all other the members of the No. 2 King's Arms Hotel Benefit Building Society, other than the defendant, who was Thomas Shutt, the secretary, and also a member of the society.

The society was established in conformity with the provisions of 6 & 7 Will. 4, c. 32, and was unincorporated.

By their writ of summons the plaintiffs claimed to have an account taken of all moneys of the society come to the hands of the defendant; payment of the amount of such moneys; and the appointment of a receiver.

On the 14th Dec., before any pleadings had been delivered, the plaintiffs moved before Bacon, V.C. for the appointment of a receiver, and his Lordship ordered the defendant to pay into court 35*l.* 6*s.*, money in his hands as trustee for the society, and appointed a receiver, and, the defendant consenting (though his consent was not mentioned in the order), ordered to be taken "an account of all moneys and property of the said society come to the hands of the defendant, or to the hands of any other person or persons by his order or for his use."

The order contained no direction that settled accounts should not be disturbed, or that they ought to be opened.

The defendant paid the 35*l.* 6*s.* into court, and carried his account into chambers.

The plaintiffs objected to certain items in the account brought in, but the defendant contended that, as the items were contained in certain accounts which had been audited by the auditor of the society, those items could not be inquired into; but the chief clerk decided that these accounts might be opened, and that, as there was no special direction in the order, the plaintiffs were entitled to have a general account taken.

By rule 7 of the society's rules it was provided as follows:

That the secretary and vice-president shall keep separate accounts of all money paid by the members at each monthly meeting, and that the president shall receive the same from each member, and if the secretary's and vice-president's books agree with the cash received, the president shall sign his name in the vice-president's book, to denote the accuracy thereof. The secretary shall report upon the state of the accounts to the society at all times when required; on default thereof, he shall pay a fine of five shillings. The books of the secretary, vice-president, and treasurer shall be audited every

twelve calendar months by auditors appointed by the society, and signed by such auditors to denote the accuracy in the secretary's book. That each auditor shall be remunerated for his trouble, the amount to be determined by the committee for the time being. After such auditing and signing, the secretary and treasurer shall not be answerable for any mistakes, omissions, or errors that may be found in such accounts hereafter.

Bacon, V.C., to whom the matter was referred, decided in chambers, on the 22nd April 1884, that, notwithstanding the omission from the order of a special direction, the audited accounts must stand on the same footing as settled accounts, and that the plaintiffs were bound by them.

The plaintiffs appealed, and the Court of Appeal held that, though the audited accounts could not be disregarded, they were only *prima facie* evidence for the defendant, and that the plaintiffs were entitled to impeach them on the ground of fraud.

The appeal was heard on the 18th June 1884, and the court dismissed the appeal, but prefaced the order with a statement of opinion to that effect: (see 51 L. T. Rep. N. S. 433; 27 Ch. Div. 111.)

The plaintiffs afterwards in chambers raised the objection that the audited account on which the defendant relied had not been audited in accordance with the rules of the society, and was not therefore even *prima facie* evidence for the defendant.

The summons was adjourned into court, and heard before Bacon, V.C. on the 18th Aug. 1884.

*Millar, Q.C. and Farwell for the plaintiffs.*

*Marten, Q.C. and Hamilton Humphreys for the defendant.*

BACON, V.C.—This case has really been judicially decided. This is a suit brought by the directors against the persons concerned in that suit, and a suit for an account. Affidavits, considerable in number, accompanied by exhibits which I have not read, nor heard read, nor intend nor want to have read, were before the court when the order and a general decree were made for the accounts, and, up to that time, neither in affidavit, or agreement, or in any other way, was any suggestion made that the alleged audit was not entirely valid and effective. It was the subject of appeal to the Lords Justices, and the order made by them seems to me to be of more importance than anything else. The Court of Appeal having heard these parties, attended to their evidence, and knowing that this account, alleged to be audited, was a matter in dispute between them (as I gather from Mr. Farwell's quotation from the Lords Justices' statement) must have meant: "You are not bound by the account if you can show that it is a fraudulent account." The Lords Justices did not omit that consideration, for they said: "This court being of opinion that, though accounts audited and signed in accordance with rule 7 of the rules of the society are *prima facie* evidence in favour of the defendant, it is competent for the plaintiffs in taking the accounts directed by the order of the 14th Dec. 1883, to impeach such accounts for fraud." That makes the quotation, which Mr. Farwell gave me from the indorsement on his own brief, of what Baggallay, L.J. said clear and distinct. The accounts, whatever they are, are not binding upon you if you can impeach them

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HOLGATE v. SHUTT.

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for fraud. They have not attempted to impeach them for fraud, so far as I know; but they come here upon this objection, which I do not scruple to call a most pettifogging objection—a most unreasonable and unjust objection, because it is raised by persons who bring in their minute-books to show that Mr. Holden was not only a member of the society, but was employed and trusted by the society in the character of auditor. They paid him for his work, they admitted his work; all the accounts previous to this seem to have been signed by Mr. Holden, as I gather from the entries, and now they say, "Because an Act of Parliament provides that there ought to be two auditors, and because in this instance there was only one auditor, we have a right to say there were not accounts audited, and no accounts taken." Their own books show that the accounts were taken. If they have been negligent in observing the conditions of the Act of Parliament, whose fault is that? Are they to take advantage of that? Did anybody ever hear of so unreasonable a thing as that? But I treat it as a thing judicially determined by the Lords Justices, and, although reference is made to the account audited in accordance with rule 7, that is merely descriptive, descriptive of the account which had been discussed. It was alleged that there had been accounts audited according to rule 7. The Lords Justices say, The account we have been talking about, you have been swearing to, and we have been considering, is *prima facie* evidence, though you shall not be precluded from impeaching it, audited as it is, if you can show any fraud in it. The decree is clear and distinct, and plainly directed to the issues as between the parties. If the objection was taken at the hearing before the Lords Justices, then it was overruled by them, for they adopted the account audited under rule 7, which was the only thing then in question, not whether it was in accordance with rule 7, not whether all the stipulations of rule 7 were complied with, but that which was alleged to have been audited under rule 7. They either decided that it had been properly audited, or they did not. If they decided that it was properly audited there is an end to the matter. If they did not, and if the plaintiffs, who make this objection now at this late period, can claim a right to set up their technical objection, then I say they make it too late. It is against reason and justice that they should be heard upon it. In my opinion, the account audited under rule 7 is, as the Lords Justices have said it is, although signed by only one auditor, *prima facie* evidence in favour of the defendant. I dismiss the summons, and I order the plaintiffs to pay the costs of the adjournment into court.

From this judgment the plaintiffs appealed.

*Millar*, Q.C. and *Farwell*, for the appellants, referred to

6 & 7 Will. 4, c. 32;  
10 Geo. 4, c. 56, s. 33.

*Marten*, Q.C. and *Hamilton Humphreys*, for the defendant, referred to

*Begbie v. Tait*, 20 W. R. 57.

No reply was called for.

*Fry*, L.J.—I have been asked by my learned brother to give the first judgment. It appears this is an action brought by certain shareholders

in a building society against the late secretary, and, on motion which came before the court, the parties, with great propriety, agreed that the order should be for an account of all moneys the property of the said society which had come into the hands of the defendant. Now, upon taking the accounts in chambers, certain books were produced which were signed by a Mr. Holden, who was alleged to be the auditor of the society, and thereupon the controversy arose as to whether or not those accounts were settled accounts. That question evidently in the first place took the form of an allegation on the part of the secretary that those accounts were settled accounts, because they complied with the provisions of the rules of the society. The matter came before the Court of Appeal, upon an appeal from Bacon V.C., and there this order was made: "This court being of opinion that, though accounts audited and signed in accordance with rule 7 of the rules of the society are *prima facie* evidence in favour of the defendant, it is competent for the plaintiffs in taking the accounts directed by the order of the 14th Dec. 1883 to impeach such accounts for fraud." The point which is now raised before us is whether these accounts, contained in the book which has been so often referred to, which are signed by Mr. Holden, are or are not accounts audited and signed in accordance with rule 7 of the society's rules, so as to bring them within the scope of the declaration made by the Lords Justices on the former occasion. That appears to me to be a simple inquiry as to the meaning of the rule and the character of the accounts. The rule is made in respect of a society regulated by the existing legislation upon building societies, and one of the Acts which regulates building societies is 10 Geo. 4, c. 56. The 33rd section of that Act requires that the rules of every society shall provide for the election of certain officers for the preparation of a general statement of affairs, and then it goes on to say that a periodical statement shall be attested by two or more members of such society appointed for such purpose, which shall be countersigned by the secretary or clerk. This society's rules contain, I may say, no express provision for the appointment of auditors, and therefore it is evident that the auditors referred to in the rules, when they are spoken of, must be the auditors required to be appointed by the regulations which regulate building societies. The 7th rule of the society's rules is in these terms: [His Lordship read the rule and continued:] It appears to me to be plain that, when one inquires who are the auditors referred to in that passage, the answer must be they are the auditors pointed out by the statute of 10 Geo. 4, c. 56; that is to say, there must be two auditors for every yearly audit, and those auditors must be members of the society. In the present case the audit has for years been made by a single person, and it has been made by a person who is not a member of the society. It follows, in my judgment, that the audit has not been an audit in accordance with rule 7, or with any other of the rules of the society. It has been suggested that the general power given to the society of regulating their affairs by a majority covers this case. In my view it cannot override the express provisions of rule 7 and the provisions of the Act of Parliament. I think that the respondents are

wrong in their contention when they urge us to hold that the accounts in question have been audited in accordance with the rules of the society. I think, therefore, that the order of the Vice-Chancellor, declaring his opinion affirmative of that question, cannot stand. But then it has been urged upon us that this inquiry is precluded by the form of the original auditing of the accounts, and it is said, if the plaintiffs desire to impeach the accounts, they were bound to have made a case at the hearing of that motion, and ought, at any rate, to have obtained the direction of the court that they be at liberty to impeach the settled accounts. In my judgment that argument comes too late, because the very point was decided by this court when the case of *Holgate v. Shutt* (51 L. T. Rep. N. S. 433; 27 Ch. Div. 111) came before it in June of this year. That order of December was before this court on the question whether the settled accounts could be impeached, and the settled accounts were also before the court, and Lindley, L.J. expressed his view thus: "We must take care not to introduce rules which would preclude parties from impeaching a settled account on the ground of fraud, and at the same time we must not treat settled accounts as waste paper." The result of that judgment therefore, upon the order of December, is that it enables the accounting party under that order to set up the settled accounts, although they are not expressly mentioned in the order; and, on the other hand, it enables the plaintiffs to impeach any settled accounts so set up by the defendant, although equally the order is silent with regard to impeaching those accounts. It appears to me that is the plain result, not only from the language of the Lord Justice, which I have read, but also of the order which was made, because that order declared that the settled accounts were *prima facie* evidence in favour of the defendant as settled accounts, and also enabled the plaintiff to impeach them for fraud. So much, therefore, for that contention. But then it is said, in the third place, that this question really was determined by the Court of Appeal on the former hearing, and we are now asked to hold, not merely that they determined what they declared, namely, that accounts audited and signed under rule 7 were *prima facie* evidence in favour of the defendant, but that they held that the particular accounts now in controversy were accounts audited and signed according to rule 7. It appears to me that, if the Court of Appeal had meant to determine that, they would have expressed that opinion upon the order; and, more than that, when I compare the reports of the judgment, it is perfectly plain that they did not intend to do that. Referring to the judgment of Cotton, L.J., as reported in the (a) Law Journal I find that he says this: "We cannot enter into the question whether the accounts relied upon by the defendant are such as are required by the rules of the society, and to which protection is given by rule 7." Therefore that point was taken by the Lord Justice, and that defence fails equally. But then it appears to me that, notwithstanding this controversy, notwithstanding the failure of the defendant to show that the particular accounts

are accounts under rule 7, he may nevertheless be able to show that these accounts are accounts which have been settled by a person who must be deemed to be the agent of the plaintiffs to settle those accounts. As that point has really not been brought plainly before us in any of the proceedings, it is right that the judgment which we now pronounce should be without prejudice to that question. We shall therefore give liberty to the defendant to show that these are settled accounts upon any other ground than that they are accounts under rule 7. One other matter remains for consideration, and that is the question of costs. It appears to me that the appellants ought to have brought the whole of their case upon these accounts before the court in the first instance, instead of obtaining first an adjudication upon the general proposition whether accounts under rule 7 were settled accounts as against them, and secondly upon the minor inquiry whether the particular accounts are accounts under rule 7. Instead of taking that course they have contrived to separate the two questions, and to bring them successively before the learned Vice-Chancellor and before the Court of Appeal, thereby entailing, as it seems to me, a very unnecessary expense to the litigant parties. Therefore the order which appears to us to be just with regard to costs is this, that if the defendant succeeds the costs of this appeal and in the court below will be his costs, but that we make no order with regard to the costs of the appellants either in the court below or here. The costs of the respondent both in the court below and here to be his costs in the action, so that in case the costs of the action are awarded to the defendant he will get those costs as part of such costs of the action. But with regard to the costs of the appellants—that is the plaintiffs—both here and in the court below we make no order. I have sketched out this as expressing our opinion: This court being of opinion that the accounts referred to in the order of the Vice-Chancellor as audited accounts of the society have not been duly audited in accordance with the statute of 10 Geo. 4, c. 56, and the 7th rule of the society or either of them, discharge the order of the Vice-Chancellor. That this order must be without prejudice to the right of the defendant to show that the said accounts referred to in the order of the Vice-Chancellor as audited accounts, being the accounts contained in the book exhibit A. in the affidavit of Mr. Pritchard (I put that in so that there may be no mistake, and the date of the affidavit must be inserted) should be treated as settled accounts on any other ground than that they were audited in accordance with the statute and rules or any of them. Then the order as to costs to remain as I have said.

BOWEN, L.J.—I am of the same opinion. I have nothing to add.

Solicitors: *Pritchard, Englefield, and Co.*, agents for *Charles Costeker, Darwin; Johnson and Weatheralls*, agents for *Charles Hall, Son, and Frankland*, Accrington.

(a) See also the judgment of Cotton, L.J., in the *LAW TIMES* Reports (51 L. T. Rep. N. S. 434).

[CT. OF APP.]

Re HUTTON; *Ex parte* BENWELL.

[CT. OF APP.]

Friday, Dec. 12, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

Re HUTTON; *Ex parte* BENWELL. (a)

**Bankruptcy**—*Bankrupt in receipt of income—Order for payment to trustee—Professional earnings—Act of 1869 (32 & 33 Vict. c. 71), ss. 89, 90—Act of 1883 (46 & 47 Vict. c. 52), s. 53.*

*An order cannot be made under 32 & 33 Vict. c. 71, s. 90, or under 46 & 47 Vict. c. 52, s. 53 (2), for payment to the trustee of income, not in the nature of salary, which a bankrupt is earning by the exercise of personal skill and knowledge in carrying on his profession or business.*

THIS was an appeal by the trustee in bankruptcy from the refusal of Mr. Registrar Pepys to make an order under the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 90, for payment to the trustee of income, of which it was alleged the bankrupt was in receipt.

The adjudication took place in January 1880.

The bankrupt was what is popularly termed a "bone-setter," and many persons resorted to him for surgical treatment in consequence of his high reputation for skill in dealing with certain kinds of injuries. He continued his practice after the adjudication, and it was alleged that his yearly earnings averaged 1500*l*.

By the Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 89:

Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension, as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension or compensation is enjoyed, directs.

Sect. 90:

Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court, upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the court may direct.

The corresponding provisions now in force are contained in the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 53, and are in very similar terms to the above.

Cooper Willis, Q.C. and J. E. Palmer, for the trustee in support of the appeal, referred to

*Es parte Huggins; Re Huggins*, 47 L. T. Rep. N. S. 569; 21 Ch. Div. 85;

*Es parte Wicks; Re Wicks*, 44 L. T. Rep. N. S. 636; 17 Ch. Div. 70;

*Wadding v. Oliphant*, 33 L. T. Rep. N. S. 837; 1 Q. B. Div. 145;

*Emden v. Carte*, 44 L. T. Rep. N. S. 636; 17 Ch. Div. 768;

*Ellist v. Clayton*, 16 Q. B. 561;

*Crofton v. Poole*, 1 B. & Ad. 563.

T. L. Wilkinson, for the bankrupt, was not heard.

BRETT, M.R.—The bankrupt in this case, Mr. Hutton, carries on business as a surgeon, not in

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

the sense of being a member of the College of Surgeons, but as what is popularly called a bone-setter. In carrying on that business he exercises great and well-known skill. What he does is all done by means of his own personal skill and knowledge, and all the emolument which he receives is earned by means of his own personal skill and knowledge. He does not sell anything. It is not like such a case as, for instance, that of a cabinet-maker, who no doubt adds very greatly to the value of the materials on which he works by the skill which he possesses, but who sells a cabinet, and not his own skill. We are asked to make an order, not dealing with anything in possession, or with anything to which the bankrupt is entitled under any contract, which in the phraseology of the law would be called a *chose in action*, but dealing with the proceeds of personal skill which has not yet been exercised; that is, with future income which he will or may earn. It is said that he earns an average income of 1500*l*. a year, but there can be no certainty that he will continue to earn this in future. I am of opinion that what may or may not be earned in the future is not property which passes to the trustee. One might as well say that, if a father promises to his son that he will leave him something by his will, that could be dealt with as property if the son were to become bankrupt in his father's lifetime. Certain kinds of property are referred to in sect. 89 of the Act of 1869, and I think that sect. 90 was intended to deal with something similar. In cases coming within sect. 89 the bankrupt is entitled to receive the "pay, half-pay, salary, emolument, or pension" which is to be dealt with, and it seems to me that emolument in that section is something *ejusdem generis* with pay, half-pay, and salary. All these things are something which it is certain that the bankrupt will have, and therefore power is given to the court to deal with them for the benefit of the creditors. Sect. 90 goes further than sect. 89, but I think that "salary, or income, other than as aforesaid," in sect. 90, must be something of the same kind as the other matters referred to in the preceding section, according to the ordinary rule that where particular words are used in an Act of Parliament, and are followed by general words, these general words are only to be held to include that which is *ejusdem generis* with what is denoted by the particular words which have gone before. If this be so, it follows that although "income," within the meaning of sect. 90, is neither pay, half-pay, salary, emolument, nor pension, within the meaning of sect. 89, still must be something which is in the nature of salary. Therefore what we are really asked for is an order to deal with what Mr. Hutton will earn in the future, on the ground that it is an income of the same kind as a salary. It is only necessary to state the case to show that it is not anything of the kind. For these reasons I am of opinion that the case is not within sect. 90, and that this appeal ought to be dismissed.

COTTON, L.J.—This is an appeal from the refusal of the registrar to make an order under sect. 90 of the Act of 1869. The trustee asks for an order dealing with future property which may or may not be earned, and we have to decide whether such a prospective order ought or ought not to be made. What the bankrupt had at the time of the bankruptcy was only his personal skill and know-

ledge, by means of which, if people consulted him, he would be enabled to earn money, and the capacity to earn money is not, in my opinion, property which passes to the trustee. There is nothing in the nature of property and there are none of the things described in sect. 89, nor any thing of a similar nature. I am therefore of opinion that sect. 90 does not enable the court to make a future order. In cases which come within sect. 89 there is a right to receive the pay, half-pay, salary, emolument, or pension, and I think that sect. 90 deals with similar matters to those dealt with by sect. 89. I agree with the Master of the Rolls in thinking that we ought not to apply the provisions of those sections to contingent and uncertain income, which may or may not be earned, for the court cannot force a man to go on with his practice and earn an income for the benefit of his creditors, if he does not wish to do so. I think, therefore, that the registrar was right. Apparently such an order as is now asked for has never been made under circumstances such as those of the present case. The income which the bankrupt earns is derived from his own skill in performing surgical operations, not from skill in making up materials.

LINDLEY, L.J.—I am also of opinion that the present case does not come within sect. 90. It is the case of a man earning fees by carrying on a profession or business, and his income is necessarily precarious, and is not like a pension or salary. We are asked to impound the future earnings of the bankrupt. If we were to make any such order it could be evaded, for he need not see patients or earn fees if he did not wish to do so. I am therefore of opinion that, under sects. 89 and 90, precarious income cannot be seized. It is said that there is authority the other way, and we are referred to the case of *Ex parte Huggins* (47 L. T. Rep. N. S. 559; 21 Ch. Div. 85), where it was held that a Government pension came within the provisions of sect. 90. I think that case is an illustration of what sect. 90 was intended to meet. The decision in *Emden v. Carte* (44 L. T. Rep. N. S. 636; 17 Ch. Div. 768) does not, I think, touch the present point. For the reasons which I have given I am of opinion that the case is not brought within sect. 90. It is certainly somewhat remarkable that this question now arises for the first time.

#### *Appeal dismissed.*

Solicitor for the trustee, *Thomas Durant, jun.*  
Solicitor for the bankrupt, *W. Maynard.*

*Friday, Dec. 12, 1884.*

Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

*Re ANGELL; Ex parte SHOOLBRED. (a)*

*Bankruptcy—Costs—Taxation as between solicitor and client—Bankruptcy Rules 1883, r. 98.*

*Rule 98 of the Bankruptcy Rules 1883 gives power to the court in awarding costs to direct that the costs of any matter or application be taxed and paid as between solicitor and client.*

*Held, that where an order dealing with costs has been made, the court has no power to grant a subsequent application for an order that such*

*costs be taxed and paid as between solicitor and client.*

THIS was an appeal by the petitioning creditor against the refusal of Mr. Registrar Murray to make an order that certain costs, which were payable to the petitioning creditor out of the bankrupt's estate, by virtue of three orders dated the 29th Jan., the 6th May, and the 19th June 1884 respectively, should be taxed and paid as between solicitor and client.

In Dec. 1883 the debtor filed a liquidation petition under the Bankruptcy Act 1869. The creditors resolved to accept a composition of 5s. in the pound, but the present appellant opposed the registration of the resolutions.

On the 29th Jan. 1884 the first of the orders in question was made, refusing the debtor's application to register the resolutions, and ordering that the present appellant's costs of and incidental to opposing the application to register should be paid out of the estate.

On the same day the appellant presented a petition in bankruptcy against the debtor. This petition, having been presented in the form in use under the Act of 1869, was dismissed on the authority of the decision in *Ex parte Pratt* (50 L. T. Rep. N. S. 294; 12 Q. B. Div. 334).

On the 5th March the appellant presented a fresh petition under the Act of 1883.

On the 17th March a receiving order was made.

On the 21st April the creditors at the first meeting accepted a proposal for payment of a composition of 7s. in the pound.

On the 6th May the appellant applied for and obtained the second of the orders in question, which was that the costs of and incidental to the petition of the 29th Jan., and all the proceedings thereunder and consequent thereon, should be costs in the matter, and be paid out of the debtor's estate, and be taxed in the event of the resolutions being confirmed by the court, or in the event of an adjudication in bankruptcy.

On the 15th June, at the second meeting of creditors, the receiver reported that the estate was sufficient to pay 15s. in the pound, and therefore the resolutions were not confirmed.

The debtor was adjudicated a bankrupt, and the official receiver declared a dividend of 16s. in the pound.

On the 19th June the bankrupt applied to the court to rescind the receiving order on the terms of paying 20s. in the pound with interest. The official receiver opposed this application, and the appellant also attended the hearing. The registrar then made the third of the orders now in question, refusing the bankrupt's application, and ordering that the costs of all parties appearing should be paid out of the estate.

On the 9th Aug. the application to Mr. Registrar Murray was made, from the refusal of which application the present appeal was brought.

Rule 98 of the Bankruptcy Rules 1883 is as follows :

*Awarding costs.*—(1) The court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and party or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the court may fix a sum to be paid in lieu of taxed costs. (2) In the absence of any express direction costs of an opposed motion shall follow the event, and shall be taxed as between party and party.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

CHAN. DIV.]

Re TWEEDY.

[CHAN. DIV.]

*Herbert Reed* for the petitioning creditor in support of the appeal.—It is clear that by rule 98 the court has jurisdiction to make the order now sought, and this is a strong case for the exercise of that jurisdiction, for if it had not been for the exertions of the present appellant the creditors would only have received a composition of 5s. in the pound.

*Macdonell* for the trustee.

BRETT, M.R.—The meaning of rule 98 is, that when the court makes an order as to costs they can say that the costs dealt with by the order shall be costs as between party and party, or costs as between solicitor and client. Here three different orders have been made giving costs as between party and party, not as between solicitor and client. The appeal (if any) should have been against each of those orders at the time when it was made. As to whether there could be such an appeal it is unnecessary to express any opinion. It certainly would be a very difficult appeal to bring, for the question is one of discretion, and it is admitted that at the different times when these three orders were made none of them could properly have been made in different terms from the terms in which they were then made. I am of opinion that the rule does not allow this court to make a new substantive order, and therefore that we have no jurisdiction to make such an order as is asked for in the present case.

COTTON, L.J.—I also think it right to refuse to make an order. As to whether an appeal would or would not lie from the orders which have been made I will not say anything, but I think the meaning of the rule is clear, and that it never was intended that this court should hear the whole matter over again under such circumstances as the present. Costs as between solicitor and client ought to be awarded only under exceptional circumstances.

LINDLEY, L.J.—I am of the same opinion. If we were to accede to such applications as this we might be asked at the close of any bankruptcy to reopen the whole of the proceedings.

*Application refused.*

Solicitors: *Hindson, Müller, and Vernon; W. W. Aldridge.*

## HIGH COURT OF JUSTICE

### CHANCERY DIVISION.

Friday, Nov. 28, 1884.

(Before BACON, V.C.)

Re TWEEDY. (a)

*Chambers—Vesting order—Right to transfer stock—Trustee Act 1850 (13 & 14 Vict. c. 60), ss. 32 and 43—Rules of Court 1883, Order LV., r. 2, sub-sects. 8 and 18.*

*Where an order was made on petition to appoint new trustees, with liberty to apply at chambers for an order to vest the trust estate in the new trustees when appointed, and a subsequent order was made in chambers appointing the new trustees, and declaring that the right to call for a transfer of, and to transfer into their own names a sum of India Four per Cent. stock vested in the new trustees; on motion:*

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

*Held, that the proceedings having been properly commenced by petition, the judge had jurisdiction under Order LV., r. 2, sub-sects. 8 and 18 of the Rules of Court 1883, to make the order on summons in chambers, and that the Bank of England ought to be ordered to act upon it. Motion allowed without costs.*

THIS was a motion on behalf of *Barbara Lady Torrens*, the widow of the late *Sir Robert Richard Torrens*, for an order requiring the Governor and Company of the Bank of England to act in accordance with an order of *Bacon, V.C.*, made in this matter on the 22nd July 1884, whereby the right to call for a transfer of certain sums of India Four per Cent. stock was vested in *Norcott D'Estorre Roberts* and *Walter Stennett Prichard*, the new trustees of the will of *Violet Tweedy*, deceased, duly appointed by the court, and that the Governor and Company of the Bank of England do pay the costs of and occasioned by the application.

By an order made the 28th June 1884, upon the petition of *Barbara Lady Torrens*, it was ordered that two or more proper persons be appointed trustees of the will of the testatrix *Violet Tweedy*, in substitution for *Patrick Sellar Lang*, who is out of the jurisdiction of this court, and *William Brydone*, who has been gazetted a bankrupt in Scotland, and it was ordered that the following inquiry be made; that is to say, an inquiry of what the trust funds subject to the will of the testatrix *Violet Tweedy* consisted.

And the parties were to be at liberty to apply at chambers for an order to vest the trust estate in the new trustees when appointed, and to apply generally as they might be advised.

By an order, made in chambers on the 22nd July 1884, the judge appointed *N. D. Roberts* and *W. S. Prichard* trustees of the will of the testatrix, and declared that the right to call for a transfer of and to transfer into their own names, among other things, several sums of India Four per Cent. stock amounting in all to 4914l. 2s. 11d. standing in the names of the old trustees, might vest in *Roberts* and *Prichard* as such trustees as aforesaid, and that the right to sue for and recover the said sums might vest in *Roberts* and *Prichard* as such trustees.

The chief clerk's certificate was filed on the 13th Nov. 1884, and certified the result of the inquiry made in pursuance of the order of the 28th June 1884.

On the 9th Oct. 1884 the solicitors of *Lady Torrens* left office copies of the two orders at the Bank of England for the purpose of having the Indian stock vested in the new trustees; the bank returned the orders on the 13th Oct. with the following note indorsed by the solicitors to the bank on the copy order of the 22nd July 1884:

This order is not sufficient. It is a vesting order made in chambers, and, as the law now stands, I cannot advise the Bank of England to act on it.

The bank, therefore, declined to act upon the order.

*Marten, Q.C.* and *Birrell* for *Lady Torrens*.—The proceedings were properly instituted by petition, and the subsequent order was rightly made in chambers:

The Trustee Act 1850, ss. 32, 35, 40, and 43;

The Trustee Extension Act 1852, s. 6;

The Supreme Court of Judicature Act 1873, s. 16.



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Re TWEEDY.

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In *Frodsham v. Frodsham* (43 L. T. Rep. N. S. 558; 15 Ch. Div. 317) the Court of Appeal held that, as the law then stood, there was so much doubt as to the jurisdiction as to render it unsafe to make a vesting order in chambers. Chitty, J., in *Re Moate's Trusts* (22 Ch. Div. 635), held that, if the proceedings were properly commenced by petition, the subsequent proceedings might be carried on in chambers. Order LV., r. 2, of the Rules of Court 1883, defines the business to be disposed of in chambers. Subsect. 8 of that order relates to the transfer of stock, and subsect. 18 is very general, "such other matters as the judge may think fit to dispose of at chambers;" this gives the judge full discretion, and your Lordship is fully justified in acting in pursuance of it.

*Kekewich, Q.C.* for the Bank of England.—The court has not had a petition before it for the vesting of this specific sum of stock. In *Frodsham v. Frodsham* Cotton, L.J. dwelt upon the protection afforded to the public by making such an order in court, and not in chambers. *Re Moate's Trusts* was a different case to this.

BACON, V.C.—No doubt it is of very great importance that all possible vigilance should be exercised upon the subject of such orders as that which is before the court at this moment, and nobody can in the least complain of the Bank of England, who of course are not desirous of impeding in any way the operation of any order which has been made. They are quite ready to give great care and attention to any order which they are asked to carry into execution or give effect to, and I do not blame them for the course they have taken on the present occasion. After the decision in *Frodsham v. Frodsham* I cannot say that the Bank of England were wrong if they hesitated to act on the order. However, when the matter is mentioned I think it is clear. I am very much obliged to Mr. Marten for the care with which he has collected and gone into the various Acts of Parliament and general orders, and for the trouble he has bestowed upon the matter; but at the same time I cannot think that they have much to do with the question before me. I have to decide upon the law as it exists. The right of the court to entertain the petition is not in question. The right of the court to adjourn to chambers the further hearing either of the petition itself or the inquiry into any of the matters contained in the petition is not capable of dispute. The right to act in chambers is clear, and is plainly authorised by the Legislature, and is confirmed by every-day practice. *Frodsham v. Frodsham* decided only this, that, inasmuch as the proceeding ought to have been by petition, the court would not enforce the order as against the Bank of England where the proceeding had not been by petition. The law has been altered since that. The law, as it stands now, is that, where a proceeding originated by petition is heard by the court in court, the right exists in the court to adjourn that petition and every part of it into chambers to be further disposed of. The court has so dealt with the present petition; for by the first order—that of the 28th June 1884—it directs the appointment of new trustees, and it directs an inquiry. It does not dispose of the whole matter before it; it disposes of a part conclusively by a decree, or that which is equivalent to a decree. It

directs an inquiry of what the trust funds subject to the will of the testatrix consist, and it says, "and the parties are to be at liberty to apply at chambers for an order to vest the trust estate in the new trustees when appointed, and to apply generally as they may be advised"—that is, to apply for an order to vest the trust estate when the previous inquiry shall have been satisfied. The previous inquiry, I am told, has been satisfied, though Mr. Kekewich says he has heard that to-day for the first time. I do not think that of the least importance; for, when I come to the second order which the judge made in chambers (and the same judge is supposed to be acting throughout), I must assume that the inquiry has been made, and that the result has been satisfactory to him. By that order, the judge (stating it shortly) appoints the new trustees, and says they have the right to call for the transfer, and to transfer into their own names the sums there stated, and that the right to sue for and recover the sums mentioned is vested in them. This matter seems to me to be entirely free from the objection which was taken in *Frodsham v. Frodsham*, and it resolves itself into one of the commonest applications that can be made to the court. The right to appoint new trustees is recognised as inherent in the court, as also is the right to name trustees, and the right to inquire of what the funds which are to be transferred to them consist. Those rights are exercised, and it having been ascertained that the fund consists of the sums here mentioned, the trustees are appointed, and the right to call for a transfer is vested in them. I think *Frodsham v. Frodsham* has no application whatever to the present case. The decision in that rested on the narrow question whether, in a proceeding commenced by action—not petition—the court had jurisdiction to make a vesting order in chambers. The right of the court to deal with the subject-matter of the present case is clear. Nobody can doubt it for one moment. New trustees have been appointed in the place of former trustees, the right to call for a transfer of the trust fund is vested in these new trustees, the legal right to the fund in question is vested in them. It remains only that the bank should perform a ministerial office and give full effect to the order the court has made, and that the funds should be transferred into the names of the trustees. I have not heard that such an order cannot be made in chambers. It is not right that the bank should be present on the inquiry of what the trust funds consist. To ascertain that is the duty of the court, and the court has discharged that duty, and upon the face of the order I must take it to have been positively decreed and decided that new trustees shall be appointed, and to have been positively decided that the legal estate in the fund belongs to the trustees when appointed; for the court has pursued the inquiry and must be assumed to have done so in making the second order. The right to require the bank to transfer cannot be resisted. I think no doubt can be thrown on the power which the court or a judge now possesses on the hearing of a matter to adjourn it and deal with it in chambers upon what he has heard in court. Undoubtedly, the bank is quite safe in acting upon the order of the court. In my opinion the right of the applicant to have the order which the court has made per-

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formed cannot be resisted, and I therefore make an order on the Bank of England to act on the order in chambers in the terms of the notice of motion.

*Marten.*—With costs against the bank?

*Kekewich.*—It is not usual in these cases.

BACON, V.C.—I think the bank, who have no interest in the matter, except as custodians of the public money, ought not to be made to pay costs, but I do not give them any costs; the costs of the applicants will be costs in the matter of the petition.

Solicitors: *Keeping and Co.; Freshfields and Williams.*

Saturday, July 12, 1884.

(Before CHITTY, J.)

BAYNTON v. COLLINS. (a)

*Married woman—Separate estate—Reversionary interests—Payment out on separate receipt—Property acquired in possession after 1882—Malins' Act (20 & 21 Vict. c. 57)—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 5.*

*A tenant for life of a fund in court had died, and a petition for payment out was presented by parties entitled in remainder, two of them being married women, and married before 1883. The married women were entitled to their shares on the death of the tenant for life, and the question arose whether they were entitled to have their shares paid out on their separate receipt by virtue of the Married Women's Property Act 1882, s. 5.*

*Held, that property to which a woman married before the Act of 1882 came into operation, was entitled in reversion at the date of the Act, but which had since the commencement of the Act become a title in possession, was within the scope of sect. 5, and therefore might be paid out to her on her separate receipt without the necessity of her separate examination.*

An unopposed petition was brought by nine persons (two of whom were married women who had been married before the 1st Jan. 1883, at which date the Married Women's Property Act 1882 came into operation), for payment to them respectively of their shares in certain funds in court to which they had become entitled in reversion before the 1st Jan. 1883, but had not become entitled in possession until the death of the tenant for life in Jan. 1884.

The question arose whether, under the Married Women's Property Act 1882, the two married women were entitled to have their shares paid out to them on their separate receipts. The funds in court formed part of the proceeds of the realisation of the residuary real and personal estate of a testator who had died in 1820, and they had been realised in various actions, and were now standing to a separate account in the action of *Baynton v. Collins*, which was instituted in the year 1870, under the Partition Act 1878, for the sale of the testator's real estate which remained subject to the trusts of his will.

*Whitehorne, Q.C.* and *P. Kingdon* for the petitioners.—The words of the Married Women's Property Act 1882, s. 5, are as follows: "Every

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.

woman married before the commencement of this Act shall be entitled to have, and to hold, and to dispose of, in the manner provided by the Act, as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her in manner mentioned in the Act." These words are sufficient to displace any inchoate right the husbands may have had, for they are equivalent to "become entitled in possession." But even if the court holds this contention to be wrong, still the married women can, upon separate examination, elect as to the shares which have arisen under the Partition Act 1868, to take such shares as personality:

*Standering v. Hall*, 11 Ch. Div. 652.

CHITTY, J.—I am of opinion that if the Married Women's Property Act 1882, s. 5, was meant to apply only to cases of title accrued in inception subsequently to the commencement of the Act, the words "whether vested or contingent, and whether in possession, reversion, or remainder," need not all have been used. There are five kinds of title mentioned, and, if any of them accrue after the date of the Act, then sect. 5 will apply. The fair meaning to be attributed to the words "the title to which shall accrue after the commencement of the Act" when referring to a title in possession or remainder is "accrue in possession." I hold that the title, which was in reversion or remainder, at the commencement of the Act, and which has since come into possession, is within the Act. A further effect of the section, and probably one of its objects, is to enable married women to deal with their reversionary interests without the aid of *Malins' Act* (20 & 21 Vict. c. 57). The married women are entitled to receive their shares of the funds in court on their separate receipts, without the necessity of their separate examination.

Solicitors for the petitioners, *Bridges, Sawtell, Heywood, Ram, and Dibdin.*

July 1, 7, and 14, 1884.

(Before CHITTY, J.)

*Re* WHEATLEY; SMITH v. SPENCE. (a)

*Married woman—Life interests—Election—Restraint on anticipation.*

*A testatrix who was donee of a power of appointment amongst the children of J. W., by her will and codicils exercised such power in favour of persons, some of whom were objects of the power, and also in favour of others who were not, and also gave to two of the appointees, who were married women, and children of J. W., certain property of her own for life without restraint on anticipation. The question arose whether the above-mentioned married women could be put to their election.*

*Held, that, in the case of a married woman to whom a life interest with a restraint on anticipation is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the nature of her interest in the*

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.

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*property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable.*

*Willoughby v. Middleton* (6 L. T. Rep. N. S. 814; 2 J. & H. 344) distinguished.

*Smith v. Lucas* (45 L. T. Rep. N. S. 460; 18 Ch. Div. 354); *Cahill v. Cahill* (49 L. T. Rep. N. S. 605; 8 App. Cas. 427) followed.

THIS action was instituted for the administration of the estates of Henry Wheatley and Maria Wheatley.

Henry Wheatley, by his will, dated the 20th Nov. 1868, gave 2000*l.* to, and equally to be divided between, such one or more of his nephews and nieces (naming them), the four children of his deceased brother William Wheatley as should survive him, and 3000*l.* to and equally between such one or more of his nephews and nieces, the six children of his late brother John Wheatley, as should survive him and attain twenty-one, and subject to the trusts and legacies aforesaid, the testator directed that the trust premises, or the residue thereof, with the future income, should be held upon such trusts, &c., whether the same extended to, and should be an absolute or only a limited and revocable disposition thereof, and in such manner in all respects as his sister Maria Wheatley, whether covert or sole, should by will direct, appoint, give, and devise, "but so that every direction, appointment, gift, or devise be made in favour of some one or more of my nephews and nieces, the children of my said brothers and sister, William Wheatley, John Wheatley, and Isabella Smith. And in case my said sister Maria Wheatley shall make no such direction, appointment, gift, or devise as aforesaid, then as to one moiety of the residue of the said trust premises, with the future income thereof, I direct that the same shall be in trust for, and to be equally divided between, my said nephews and nieces, the children of my said brother William Wheatley, the same as the sum of 2000*l.* given to them, with the like proviso in favour of issue in case of any of them dying, as mentioned in the same proviso, leaving lawful issue. And as to the remaining moiety of the residue of the said trust premises, with the future income thereof, I direct that the same shall be in trust for and equally divided between my nephews and nieces, the children of my deceased brother John Wheatley, the same as the before-mentioned sum of 3000*l.* given to them, and also with the like proviso in favour of issue in case of any of them dying, as mentioned in the same proviso, leaving lawful issue."

Maria Wheatley, by her will, dated the 1st June 1870, after making an appointment in exercise of the power given to her by Henry Wheatley's will, directed that her real and personal estate should be held upon trust for her niece Dorothy Ewart, and the nieces and nephews of her sister Isabella Smith and her late brother John Wheatley, who should be living at her death, in equal shares, the shares of any niece surviving the testatrix to be settled upon certain trusts for such niece for her life, for her separate use, without power of anticipation.

By a codicil, dated the 26th Aug. 1871, Maria Wheatley revoked the appointment made by the will, and instead thereof appointed, gave, and devised the property, subject to the appointment,

unto her sister Isabella Smith, for her natural life, and after her death "I appoint, give, and devise the same real and personal estate unto my nephew William Smith (the plaintiff), and to my nieces Isabella Smith and Margery Irvin, the son and daughter of my sister Isabella Smith, and to my nieces Dora Anne Ewart and Margaret Ewart, the daughters of my niece Dorothy Ewart, now deceased, in equal shares as tenants in common, and to their respective heirs, executors, administrators, and assigns, the shares of each niece being held upon such trusts as she, whether covert or sole, should by deed or will appoint, and in default of appointment upon trust for my same niece, her heirs, executors, administrators, and assigns, for her separate use, free from marital control and engagements."

The question now raised for further consideration was whether the children of John Wheatley, to whom gifts were given by the will of Maria out of her own property, and who, by the terms of Henry Wheatley's will (assuming that the appointment of two-fifths in favour of Dora Anne Ewart and Margaret Ewart was invalid from their not being objects of the power), were entitled in default of appointment, were bound to elect between Maria Wheatley's will and the two-fifths to which they became entitled in default of appointment.

It appeared that two of the children of John Wheatley (Mrs. McDowell and Mrs. Morison) were married at the date of Maria Wheatley's death, and a further question arose whether the doctrine of election applied in their case, as by Maria Wheatley's will the gifts to them out of her own property were coupled with a restraint on anticipation.

*C. Parke* for the trustees of Mr. and Mrs. McDowell.—The children of John Wheatley, other than the two married women, are put to their election:

*Whistler v. Webster*, 2 Ves. jun. 367.

But the married women whose interests under Maria Wheatley's will were given subject to a restraint on anticipation are not bound to elect. There is no direct authority on the point. A married woman, however, has been put to her election, as between property given to her for her separate use and property to which she was entitled under her marriage settlement for her separate use without power of anticipation:

*Willoughby v. Middleton*, 6 L. T. Rep. N. S. 814; 2 J. & H. 344.

But Jessel, M.R. expressed a very strong opinion that, where a married woman was restrained from anticipation, she could not under the doctrine of election make that alienable which was inalienable before:

*Smith v. Lucas*, 45 L. T. Rep. N. S. 460; 18 Ch. Div. 354.

[CHITTY, J.—Where a deed or a will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the will without at the same time conforming to all its provisions, and renouncing every right inconsistent with them: *Codrington v. Codrington*, 34 L. T. Rep. N. S. 221; L. Rep. 7 H. L. 854.] It has been held that the court has no power to release the separate estate of a married woman from the prohibition against anticipation thereto attached

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so as to enable her to alienate the property subject to this restriction, though it would have been greatly to her benefit to have done so:

*Robinson v. Wheelwright*, 6 De G. M. & G. 535.

The question also whether a married woman, who is restrained from anticipation, could be put to her election has been under discussion before:

*Re Tussaud's Estate*; *Tussaud v. Tussaud*, 39 L. T. Rep. N. S. 113; 9 Ch. Div. 363.

The restraint upon anticipation cannot in any case, or upon any pretext, be evaded even for the purpose of reconquering loss occasioned by fraud or breach of trust by a married woman of which she was cognisant:

*Oliver v. Carrow*, 1 J. & H. 129;

*Stanley v. Stanley*, 37 L. T. Rep. N. S. 777; 7 Ch. Div. 569.

[CHITTY, J.—It appears that Selborne, L.C. has approved of the view taken by Jessel, M.R. in *Smith v. Lucas* (*ubi sup.*): *Cahill v. Cahill*, 49 L. T. Rep. N. S. 605; 8 App. Cas. 427.] Another point is, that the rule of election is not applicable as between one clause in a will and another clause in the same will or codicil:

*Wollaston v. King*, 30 L. T. Rep. N. S. 1003; L. Rep. 8 Eq. 163;

*Cooper v. Cooper*, 30 L. T. Rep. N. S. 409; L. Rep. 7 H. L. 53;

*Re Warren's Settlements*, 49 L. T. Rep. N. S. 696; 26 Ch. Div. 208;

*Tomkyns v. Blane*, 26 Beav. 422;

*Conveyancing and Law of Property Act 1881* (44 & 45 Vict. c. 41), s. 39.

P. H. Lawrence for the children of Dorothy Ewart.—The married women are bound to elect equally with the other children of John Wheatley. They cannot take under both the will and the appointment, and the fact that the interests given by the will are subject to a restraint on anticipation can make no difference, for election is no forfeiture of interest; but the court lays hold of what is devised, and makes compensation out of that to the disappointed party:

*Lady Cavan v. Pulleney*, 2 Ves. jun. 544, 559.

The disappointed legatees are entitled to keep back or sequester from the other devisees or legatees the property so devised or bequeathed until compensation is made:

*Pickersgill v. Rodger*, 5 Ch. Div. 163;

*Gretton v. Howard*, 1 Sw. 409 and notes.

Persons claiming under a will must conform to all its terms, and this duty to make compensation is a charge on the interest of the married women in Maria Wheatley's property, which cannot be taken at all except subject to the obligation to make good the necessary amount to the disappointed legatee:

*Pickersgill v. Rodger* (*ubi sup.*).

The charge, to which the interest given by the will is subject, overrides the restraint on anticipation, which was probably invented in order to prevent a married woman's interest from becoming forfeited. Election, however, is not based upon forfeiture, but upon compensation, and *Robinson v. Wheelwright* (*ubi sup.*) is the first case in which any doubt was thrown on the application of the doctrine of election in cases where the person to elect was restrained from anticipation.

*Ince*, Q.C., *Macnaghten*, Q.C., *Romer*, Q.C., *Madd*, *Robinson*, and *Brinton* also appeared for various parties in the case.

CHITTY, J.—In this case, Maria Wheatley had a power of appointment under the will of her brother Henry in favour of certain objects, and certain objects only, and by her codicil she purported to exercise the power in such a manner as to give an interest to persons who are not objects of the power. The result is, that by reason of this attempt on her part to appoint to strangers two-fifths of that fund are ill-appointed. There is another fifth of the same fund which I do not deal with now for the purposes of this judgment, because that has lapsed, and there is no question of election in regard to that fifth. Under the same will there are five children of John, who take benefits out of the testatrix's own property, and of these five children three are persons *sui juris*: William, who takes an absolute interest; Martha and Jane, who were spinsters at the death of Maria Wheatley, and are so still; and two others, Mrs. McDowell and Mrs. Morison, who were married women at the death of Maria Wheatley, and are so still. The first point that arises is, inasmuch as those five persons take an interest under the trusts in default of appointment under Henry Wheatley's will, which entitles them to say that the appointment made by Maria's codicil is void as to two-fifths, whether they are put to their election. In regard to that question, it has been established since the time of *Whistler v. Webster* (*ubi sup.*) that the question of election does arise. It is unnecessary to go through the authorities on that point, because the law has been considered for a long time to be finally settled in regard to that matter, and it is not permissible to question it at the present day. The proposition is stated in Sugden on Powers (8th edit. p. 578), which is quite sufficient for my purpose, in these words: "It follows from these principles, that where a man, having a power to appoint A. a fund which in default of appointment is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet, if B., will accept the gift to him, he must convey the estate to C., according to the appointment." In other words, *prima facie* the five children of John, who take benefit under the same will, and are persons who are entitled to disappoint the person in whose favour the erroneous appointment has been made by the codicil, are bound to elect. I say *prima facie*, because I think there is a distinction between the case of those who are *sui juris* and that of the two married women. I should say that Pearson, J. in *Re Warren's Trusts* (*ubi sup.*) did not purport really to deal with this particular proposition; and, without expressing any opinion whether it was rightly decided or not, I consider that *Re Warren's Trusts* does not in the least degree stand in the way of my present decision. Then comes the question, which is one of some importance, viz., whether in regard to Mrs. McDowell and Mrs. Morison, who take life interests under Maria Wheatley's will, and are by the very same will restrained from anticipation, any case of election arises. It appears to me that Mrs. McDowell and Mrs. Morison, being thus restrained from anticipation, are not bound to elect. Now, the doctrine of election is thus spoken of by Cairns, L.C. in *Codrington v. Codrington*: "By the well-settled doctrine which is termed in the Scotch law the doctrine of approbate and reprobate, and in our courts more commonly called the doctrine of elec-

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tion, where a deed or a will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the will without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." That is a sufficient statement of the doctrine for the purposes of my judgment. The person against whom the case of election arises is bound to give effect to the whole instrument, and there is an implied condition, arising out of the dispositions on the face of the will itself, that the person who takes under the instrument should renounce any independent title that person has, and could set up against the instrument itself. But the question of election arises with reference to the instrument in this way. On the face of this will these two ladies are restrained from anticipation. Now, it is settled that the doctrine of election does not involve forfeiture, but involves compensation. Compensation out of what? Out of the property which is given by the instrument; that is to say, arising out of the property which Mrs. Morison and Mrs. McDowell take under the will, as being property which the testatrix Maria Wheatley was absolutely entitled to. Now, can I imply, on the face of these testamentary instruments, any such condition as against them? I hold not; because it is on the very face of this will that they are restrained from anticipation. I put this point during the argument. Suppose the testatrix had said, "I give you an interest in my own property, and you are not to be put to any election by reason of my having in another part of my will disposed of your property" (for that is what the attempt, the invalid attempt, to exercise the power of appointment really comes to), it would be clear there was an intention shown on the face of the will itself that there should be no election. It appears to me, when this case is considered, it resolves itself into a case such as the one I have supposed; for it is the testatrix herself who has said that these two beneficiaries, Mrs. McDowell and Mrs. Morison, are to enjoy the property which she gives them as a personal provision for their inalienable use. The case, therefore, does not fall, as far as the facts are concerned, within the decision of Lord Hatherley in *Willoughby v. Middleton* (*ubi sup.*). There the funds purported to be brought into settlement by the covenants of the husband and the wife consisted, first, of a reversionary interest of the wife, and, secondly, of her after-acquired personalty; and under the trusts of the settlement the wife took the first life interest in both funds for her separate use, without power of anticipation. The wife's reversionary interest fell into possession during the coverture, and was therefore bound by the husband's covenant, but not by the wife's. The wife's after-acquired personalty accrued to her for her separate use, and was therefore bound by her covenant, but not by the husband's. Lord Hatherley held in these circumstances that the husband had settled the reversionary interest on the faith that the wife would give effect to her covenant and to the settlement as a whole, and consequently that the implied condition of election arose as against her. That reasoning does not decide the present case. But the late Master of the Rolls, in *Smith v. Lucas* (*ubi sup.*), considered the point

which I have to decide as still open, and not finally disposed of by Lord Hatherley in *Willoughby v. Middleton*, and he expressed a strong though not a final opinion on the point; and, adverse to that decision, the late James, L.J. appears by his question in *Tussaud v. Tussaud* to have thought that a married woman who is restrained from anticipation could not be put to her election. I adopt the view which the late Master of the Rolls took in *Smith v. Lucas*. The property, which, it is said, must be sequestered for the purpose of making compensation to the persons who have been disappointed by the failure of the appointment in their favour, is property given in such a manner that the testatrix herself must be deemed to intend that the persons to whom she gives it shall not deal with it, and that it shall not be dealt with adversely to them; and to imply a condition of election would be to imply a condition of election against the express language of this will. For these reasons, it appears to me there is no case of election arising as against Mrs. McDowell and Mrs. Morison in respect of their life interests. The will has not been stated so as to see whether they took any other interest in reversion in those shares settled on them. Any question of that kind I leave open. I rather understand that the whole of their shares are so settled that they can take no more than the life interest. It was argued that sect. 39 of the Conveyancing and Law of Property Act 1881 made a difference in this case, but it has no application whatever; because I have held that the married women thus restrained from anticipation are not put to their election.

Solicitors for the parties: *Maples, Teesdale, and Co.*, agents for *Lietch, Dodd, and Bramwell*, North Shields; *F. Venn and Co.*; *S. W. Johnson and Son*, agents for *H. A. Adamson*, North Shields; *Chester and Co.*, agents for *Sutton and Elliot*, Manchester; *Redpath and Holdsworth*.

Tuesday, July 22, 1884.

(Before CHITTY, J.)

SHAW v. THE CORPORATION OF BIRMINGHAM. (a)

*Arbitration—Award—Payment of sum awarded into court—Appeal to jury—Verdict—Compensation—Interest on difference between two sums—The Artisans and Labourers' Dwellings Improvement Act 1875 (38 & 39 Vict. c. 36), s. 20, schedule, ss. 18, 20, 24, 26.*

*A corporation had decided on taking some property, of which the plaintiff was tenant for life, for the purposes of an improvement scheme. An arbitrator had awarded the plaintiff 2400*l.* for the property.*

*The plaintiff declined to accept the award, but the corporation took possession, and paid into court 2400*l.* on the 26th March 1881. Later on the plaintiff, acting under the Artisans and Labourers' Dwellings Act 1875, appealed to a jury from the arbitrator's decision, and was awarded 3200*l.*, and on the 15th Jan. 1884 the corporation paid the additional sum of 800*l.* into court.*

*The plaintiff now claimed to be entitled to an additional sum of 4 per cent. interest on the 800*l.* from the 26th March 1881 up to the 15th Jan. 1884.*

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.

*Held, that where, under the provisions of this Act, a sum of money has been paid into court under the award of an arbitrator, and on appeal a verdict is given by a jury for a larger sum, the difference also being subsequently paid into court, interest at the rate of 4 per cent. per annum from the date of the first payment into court to the date of the second payment in, is payable on the difference between the two sums; also that a local authority is entitled to enter into possession after payment to the party entitled, or after payment into court of the sum awarded by the arbitrator.*

THE claim on this motion, which was to discharge an order made by Chitty, J. in chambers, was made under the Artisans and Labourers' Dwellings Act 1875, which embodied many of the provisions of the Lands Clauses Consolidation Act 1845, which regulated the procedure in respect of the compulsory purchase of lands, and permitted an appeal from the arbitrator's final award to an assessment by a jury. It was made in respect of property belonging to the plaintiff compulsorily purchased by the Corporation of Birmingham by virtue of powers given by the Act of 1875. Mr. Shaw, the plaintiff, was tenant for life of the reversion of certain property, and the interest of the reversioners was subject to a lease which had been granted in 1775, and which had but a few years to run at the date of the award. Under the lease, the rent reserved was only 10l. a year, a rent far less than the annual value of the houses to be taken, and in the award it appeared that all unexpired terms were calculated from Michaelmas 1880, the effect of which was that eleven and a half years of the lease had to run before the reversion fell into possession, and it was upon that calculation that the award was made.

On the 13th July 1879 the corporation, acting as urban sanitary authority, gave notice of their intention to purchase the plaintiff's property compulsorily. The amount of compensation to be paid to the plaintiff was, on the 16th June 1880, assessed by Sir Henry Hunt (the arbitrator appointed by the Local Government Board) at 2400l.

On the 7th March 1881 the corporation being satisfied with the title, paid that sum into court, and took possession on the 26th March 1881.

The amount not satisfying the plaintiff, he appealed to Sir Henry Hunt to reconsider his award, and appeared before him to urge his request. Sir Henry Hunt, however, refused to alter the award, and the plaintiff gave notice to the defendants for a jury.

On the 4th April 1881 a delay occurred on the part of the corporation in issuing their warrant to the sheriff to summon a special jury, and it was not issued until the 16th Nov. 1883.

Then the warrant before the jury recited that Shaw was dissatisfied with the amount so awarded and paid into court, and that such amount exceeded 500l., and gave notice that he intended to appeal, and submit the question of the proper amount of compensation payable in respect of the property to a jury; and the warrant, in accordance with that notice, required the sheriff to nominate a jury, to determine by their verdict the proper amount of compensation to be paid by the local authority for the purchase of the inheritance in fee simple, and so forth.

The verdict of the jury was given on the 12th

Dec. 1883 for the payment of 3200l. to the plaintiff, and on the same day the sheriff gave judgment accordingly.

On the 15th Jan. 1884 the corporation paid the sum of 800l. (being the difference between 2400l. and 3200l.) into court. It appeared that the plaintiff had received the rent due from the lessee on the 25th March 1881, but that the corporation had originally refused to pay ground rent after that date (when they had entered into possession), and they alleged that 2400l. was full satisfaction, and that they had purchased the leasehold interests, and the town clerk had written to that effect. The corporation, however, when the matter was before Chitty, J. in chambers agreed to waive this point, and the main question argued on the motion was whether interest at 4 per cent. per annum was payable on the 800l. between the 26th March 1881 and the 15th Jan. 1884.

*Romer, Q.C. and Phipson Beale for the plaintiff.*—Although as a general rule interest does not run upon a judgment for any period antecedent to the date of the judgment, in this case it ought to be paid on the 800l., as the verdict of the jury was in regard to a sum which ought to have been inserted in the original award. The interest ought to be paid from the 26th March 1881 when the corporation were entitled to take possession :

*Rhys v. Dare Valley Railway Company, L. Rep. 19 Eq. 93;*

*Re Pigott and The Great Western Railway Company, 44 L. T. Rep. N. S. 792; 18 Ch. Div. 146;*

*Re Eccleshill Local Board, 13 Ch. Div. 365;*

*Re Navan and Kingscourt Railway Company, Ir. Rep. 10 Eq. 113.*

*Methold (Ince, Q.C. with him) for the corporation.*—No interest is payable on the 800l. The court cannot go behind the verdict of the jury, and so award more than has been given by the verdict, which has the effect of compensating for everything up to the date when it was given. *Re Eccleshill Local Board* was disapproved of by the court in *Pigott v. The Great Western Railway Company*. In giving their verdict the question of interest was no doubt present to the minds of the jury, and in all probability formed one reason for their giving an increased amount of compensation.

*Romer, Q.C. in reply.*

CHITTY, J.—The question on this motion is whether Mr. Shaw, as representing the vendor, and as representing the reversioners, is entitled to interest on a sum of 800l., being the difference between the 2400l. awarded by the arbitrator and the 3200l., the sum assessed by the jury, for the period which elapsed between the date of the payment of the 2400l. into court and the date of the payment of the 800l. into court. As between the vendor and purchaser in an ordinary case, where the contract makes no provision for interest, the law is settled that the purchaser pays interest from the time when he could prudently take possession; and the late Master of the Rolls, in the case of *Pigott v. The Great Western Railway Company* (*ubi sup.*), applied that rule to the contract, or quasi-contract, which is created by the Lands Clauses Act where lands are taken compulsorily. In the decision of Bacon, V.C. in *Rhys v. Dare Valley Railway Company* he held that interest was payable by a railway company from the time of their taking possession

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of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by a verdict of the jury. That decision appears to me correct, and, though the late Master of the Rolls dissented from some observations, or from a decision of the same Vice-Chancellor in the case of the *Eccleshill Local Board*, he did not express any dissatisfaction, nor indeed, to my mind, could he have expressed any dissatisfaction, with the decision in the case of *Rhys v. The Dare Valley Railway Company*. Now, the property here has not been taken under the Lands Clauses Act, but under the Artisans and Labourers' Dwellings Improvement Act, which contains provisions somewhat similar to, but not altogether the same as those in the Lands Clauses Act. The provisions are in substance a modification of those in the latter Act. The material sections of the Act of 1875 are the 18th, 19th, 20th, 24th, and the 26th. The 18th section is not very happily worded, but it clearly gives a right to the corporation or local authority who set the Act in motion to enter upon lands where a certificate is given, and a certificate is given in the case of a person being absolutely entitled. The 20th section relates to the payment into court where the person selling has not a title which enables him to sell by virtue of his interest, and apparently that section is intended to be referred to by some expressions in the 18th section; but the result of the sections, applying to them the general rule of law such as was applied by Jessel, M.R. in the case of *Pigott v. The Great Western Railway Company*, which I have already mentioned, appeared to me to be this: that when the local authority has paid money into court under the 20th section, and when they have, as they had here, seen the title, and approved and accepted the title, they have the right upon that payment to enter into possession. Upon the facts before me, it seems that they did enter into such possession, even as against the reversioners, on the 26th March 1881. And I hold (and I think to hold the contrary would be disastrous to those who set this Act in motion) that the corporation were entitled to take possession in the circumstances of this case, having approved the title, on the day when they paid the 2400*l.* into court. The 24th section of the Act contains provisions which may be shortly styled a modification of the 85th section of the Lands Clauses Act, and there is a provision in that section with reference to the payment of interest somewhat similar to the provision which is contained in the 85th section of the Lands Clauses Act. It would be strange that the local authority should be entitled on making the deposit mentioned in the 24th section to enter into possession, and not entitled to enter into possession when they had accepted the title and paid the money into court under the 20th section. The 26th section is material to the point I have to decide. I will pick out only those portions which appear to be material, and they are these: "The party dissatisfied (that is, with the award) may submit the question of the proper amount of compensation to a jury, provided that such party gives notice in writing to the other party of his intention to appeal within ten days after the cause of appeal has arisen." Then follows: "The cause of appeal shall be deemed to have arisen, where moneys have been

paid into court, at the date of the payment into court." The jury are therefore to assess, the amount which has to be paid. But the 4th subsection of sect. 26 contains a provision that "The amount of compensation awarded by the arbitrator shall not be communicated to the jury, but they shall be required to make an independent assessment of the amount of compensation to which the party claiming compensation is entitled." Now, upon these provisions, what is the true function of the jury? It appears to me clear that they sit by way of appeal to determine the true amount of the compensation; that, on the one hand, they ought not to give in their verdict any interest for the period which has elapsed between the date of the making of the final award and the time of the verdict, and it also appears to me that they ought not to take into consideration a circumstance which was a material one in this case—that the interest of the vendor had become more valuable (as it had here) by reason of the shorter period that remained of the term to which the vendor's interest was subject; and I think that their function is to assess the amount of compensation to be paid as at the date of the final award. The result, therefore, appears to me to be this: that they have substituted for the 2400*l.* mentioned in Sir Henry Hunt's award a sum of 3200*l.*, and that that is the purchase money. Now, it is obvious, as a general rule, that interest does not run upon a verdict, and it would not run upon a judgment for any period antecedent to the date of the judgment; but this is a proceeding, to my mind, for the purpose of ascertaining the amount of the purchase money, and I think that the rule in regard to the payment of interest, which I have mentioned in an earlier part of this judgment, applies to this case, so as, in one sense, to give a retrospective effect to the verdict of the jury. I think that the true mode of reading the provisions of this Act of Parliament—provisions which counsel said were so framed that the more they read them the less they understood them, although, speaking for myself, I have had no difficulty in understanding them—is that the jury ought to say what was the proper amount the arbitrator ought to have awarded. The result, therefore, is that their verdict is a verdict in regard to the sum which ought to have been inserted in the award itself. Now, in the circumstances I have already gone through, I have held that the corporation were entitled to take possession at any time they thought fit after the 26th March 1881. I think that they did take possession in point of fact as against the reversioner somewhere about that time; and it appears to me therefore that the interest does run on the 800*l.* between the dates which have been mentioned, namely, the 26th March 1881 and the 15th Jan. 1884. The case is one of some importance, and not an easy case to argue in chambers; and, without intending to reflect in any way on the counsel who appeared before me, who no doubt did their best, I may say that it was imperfectly argued there, and no doubt there was a difficulty. At any rate, my attention was not carefully called to various provisions of the Act of Parliament which seem to me to govern this case. I therefore hold that the interest for the time which I have mentioned is payable, and I accede to the motion, and the plaintiff must have his costs. I think that any



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other decision with regard to the right to take possession would be a most disastrous one to the local authority, because in these undertakings possession is, of course, of great value to them. They desire to enter and pull down the buildings with a view to execute the improvements which are authorised by the Act, and to be delayed by one or two cases, or by being taken before a jury, would be very detrimental to their interests. I also think in this case the corporation, without of course doing it intentionally, delayed the summoning of the jury for a period which is not justifiable.

Solicitors for the plaintiff, *Church, Rendell, and Trehane*.

Solicitors for the defendants, *Sharpe, Parkers, and Co.*

Aug. 9, Nov. 15, and Dec. 15, 1884.

(Before PEARSON, J.)

Re THE UNITED STOCK EXCHANGE LIMITED. (a)  
Company—Winding-up—Judgment creditor—Discretion of court—Evidence of collusion.

*Where upon the hearing of a winding-up petition presented by a judgment creditor, evidence is before the court upon which the issue of whether the judgment was or was not obtained by collusion can be decided, the petition will be forthwith disposed of, notwithstanding that the judgment has not been impeached in an action at law.*

*Bowes v. The Hope Mutual Insurance Society* (12 L. T. Rep. N. S. 680; 11 H. L. Cas. 389) distinguished.

This was a petition by Mr. Robert Stuart Agnew to wind-up the above-named company, the principal ground alleged in the petition being that the company was indebted to the petitioner in the sum of 879*l.* 12*s.* 6*d.*, for which he had recovered judgment against the company on the 31st July 1883, in an action in the Queen's Bench Division.

Upon the petition coming on for hearing the judgment was disputed upon the ground that it had been obtained by collusion with the solicitor of the company. Upon the objection being taken, there being originally only the ordinary statutory affidavit in support of the petition, leave was asked and obtained to examine and cross-examine, and the result was a large volume of depositions containing the evidence upon examinations, cross-examinations, and re-examinations of the petitioner, a Mr. Tassie, at one time the manager of the company, Mr. Mackenzie and Mr. Kid1, directors of the company, and the solicitor, accountant, and secretary of the company. Those depositions were before the court when the petition came on for final hearing, when it occupied the court for several days.

*Higgins, Q.C.* and *Oswald* for the petitioner.

*Everitt, Q.C.* and *St. John Clarke*, for Mackenzie, a shareholder opposing.—The court has before it the evidence upon which it can decide whether or not the judgment was obtained by fraud and collusion. That evidence shows that it was so obtained, and the petition ought now to be dismissed. Even if an order were made to wind-up the company, there are in fact no tangible

assets, and upon that ground also the petition should be dismissed.

*Dawney*, for Kennedy, another shareholder opposing the petition.

*Hart* for the company.

*Oswald* in reply.—The petitioner is entitled *ex debito justitiæ* to an order. He holds an unimpeached and unsatisfied judgment against the company. There has been ample time for impeaching the judgment, for it was recovered in July 1883, and the petition was not presented until May 1884. There is in fact no ground for impeaching the judgment. The utmost that the court can do is to direct the petition to stand over to give some parties of sufficient responsibility the opportunity of impeaching the judgment in an action in the Queen's Bench Division:

*Bowes v. Hope Mutual Insurance Society*, 12 L. T. Rep. N. S. 680; 11 H. L. Cas. 389.

PEARSON, J. having stated the facts as appearing above, proceeded as follows:—Upon the petition coming on to be heard before me I had to listen to all the results of this examination and cross-examination, but the argument which was principally addressed to me was this, that whatever conclusion I might arrive at upon that evidence, inasmuch as there was a judgment and is still a judgment standing in favour of the petitioner, I have no choice in the matter, but that the utmost I could do was this, to allow the petition to stand over provided certain persons—sufficiently competent persons—would undertake to take steps within a reasonable time to impeach that judgment. I will first of all proceed to consider what the conclusion is at which I have arrived on the evidence before me; and having considered that, I will consider how far this case is covered by the case of *Bowes v. The Hope Mutual Insurance Society* (*ubi sup.*), as to which there is no doubt whatever that I am bound by it. I regret that I should have to waste the time of the court upon such a case as this; nevertheless I cannot help it, and I must, I fear, go through the matter at some length. [His Lordship then discussed the evidence in detail, and stated his finding thereon to be that the money in respect of which the judgment was obtained upon the footing of its having been a loan by the petitioner to the company, [had never in fact belonged to him, but was part of a larger sum obtained for the purposes of the company through a Mr. Tassie, and credited to him; that the action in the Queen's Bench Division was brought by arrangement, and that the solicitor to the company consented to judgment on the day the writ was issued, the object being not to benefit the petitioner in any way, but to save the furniture and effects of the company from a hostile creditor, who it was anticipated was about to commence proceedings, and that in effect the petitioner was from first to last a mere dummy in the hands of Mr. Tassie, the manager, and others. His Lordship then proceeded as follows:] Under those circumstances I must come to the conclusion upon this evidence that I ought not to treat this judgment as a binding judgment, or as evincing a debt, or one in which the court ought to make an order to wind-up this company. But it is said that I am bound by the decision in *Bowes v. The Hope Mutual Insurance Society* (*ubi sup.*), and of course, if that case covers this, I am bound to

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follow the decision given in the House of Lords. Now in that case judgment had been obtained against the company under these circumstances: A policy had been granted on the life of one Hermann Galles for 1000*l*. It was one of the conditions of the policies effected with the company that the funds of the company should alone be liable, and that individual shareholders should be exempted from all personal responsibility. In Aug. 1855 the Hope Company transferred its business and effects to the Mitre Life Assurance Company, and that company taking possession of the property of the Hope Company adopted its existing policies, and undertook to indemnify it against all its liabilities. This policy and three small annuities constituted these liabilities. Hermann Galles died on or before Feb. 1856, that is to say, within a year, and in the course of that year a claim was made against the Hope Company in respect of his policy. The matter was discussed in letters between the solicitors for the claimant and the officers of the Mitre Company. In May 1857 administration of the effects of Hermann Galles was granted to John Gaspard Schlappfer, who in July 1857 brought in the Queen's Bench an action on the policy against the Hope Company. There were several pleas put on the record on the part of the company. Strausberg was at that time a director, and the agent and the manager of the Mitre Company, and he entered into negotiations with Schlappfer's attorney, the result of which was an agreement dated the 11th Feb. 1858, by which, in consideration of the sum of 700*l*., Schlappfer was to assign the policy and the judgment thereon to Strausberg. The pleas which had been entered to the action were in consequence withdrawn, and judgment was signed by default as against the Hope Company. Then Strausberg assigned to Bowes, and then Bowes presented a petition to wind-up the company. When it came before Lord Romilly, Bowes relied entirely upon his judgment, and Lord Romilly made an order to wind-up the company. The company appealed, and Knight-Bruce and Turner, L.J.J. offered Bowes liberty to file evidence in support of the judgment. Bowes refused, and said he stood upon his judgment, and he declined to enter into evidence at all. He having so done, having so refused to file evidence, the Lords Justices dismissed his petition. Thereupon Mr. Bowes appealed to the House of Lords, and the view the House of Lords took of it was this, that Mr. Bowes had the right, if he pleased, to rely upon the judgment *simpliciter*, that he was not bound to put in any evidence whatever in support of it, and that the proper order to make was an order giving the company, if they pleased, a reasonable time within which to impeach the judgment, and to order the petition to stand over until that time had elapsed, or until their proceedings had either failed or had been successful. Now in the present case I have not Mr. Robert Stuart Agnew standing *simpliciter* upon his judgment. I have, on the contrary, a great deal of evidence, examination and cross-examination, to the effect that I have stated. Mr. Robert Stuart Agnew has been cross-examined; he has been re-examined. Mr. Tassie has filed an affidavit in support of the petition, and so has Mr. Kidd. Those gentlemen have been examined and cross-examined, and, as it seems to me, I have here before me just that

which the court said they had not before them in *Bowes' case*, namely, the opportunity of considering whether or not the judgment was fairly obtained. And I think I should be inviting the parties simply to throw away their money if I were to make any order now to wind-up the company, in which case undoubtedly I should direct this alleged debt to be disputed, as it might be disputed in the winding-up just as well as in any proceedings taken to impeach the judgment. I should simply be asking the parties to put in again in the winding-up the very same evidence that I have now before me, and which I think is quite sufficient to enable the court to decide the matter upon this petition. I decline to do that. I think it would be throwing away time and labour and money, and that it would be taking a course which this court ought not to adopt. There are one or two other matters to which I must also call attention. I am by no means satisfied that there is here any sufficient evidence of there being assets of the company which would render it proper or advisable that the company should be wound-up. Mr. Robert Stuart Agnew speaks of the assets in this way in his second affidavit: "I have been informed and believe that the assets of the company consist of the following particulars, namely, debts due to the said company" (how many or to what amount he does not state); "capital to a considerable amount in fact, due and unpaid, although purporting to have been paid" (no allegations of particulars again with regard to that); "large sums due from directors and other officers of the company in respect of moneys of the company misapplied or improperly retained by them, and for which they are accountable to the company; a large claim on the bankers of the company (the Alliance Bank Limited in London, and the Union Bank of Brighton) for moneys of the company improperly paid away by such bankers out of the balance of the company with them upon cheques drawn by unauthorised persons." Upon that plain statement of what the assets are I do not think I ought to act. When I arrived at that point upon the hearing of the petition, I was told with great confidence that, although it might be necessary, where a petition is filed by a contributory, that he should show something could be recovered for the assets of the company if it was wound-up, it was not necessary for a creditor to show that there were any assets of the company to be applied in payment of his debt, but that, if he had a right *ex debito justitie* to an order, he had a right to it, although it might turn out that there was not a sixpence available as assets. I thought that was a very extraordinary statement of the law, and I am glad to find that there is most direct authority upon it in the case of the *Chapel House Colliery Company* (24 Ch. Div. 268). In that case Cotton, L.J. says this: "But it is said that a creditor who cannot get paid is entitled to a winding-up order *ex debito justitie*, and that the ordering the petition to stand over is only a sort of compromise of giving him less than he has a right to claim. But what is the meaning of that maxim? I think it is this. A winding-up order is the means of having the assets of a company applied in payment of its debts, and therefore a creditor generally where the company is insolvent is entitled to the order as a matter of right; but this

assumes that a winding-up order will help him to obtain payment, and in a case where there are no assets which the liquidator can receive, the reason fails. I put it to the respondents whether the court is bound to make a winding-up order if it cannot result in anything but costs. They reply in the affirmative. I entirely dissent, and am of opinion that, where there are no assets which can be got in under a winding-up, an order for winding-up ought not to be made. That is another objection which I find to this petition. There is a still further objection to this petition: I am by no means satisfied that this is Mr. Robert Stuart Agnew's petition, and in the observations I am about to make I beg that it may be distinctly understood that I say nothing whatever with regard to the solicitor whose name appears on the petition. I believe he was acting as solicitor, that he believed he was acting as solicitor for Mr. Robert Stuart Agnew upon instructions which he believed he could legitimately take. [His Lordship then discussed the evidence upon which he arrived at the conclusion mentioned, and proceeded:] Well now, under those circumstances, I confess I entertain the gravest doubts whether this is Mr. Robert Stuart Agnew's petition, and the conclusion at which I shall arrive will be that it was not his petition, but that it is the petition of Mr. Tassie, or of somebody in Mr. Tassie's interest, presented in the name of Mr. Robert Stuart Agnew, and that the latter gentleman's name was used in this case, as it has been used I have no doubt in other cases connected with this company, as the name of a mere tool. Lastly, but not least, I say this, having read through all the affidavits and depositions with regard to this company with the most complete and careful attention, I have arrived at the conviction that, if I were to make an order to wind-up this company, and if the 1500*l.* were forthcoming, and were ordered to be paid to Mr. Robert Stuart Agnew, he would never be allowed to get the benefit of the money or of one farthing of it. Under all these circumstances—holding as I do that there is nothing whatever to show that if an order were made there would be one single farthing forthcoming to pay his debt, if it is his debt, that this is not a debt due from the company to Mr. Robert Stuart Agnew, and the judgment was obtained purposely, not for Mr. Robert Stuart Agnew's benefit, but to stave off as well as might be an execution by a hostile creditor—I think I shall be only doing what is right and just to the creditors of this company if I order this petition to be dismissed with costs. There will be the usual order as to the costs.

Solicitor for the petitioner, *A. M. Bradley.*  
Solicitor for the company, *W. R. Philp.*  
Solicitor for Mackenzie, *S. E. Lambert.*  
Solicitor for Kennedy, *Inderwick.*

May 21 and 26, 1884.

(Before PEARSON, J.)

GALLARD v. HAWKINS. (a)

*Trustee—Failure of cestui que trust—Copyholds—Admittance—Lord of manor—Escheat—Right of trustee to hold for himself—Right of heir of unadmitted devisee of trust estate to be admitted.*

*Where there is a failure of a trust of copyholds there is no escheat; but the trustee is entitled to hold for his own benefit as in the case of freeholds, and if unadmitted, then to be admitted accordingly.*

*Nor is there any difference in this respect in a case where the person claiming as trustee is only the unadmitted customary heir of two unadmitted devisees of trust estates under the will of the survivor of two trustees appointed by the court in place of one who was originally named by the testator, but who has disclaimed.*

*A testatrix left copyholds to A. in trust for B. for life, with remainder to certain charities. A. disclaimed, and two trustees were appointed by the court in his place, and were duly admitted. The survivor of them devised his trust estates to C. and D., who were never admitted.*

*On the death of the tenant for life, the devise to charities being void and the testatrix having no heir, J. E. H., the customary heiress of D. (who had survived C.) claimed to be admitted and to hold for her own benefit.*

*Held, on a special case, that she was entitled to succeed in her claim.*

On the 23rd July 1851 Catherine Parkes, the testatrix, died possessed of certain copyhold hereditaments in fee simple, in respect of which she had in 1833 been duly admitted tenant of the manor of Hova Villa and Hova Ecclesia in Sussex.

By her will, dated the 5th May 1851, the testatrix devised the premises to T. Hatchard "to hold the same unto the said T. Hatchard, his heirs or assigns for ever, according to the custom of the said manor, but upon the trusts to and for the intents and purposes in her said will after expressed and declared concerning the same," namely, upon trust, after payment of expenses and insurance and other charges, to pay the residue of the rents and profits to Jane King for life, and after her death to another tenant for life who predeceased the testatrix, with remainder in favour of certain charities.

T. Hatchard disclaimed.

By an order of Stuart, V.C., made on the 27th June 1853 upon the petition of Jane King (to which petition the lords of the manor were respondents), E. King and H. King were, under the Trustee Act 1850, appointed trustees of the will in place of T. Hatchard; and G. Albery was appointed to surrender the premises to them as such trustees, to be held by them upon the trusts of the will.

On the 3rd March 1863 G. Albery surrendered the premises out of court into the hands of the lords of the manor to the use of E. King and H. King, their heirs and assigns, "at the will of the lords of the said manor, and by and under the accustomed rents, suits, and services upon the trusts and for the intents and purposes declared by and contained in the will of the said Catherine

Parkes, dated the 5th day of May 1851, or such of the same trusts, intents, and purposes as were subsisting and capable of taking effect."

On the 5th March 1863 accordingly, upon E. King and H. King praying in due form "to be admitted to the hereditaments and premises so surrendered to them aforesaid according to the tenor and effect of the said surrender," the lords of the manor granted to them "seisin thereof by the rod, to have and to hold the same unto the said E. King and H. King, their heirs and assigns for ever, by copy of court roll at the will of the lords according to the custom of the said manor by the rents, customs, and services therefor due and of right accustomed," and they were admitted accordingly.

H. King survived E. King, and died in April 1877, leaving Charles King, his customary heir, him surviving.

By his will and a codicil, made in May 1873 and March 1877 respectively, H. King devised to his trustees, his brother C. King and one W. Hawkins, "all estates, as well real as personal, of which he might be seised or possessed as trustee or mortgagee at his decease unto and to the use of his said trustees, their heirs, executors, and administrators respectively, and to be disposed of so far as I am beneficially interested as part of my personal estate for the purposes of his will."

Charles King never claimed to be and never was admitted tenant, nor were C. King or W. Hawkins, or either of them, ever admitted tenants or tenant of the premises.

W. Hawkins survived his co-trustee C. King, and died on the 17th March 1880, having duly made a will, but not having thereby devised estates vested in him as trustee. He left him surviving a widow, the defendant Ann Hawkins, and six daughters, the youngest of whom, the other defendant, Janet E. Hawkins, would, according to the custom of the manor, be his heiress of any estates held by him of the manor at the time of his death.

Jane King, the tenant for life, who had after the testatrix's death become the wife of H. Barnard, died on the 22nd March 1883.

At the date of her death the premises were in the occupation of C. Watson as her tenant from year to year, and he was still in occupation when the case came on for hearing.

Doubts having arisen as to the ownership of the premises, it was agreed that the question should be brought before the court in the form of a special case, it being admitted by all parties that the devise to charities, subject to the life interest of J. King, was void, and that there were no heirs of the testatrix living.

*Cookson, Q.C.* and *Archibald Brown* for the lord of the manor.—This is a new point. There is an escheat in favour of the lord of the manor. The principle of *Burgess v. Wheate* (1 Eden, 177) does not apply to copyholds, but only to freeholds. The judges there differed as to what would be the case if the question were to arise as to copyholds, and the point was still undecided in 1825: (*Watkins on Copyholds*, 4th edit., vol. i. p. 277, note.) The lord is in a stronger position than the Crown; the copyhold interest is carved out of his estate, and when it comes to an end there must be reversion to him. It has, in fact, been determined against the trustee that, if A. devise copyhold land (duly surrendered) to B. and his heirs in trust for C.

and his heirs, and C. die without heirs, the heir of B. has no equity to compel the lord to admit him:

*Williams v. Lonsdale*, 3 Ves. 752.

And even a court of law would only grant a *mandamus* for admission to enable him to try his right:

*King v. Coggan*, 6 East, 431.

And the trustee is in a still worse position now that the court is bound to take cognisance of the state of the trust. No doubt, where there are conflicting claims and titles, the lord was bound to admit all parties presenting themselves:

*Rea v. Lord of Manor of Hazham*, 5 Ad. & Ell. 559;  
*Garland v. Mead*, 24 L. T. Rep. N. S. 421; L. Rep. 6 Q. B. 441, at 448.

It is a very different case where the heir is clearly not entitled, and someone else claims to be, but does not come forward:

*Garland v. Mead*, *Ibid.*;

*Reg. v. Garland*, 22 L. T. Rep. N. S. 160; L. Rep. 5 Q. B. 269.

[PEARSON, J.—What is the effect of sect. 30 of the Conveyancing Act 1881?] The last trustee died in March 1880, so that that section does not apply. Before he can enforce admission a claimant must show a *prima facie* title, either through surrender, devise, or succession. Even if the present claimant could insist on being admitted, admission of itself operates nothing, without the *substratum* of a prior good title:

*Scriven on Copyholds*, p. 127, 6th edit.;

*Watkins*, p. 342, note (2);

*Zouch v. Forre*, 7 East, 186;

*Anon.*, *Lofft's K. B. Rep.* 390.

Claimants have often been admitted, merely in order that the question of their right might be tried; e.g., *King v. Coggan*. The last person on the roll was Henry King; and if we were pursuing the beneficial interest, his son would probably have a better title than Janet Hawkins. [*Elton*.—That has nothing to do with the case, but we will add him if necessary.] It is not as if there was an admitted trustee at the time of the failure of the trust; it is not so, and it is a mere case of *bona vacantia*. Of course if there were trusts subsisting it would be another thing:

*Weaver v. Maule*, 2 B. & My. 97.

So far as there is any legal estate in copyholds it is in Henry King's son and heir:

*Paterson v. Paterson*, 14 L. T. Rep. N. S. 320; L. Rep. 2 Eq. 31;

*Doe v. Vernon*, 7 East, 8.

The claimant has, in fact, no equity, no legal right, and no merits, nor can she show any consideration in the shape of trouble or duty to be performed.

*Elton* and *J. E. Raven* for the customary heiress.—*King v. Coggan* is a clear authority in our favour. The lord really relies on a kind of equitable escheat, which does not exist. If the testatrix had left heirs they would be entitled to be admitted, as against the lord: our title is even better than theirs. The early statutes of mortmain provided that a forfeiture should accrue to the lord, and ultimately to the crown. The later statutes, 23 Hen. 8, c. 10, and 9 Geo. 2, c. 36, simply declare the disposition void:

*Corbyn v. French*, 4 Ves. 434, note.

Escheat only applies to legal estates:

*Attorney-General v. Sands, Hardres*, 488.

The broad principle, laid down by Blackstone (vol. ii. 288, 4th edit.), is that if a trust fails the trustee holds to his own use:

*Burgess v. Wheate* (ubi sup.);

*Onslow v. Wallace*, 1 M. & G. 506.

They referred to Coke's *Compleat Copyholder*, p. 93.

*Wolstenholme*, for the widow of W. Hawkins.—There is no escheat, and I am entitled to free bench. *King v. Coggan* shows that the customary heiress has at least a legal right to be admitted, and that is enough, unless there is an equity to restrain it. But she has an equitable right too. Before 4 & 5 Will. 4, c. 104, if a trustee of copyholds died without an heir, the lord took; this was remedied by that Act. If, however, in the present case the lord of the manor is right, the legislature then passed over, with their eyes open, the equal injustice that the lord should take when a *cestui que trust* dies without an heir. There was no admission according to the tenor of the trusts, though the prayer was to that effect. The admittance was "according to the custom of the manor."

*Cookson*, Q.C., in reply.—The trustees originally appointed by the court could not pass on the duties. We could have refused admittance to Hawkins. [PEARSON, J.—Suppose the court had appointed new trustees to succeed H. King, would not Hawkins have had to be admitted and surrender to them?] Perhaps, for the mere purposes of devolution of title. The form of admittance always follows the form of surrender. He referred to *Scriven*, p. 54.

PEARSON, J.—This case is said to be a new case in the year 1884, and I am told that in the year 1825 a writer whom we all respect said it was then an open question. The writers who have followed that writer since that time perpetuate that remark, and say that it is still an open question. It seems to me that, upon the same ground, every case that has not been pointedly decided, either in this court or in some other court, must be held to be an open question; but beyond that it seems to me really the question is not an open question, but has been decided at all events certainly, if not quite one hundred years ago, something like one hundred years ago. The case is shortly this. [His Lordship stated the facts, down to and including the terms of the surrender and admittance, and continued:] That reference to the will was put in in consequence of the trustees having been appointed by the order of the court, and if it was a surrender to the use of those persons as trustees of that will, I am at a loss to understand how it would in any way diminish any rights that might accrue to them as trustees of the will. Whatever right they would get under the will and as being trustees of the will, whether it is the right that is now claimed on behalf of the representative of one of those trustees or not, it seems to me that they were admitted to the full benefit of all the rights that accrued to them, whether they came to them upon the express trusts of the will, or whether they came to them by virtue of the law upon the failure of those trusts. The question really and truly, if this were freehold property, would be beyond all dispute. However, those trustees died, Mr. Henry King being the survivor of them; and by a codicil to his will he devised all the trust estates to his brother Charles

King and his friend William Hawkins. That codicil was dated in 1877. Charles King and William Hawkins were not admitted. Charles King died in January 1880. William Hawkins died in March of the same year. Neither of them was admitted. William Hawkins, having died at that time, made a will; but there was no devise whatever of trust estates, and he left his daughter Janet Hawkins, who was his customary heiress according to the custom of the manor of which these copyhold premises are held. At the time when William Hawkins died in March 1880, the tenant for life was still alive. She survived until 1883; and it is perfectly plain between the death of William Hawkins in 1880 and the death of Mrs. Barnard in 1883, that the trust in her favour was subsisting, and that she would have had a right to have some person admitted to those copyholds to act as trustee or trustees for her, for it became immaterial really during her lifetime whether any person should be admitted or not. The lord of the manor might, if he pleased, during the interval between the death of Henry King and the present time, have required some person to come in and be admitted, but he did not do so. The first point that is really raised, which I will dispose of, if I have not already disposed of it, is that if any person has the right to be admitted at the present moment it is the heir of Henry King, who was the last of the two trustees appointed by the court, and the survivor, therefore, of those persons who were admitted. But, inasmuch as Henry King actually devised his trust to somebody else, as the brother of William Hawkins had a right to be admitted on the devise, I am at a loss to see what possible right there can be in the heir of Henry King to have anything whatever to do with these trust estates. I have really only to consider whether or not Janet Hawkins is, at the present moment, entitled to be admitted, and to say whether she is entitled to be admitted, because it is perfectly plain that, sitting here, I cannot order a writ of *mandamus* to issue to the lord to admit her. The parties have chosen to bring this special case here to have their rights determined on the special case, and they have brought it in a court which has no right whatever to issue a *mandamus* to compel the lord to admit. The only thing I can determine is, whether or not, according to my conception and understanding of the law, Janet Hawkins is at the present moment entitled to be admitted.

The question is raised in two ways. First of all, has she a right or not, at law, to be admitted? and secondly, if she were admitted, would she have any right to receive the profits of these copyhold hereditaments? What is said is this; even assuming, according to law, she might have a bare legal right to claim admittance, that is a bare legal right which never could be enforced against the lord of the manor, because, if she were admitted, she would have no right to profits as against the lord, and she would be, as suggested, a trustee for the lord; and if that were so, it would be a piece of folly to order the lord to admit her. It is said, therefore, that this court, or any court, would never on any consideration order the lord to admit her, coming to the conclusion that if she were admitted, she must be a trustee for the lord, and that if she was not a trustee for the lord, I presume the lord would have the right to eject her. Now

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the first question, which I put very early in the case to Mr Cookson, seems to me still, after hearing the argument on both sides, to be practically conclusive in this case. I put it to Mr. Cookson, if, in a case of this kind, there were trustees upon the court-rolls at the time when the trusts came to an end, whether the lord of the manor could disturb them? Certainly I have got no very confident answer to that question; and, to my mind, the only answer to the question can by possibility be that the lord could not disturb them. The Lord Keeper, who gave judgment in that case of *Burgess v. Wheate*, as to the law of which there is no doubt now, says, in the year 1759: "I think from these authorities it is as well founded as any position in law, that the law does not regard the tenant's want of title as giving the lord any claim to escheat;" and, if that be so, I cannot understand what possible right the lord has to inquire into anything but the legal right to be admitted of the person who applies to him for admittance. As I understand the law of escheat, as laid down here by Lord Keeper Henley, and as I understand the law has always been laid down, the right of escheat depends upon the want of a tenant, and as long as there is a tenant, or a person who of course has a right to be admitted as a tenant, the right of escheat does not arise. If I were to say that the right of escheat arose because the trusts upon which the person admitted would have to hold were come to an end, I must then go further still, and say, that in all cases it is the business and duty and privilege of the lord of the manor to inquire into the equitable title of the person admitting him, and if he found the person so admitting did not hold of himself, to say under those circumstances, You had no right to be admitted, and I have the right to prevent your claiming any admittance at all. Certainly, there never has been any law of this court laid down to that effect; and, to my mind, the cases are directly opposed to anything of the sort. That very question, as I understand the controversy, arose in the case of *King v. Coggan*, which was decided unfavourably to the plaintiff in this case. The case of *The King v. Coggan* is very properly said to have been a case supplementary to the case of *Williams v. Lord Lonsdale*. It arose with regard to the same will; it arose, as far as I can collect, with regard to the same premises with which the question had been construed in the case of *Williams v. Lord Lonsdale*. In the case of *Williams v. Lord Lonsdale*, the tenant who had the legal right to be admitted to the copyholds came and asked the Court of Equity to order the lord to admit him. The court said: "We have nothing to do with it; you say you have a legal title. Go to the court of law and get your legal title enforced as you best may; there can be no equity whatever in your case, and we decline to interfere at all in the matter." In the other case the tenant came to the court of law and asked for a *mandamus*, and the answer made by counsel for the lord was this: "There is no equity whatever on behalf of this person to be admitted, because he is coming really in his right as a trustee when all the trusts have failed, and asking to be admitted for his own benefit." Upon which Lord Ellenborough said: "We have nothing whatever to do with the trusts here, he has got the legal right, and, having the legal right, he ought to be admitted." Well then it is said that,

inasmuch as the law in the case of *The Attorney-General v. The Duke of Leeds* was decided before the Act had been passed, passed no doubt to remedy the grievance inflicted upon the *cestuis que trust* in that case by the narrow legal decision to which the court felt itself bound to come, and by which the court decided that where the trustee died without heirs the lord was entitled to escheat, it must rule this case; and I must therefore follow that case and say that, inasmuch as where the trustee died without heirs the lord had the right to the escheat, so on the same parallel reasoning here, where the trustee who has been admitted out-lives his trust, and all the *cestuis que trust* vanish, the lord has the same right to an escheat then. It seems to me to be reasoning which I cannot follow, and I draw a contrary conclusion from the case, and say that if, where the trustee died without heirs, the lord had a right at law to escheat because he knew nothing of the trusts, so in the same way here where the *cestuis que trust* vanish, and the trustee is still a tenant upon the court-rolls, the trustee has a right to hold as against the lord, because the lord cannot interfere with the trusts or ask after the trusts in any way whatever. To my mind the rule of law is a very plain and simple one. The rule is laid down in 1759 by the lord keeper. The law does not regard the tenant's want of title as giving the lord any claim by escheat. The person who comes here to ask to be admitted as a tenant on the court-rolls is the customary heiress of the devisee of the last surviving trustee. At law, I apprehend that person has a perfectly good right to be admitted, and I can certainly see no equity whatever on the lord's side why I should interfere in his favour, as under other circumstances there would have been no equity on which I could interfere on behalf of the trustee. I simply follow, therefore, what I conceive to be the rule of law in this case, and I decline to deprive the customary heir of the devisee of the surviving trustee of the benefit which, by the chapter of accidents, has devolved upon her. I must, therefore, declare in this case that Miss Hawkins, as customary heiress of W. Hawkins, who was the devisee of Henry King, is entitled to be admitted to these copyhold premises and to hold them for her own benefit. That, as I understand, Mr. Wolstenholme, will give your client the right to free bench.

Wolstenholme.—Yes, my Lord.

Solicitors for the lord of the manor, *Lawrence, Plews, and Baker*, for *H. M. Williams*, Brighton.

Solicitors for other parties, *F. Hickson*, for *C. J. Daintrey*, Petworth.

Tuesday, June 24, 1884.

(Before PEARSON, J.)

Re PEARSON; OXLEY v. SCARTH. (a)

Trustee — Investment — Mortgage — Negligence — Liability.

*A trustee advanced trust moneys to a brickbuilding firm upon the security of a first mortgage of their premises, freehold and leasehold, and some of the plant. In so doing he acted upon the advice of his solicitor, and upon a favourable report and*

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

valuation made by a respectable firm of architects and surveyors. A bank of good standing, moreover, consented to postpone a charge of theirs to his mortgage.

The mortgagors failed three years afterwards, whereby their lease of that part of the property upon which was most of the clay and shale necessary for the carrying on of the business, became forfeited. The remainder of the property proved unsaleable, and rapidly went to ruin.

An action was subsequently brought by the cestuis que trust to make the trustee liable for the loss sustained by them, and it appeared that the report and valuation proceeded, *ex facie*, in some respects upon faulty principles.

Held, nevertheless, applying the rule stated in *Re Godfrey; Godfrey v. Faulkner* (48 L. T. Rep. N. S. 853; 23 Ch. Div. 483), that the trustee had acted as a prudent man would have acted in dealing with his own property, and was therefore not liable.

In July 1870 Charlotte Pearson died, having by her will, after directing payment of her debts, &c., and bequeathing to J. W. Scarth, the defendant, a pecuniary legacy, proceeded to devise and bequeath all her personal and real estate to him, his heirs, executors, administrators, and assigns, upon the trusts therein mentioned, including a trust for investment "on real or Government security or securities in Great Britain, or on mortgage bonds, or on the debentures or preference or guaranteed stock or shares of any railway or other public company or companies incorporated or to be incorporated by Act of Parliament in Great Britain," and the testatrix appointed the defendant sole executor.

The defendant, who was a doctor practising in Leeds, got in the estate, paid the debts and legacy, and invested the residue as directed by the will.

In July, 1876, there being a sum of 2500*l.* cash, part of the trust estate, lying on deposit at a bank in Leeds, the defendant was requested by the persons at that time entitled to the income to invest the money so as to bring a higher rate of interest than had hitherto been the case.

The defendant thereupon caused inquiries for a suitable investment to be made, and was informed by his then solicitor, Mr Turner, that a mortgage might be had of certain brickworks belonging to Messrs. Harrison at Otley, which would afford a proper investment if the security was sufficient.

The defendant then instructed Messrs Wilson and Bailey, who were a firm of architects and surveyors, of good standing in Leeds, to examine the premises, and send him a report and valuation. The property proposed to be included in the mortgage consisted of: (1) a small piece of freehold land, about 2 or 3 acres, divided by the North Eastern Railway into nearly equal parts, connected by a bridge belonging to the railway company; (2) the brickworks and plant, situated on the part to the north of the line; (3) another small piece of freehold land, known as "Hammond's piece," 2265 square yards, adjoining the works, and separated from them only by the road which crossed the bridge; and (4) a piece of leasehold land known as "the Cambridge allotment," comprising about 8½ acres, and held on a fifty-years' lease, subject to a condition of for-

feiture in the event of Messrs. Harrison ceasing to carry on the business. The "Cambridge allotment" was about 250 yards from the works.

On the 22nd July 1876 Wilson and Bailey sent in the following report:

Central Market Buildings, Leeds, July 22, 1876. Dear Sir: We have carefully examined the land, buildings, and machinery at Messrs. J. and B. Harrison's brickworks, Otley, according to the accompanying schedule, and find the value of same to be five thousand pounds (5000*l.*), and consider you will be quite safe in lending 2500*l.* upon them. We remain, yours truly, Wilson and Bailey.

And we consider that the above property would realise by forced sale 4000*l.* any time within six years, and we think it would be advisable to have it examined at the end of that time, and in this valuation we have not added anything for the leasehold land. Wilson and Bailey.

Schedule. The contents of the land is given as stated by Messrs. Harrison, 8½ acres of leasehold land for fifty years, 2½ acres of freehold land on which the works stand, and the field on the other side of the railway, 2265 square yards of freehold land fronting the turnpike road, purchased for Mr. James Hammond; revolving pan and fixings, with sahlar; Hoffman's kiln, with slated roof and chimney; 16 horse engine; 40 horse boiler; shafting and belting, &c.; pair of heavy rollers and frame; No. 2 pug mills; No. 2 brick presses; well sinking, with pump and water pipes; siding to railway; wire tramway, with wood framing, &c.

It was stated that the paragraph beginning "and we consider" was added upon the defendant's solicitor asking Wilson and Bailey to reconsider the report excluding the leaseholds: This was done before the defendant saw the report.

A valuation in detail was also made and sent in. It omitted the leaseholds and some other of the items mentioned in the report, and estimated the total value of the property comprised in it at 5704*l.*, taking as a basis (in every instance but one) the cost price originally given by Messrs. Harrison, and then making deduction for wear and tear or depreciation.

On the 26th Sept. 1876 a mortgage was accordingly executed of the freehold and leasehold premises and plant. By the recitals to the mortgage it appeared, as the fact was, that the Midland Banking Company, who themselves had a charge on the premises for 1200*l.*, consented to postpone such charge to the defendant's mortgage, which accordingly was given priority.

Owing to circumstances which did not appear Messrs. Harrison's business did not prosper, and in 1879 they became insolvent. The lease of the Cambridge allotment thereupon became forfeited, and it being found impossible to sell the brickworks, the buildings and plant rapidly fell out of repair. The defendant, who had no funds to apply in maintenance of the concern, informed his cestuis que trust of the state of affairs, telling them that unless money was laid out upon the premises they would become valueless. No money, however, was forthcoming, and the whole concern went to ruin, the doors, windows, and such part of the plant as remained on the place, being broken, stolen, or spoilt by exposure. The total value at the time of the hearing of the action was stated to be between 500*l.* and 800*l.*, including the value of the land.

The present action was commenced by the cestuis que trust in Dec. 1882, asking for the administration of the estate, and that the investment of the 2500*l.* might be declared to be an improper one, and the defendant declared liable to make good the loss thereby occasioned to the trust estate.



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*Cookson*, Q.C. and *Eastwick* for the plaintiffs.—The money is gone, and the defendant must exculpate himself. It was an obviously improper investment. The security was far below the usual limit. He must have known it, or ought to have found out. The valuation was, on the face of it, untrustworthy, practically taking the mortgagor's own values as the basis :

*Ingle v. Partridge*, 34 Beav. 411.

[PEARSON, J.—I think the *onus probandi* is on the defendant.]

*Farwell* for the defendant.—I acted perfectly *bonâ fide*, and on the best advice I could get. A person in my position must take and rely upon expert advice: it would be absurd for him to set up his own judgment. [*Cookson*, Q.C. referred to *Hopgood v. Parkin*, 22 L. T. Rep. N. S. 772; L. Rep. 11 Eq. 74.] A trustee need not take more care than an ordinary prudent man would of his own property :

*Re Godfrey; Godfrey v. Faulkner*, 48 L. T. Rep. N. S. 853; 23 Ch. Div. 483;

*Speight v. Gaunt*, 48 L. T. Rep. N. S. 279; 22 Ch. Div. 727.

The "two-thirds" limit is not a hard and fast rule:

*Stretton v. Ashmall*, 3 Drewry, 9.

At any rate, the value need not be taken as on a forced sale at a time of great depression of trade. The Midland Bank evidently did not think badly of the security.

*Cookson*, Q.C. and *Eastwick*, *contra*.—We are as innocent as the defendant, and even more so. A trustee is not justified in relying on experts in such matters as this. The decision in *Speight v. Gaunt* was that reliance might be placed in a broker in ordinary brokerage transactions, because all men must do so in dealing with securities. A trustee would not be justified in lending money on a second mortgage merely because his solicitor told him it would be all right. [*Farwell*.—Everyone is presumed to know the law.] Nor in relying on a broker for advice as to investments. At any rate, the defendant ought to have made inquiry himself. Even if the lease of the "Cambridge allotment" had not been forfeited, the clay there could not have been worked long at a profit, owing to the distance from the kiln.

PEARSON, J.—In the year 1876 Dr. Scarth, the defendant, was in the unfortunate position which many people occupy, that of being a trustee. [His Lordship stated the will and the plaintiffs' interest as beneficiaries, and continued:] It is now sought to make Scarth liable for a sum of 2500*l.*, which, in Sept. 1876, he lent to Messrs. Harrison on a security, which is now admittedly absolutely deficient—for whether it is worth 700*l.* or 800*l.*, or barely 500*l.*, it is confessedly grossly insufficient. The question which I have to decide, therefore, is whether Scarth has so conducted himself that he must be held liable for not having taken proper steps to get a good security. [His Lordship stated shortly the facts above detailed, mentioning that Wilson and Bailey had been shown to be architects and surveyors of respectable position, and continued:] It is now said that Scarth must be held liable to make good the 2500*l.*, because he took a security which he ought to have known was insufficient. There is no doubt a difference of opinion as to what makes a man liable under such circumstances, and the

dicta in different cases are somewhat difficult to reconcile. I incline to agree with Bacon, V.C. in his opinion expressed in *Re Godfrey, Godfrey v. Faulkner*, that in considering questions as to a trustee's liability you are to see whether he has acted with ordinary caution and prudence in the way in which an ordinary cautious and prudent man would act. I do not desire to depart from that rule, nor to say that wherever, in a case of a mortgage, an ordinary person would advance more than the practice of the court would permit, a trustee also is to be at liberty to exceed the limit. But, where the usual limit has not been exceeded, then, when you have to consider whether or not the trustee is liable, the Vice-Chancellor's rule holds good. It is said, however, that Scarth failed to satisfy the rule, and the question is, did he, or did he not? For trusting his solicitors and valuers no fault can be found with him, if that were all; but it is said that when he knew what the property was, as he did, and when Wilson and Bailey's valuation came and was read, his own ordinary sense and intelligence ought to have told him that the security was not a proper or sufficient one. The report is dated Leeds, 22nd July 1876. [His Lordship read it and the schedule.] Then when you look at the items of the valuation, which Scarth admits that he saw, you see that it is made out thus: "The land on which the works stand is freehold and cost" so much. The siding "cost" so much—240*l.*; the Hoffman's kiln "cost" so much—1500*l.*, and so on, the total amounting to 5704*l.*, of which only one item is stated as of its then value, the others being all put down at cost price. There are other items in the report which are omitted from this detailed valuation, as is also the leasehold land, and before Scarth saw the report Wilson and Bailey added a postscript to it. [His Lordship read the paragraph beginning "And we consider."] Therefore what Scarth relied upon in lending the money was the valuation of the freehold property alone, without taking into account the value of the leasehold property, if, indeed, it was worth anything at all. It is said, however, that there were divers good reasons why Scarth should have refused to accept the security. In the first place, he saw that the valuation went upon the basis of cost price, which, as he must have known, was a wrong principle. Now, if I had to express an opinion on that, I myself should say it was a wrong principle. But the question is, was Scarth in fault, employing skilled persons of good reputation as he did, and ought he to have determined at once that their report was wrong and could not be accepted because it proceeded on that principle of valuation? It seems to me that, if he had thought anything about it, he would have also seen that they had in their report deducted 700*l.* from the amount of their valuation, and had also considered the contingency of a forced sale, putting the value in such a case at 4000*l.*; so that, at all events, they assure him that, even if such a contingency were to arise, the property would be still worth 1500*l.* more than the sum he was about to lend. Then, in the next place, it is said that he ought to have considered this, that the business was a brick-making business altogether, all brick; without that the business was worth nothing, and that he ought to have borne in mind the terms upon which the Cambridge allotment was held, remembering that the lease might be

broken by the default of Messrs. Harrison, in which case there would be left only the small pieces of freehold land and the buildings and machinery. But Wilson and Bailey had reported that, excluding the leaseholds altogether, he would be able to get enough, even by a forced sale, to bring him safe through. I think, therefore, that he was not bound to consider that question about the possible forfeiture of the lease, having been told that without the lease the security was ample, and I cannot see that he was not justified in what he did. Then as to the mortgage. It seems to me that there is still more to exonerate him from the charge of carelessness. The parties to the mortgage deed were Hartley (a prior mortgagee), the Midland Banking Company, Messrs. Harrison and Scarth. The deed recites that under two prior mortgages two sums of 1200*l.* and 500*l.* were still due to Hartley, and that the Midland Banking Company, of whom Messrs. Harrison were clients, had taken a charge upon the premises, subject to these two mortgages, to secure Harrisons' current account to the extent of 1200*l.* Then the two mortgages to Hartley are expressed to be paid off, and the defendant takes a first mortgage to secure this 2500*l.* There is therefore nothing in the transaction about the mortgage to show that the security was not sufficient. On the contrary, since before the defendant had anything to do with the property it had been treated as sufficient security for 2900*l.*, he might surely lend 2500*l.* upon it, the bank consenting that his security should have precedence of theirs. In all this I cannot see that Scarth acted with less prudence than an ordinary man of the world, and if having taken all these precautions the affair has turned out badly, it is not the duty of the court to visit him with a penalty. Mr. Cookson has pressed upon me that it is a case of two innocent parties; and contends that, though the defendant has been guilty of nothing more than negligence, yet, at all events, the *cestuis que trust* not having had to intervene in any way, are not to blame. So far I agree with him. But I think that trustees are sufficiently hardly dealt with already. I think it would be a bad precedent if, when a trustee has taken the same pains with regard to an investment of trust property as if it were his own, being carefully advised by persons who are in no way supposed to have been acting fraudulently or wilfully leading him into error, without having shut his eyes to anything which he ought to have seen—if, in such a case, because under circumstances which occur the security turns out bad, he were to be held responsible for the loss. It must not be forgotten that if the brick factory had not failed, but Messrs. Harrison had continued to carry on their business, the security would at this moment be a sufficient security, and when it is said that there was not sufficient brick-making material except upon the leasehold land, it must be remembered that no substantial difficulty had been found in working that ground during the three years after the mortgage, and I consider that Scarth was therefore not bound to contemplate all possible contingencies, it being admitted that there was sufficient material on the leasehold plot for the making of bricks, and that it ceased to be available, not because the "Cambridge allotment" was 250 yards from the kiln, but because, owing to trade depression, or

otherwise, Messrs. Harrison failed. I hold, therefore, that Dr. Scarth is not liable to make good the money, and I dismiss the action, but without costs. Dr. Scarth may take his costs out of the estate, as trustee.

*Action dismissed, without costs. Defendant's costs out of estate.*

Solicitors: H. E. Brown; H. F. Wood, for Turner and Hewson, Leeds.

Thursday, July 17, 1884.

(Before PEARSON, J.)

Re THE KNATCHBULL ESTATE. (a)

*Tenant for life—Remaindermen—Improvements—Drainage—Terminable charges—Charge redeemable by instalments—Application of capital moneys—Improvement of Land Act 1864 (27 & 28 Vict. c. 114), ss. 27, 49, 66—Settled Land Act 1882 (45 & 46 Vict. c. 38), ss. 21 (ii.), 25, 26 (2), 33, 53.*

*The words "incumbrances affecting the inheritance" in sect. 21 (ii.) of the Settled Land Act 1882 do not include terminable charges.*

*Charges under the Land Improvement Act 1864, for drainage improvements made before the passing of the Settled Land Act, cannot therefore be paid out of capital under that section.*

*Nor can capital be so applied even where the improvements effected have always been such as would now be sanctioned under sects. 25 and 26 of the Settled Land Act, these sections being prospective and not retrospective.*

THIS was a summons taken out on the 5th June 1884, by Sir Wyndham Knatchbull, the tenant for life of a settled estate known as the "Knatchbull Estate," Kent, asking "that it might be declared that the trustees of the settlement might be directed, out of the capital money in their hands, and out of the proceeds by sale of lands subject to the said settlement, and about to be sold under the powers of the Settled Land Act 1882, to pay off and discharge certain incumbrances affecting the inheritance of the settled lands, namely, certain land drainage improvement charges."

The charges in question were created under the Improvement of Land Act 1864 before the Settled Land Act 1882 came into operation, and were repayable with interest by annual instalments.

The material sections of the Improvement of Land Act 1864 were as follows:

27. Every order operating under this Act alone to sanction any improvement . . . and shall be called a provisional order, and shall, subject to the following section hereof, create in favour of the landowner named therein the title to an absolute charge on the completion of the sanctioned improvements, which title such landowner may assign, either absolutely or by way of security, to any person; and such assignment may be made by indorsement on the provisional order.

49. When the commissioners are satisfied that the improvements sanctioned by them, or some part thereof, have been properly executed, either according to the specifications and plans or drawings approved of by them, or with such deviations therefrom as in their judgment will not diminish the permanent benefit accruing from such improvements to the lands wherein they have been made, they shall execute a charge under their hands and seal upon the inheritance or fee of the lands comprised in the provisional or other sanctioning order, or some

(a) Reported by H. G. WILLIAMS, Esq., Barrister-at-Law.

sufficient part thereof, for the sum by the same order expressed to be chargeable in respect of such improvements, if all the said improvements have been completed, or for a proportional part of such sum if a part only of the said improvements has been executed, together, in either case, with the interest by the same order expressed, and with the amount (if any) which shall have been paid in respect of the purchase of the adjoining lands, or of any easement, authority, or right in, through, over, or affecting adjoining lands, with interest thereon at the like rate.

66. Every landowner on whose land a charge shall have been made under this Act, and every succeeding tenant for life, tenant in tail, and every person having a limited interest in the land so charged, shall, as between himself and the persons in remainder or reversion, be bound to pay the yearly or other periodical payments of such charge which shall become payable during the continuance of his interest; and in case he be in the actual occupation or entitled to an apportioned part of the rents and profits of such land up to the time of the termination of his interest he shall also be bound to pay an apportioned part of the yearly rent or other periodical payment of such charge which shall become due next after the termination of his interest, proportional to the time which elapsed between the day for the previous payment and the day of such termination. Provided that no person becoming entitled in possession to any estate or interest in the land shall be liable, as between himself and the persons entitled to the rentcharge, to pay any arrears of the charge remaining unpaid at the time of his becoming so entitled in possession beyond the amount of two years' payment of such charge: Provided also that the amount paid by any person in respect of such arrears, and any costs occasioned by nonpayment thereof, shall be a debt from the person who, in the first instance ought to have paid the same, or from his estate, to the person who paid the same, and shall be recoverable accordingly.

The form of charge (schedule B.) was as follows: "The Inclosure Commissioners for England and Wales, in pursuance of the Improvement of Land Act 1864, do by this absolute order under their hands and seal charge the inheritance or fee of the lands mentioned in the schedule hereto with the payment to of the yearly sum of l. for the term of years, and being a proportionate repayment according to the table annexed of the capital sum of l. with interest at per cent. per annum, the first payment to be made on the day of "

The amount due in respect of principal and interest was about 16,000*l.*, and the annual instalments amounted to about 1200*l.* The earliest charge would expire, upon full payment, in 1898, the latest in 1914.

The trustees did not object to the proposed application of capital if the court should be of opinion that it might be authorised; but they contended that it was not within the scope of the Act.

The following sections of the Settled Land Act 1882 were referred to, viz.:

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another, or others, of the following modes (namely):

(i.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, crown rent, chief rent, or quit rent, charged on, or payment out of the settled land.

25. Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for

securing the full benefit of any of those works or purposes (namely):

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses.

26 (2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work, or operation, comprised in the improvement, on

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor, nominated by the trustees and approved by the commissioners, or by the court, which certificate shall be conclusive, as aforesaid; or on

(iii.) An order of the court directing or authorising the trustees to so apply a specified portion of the capital money.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

The remaindermen were not represented.

*Coxens-Hardy*, Q.C. and *Lake* for the tenant for life.—The charges are "incumbrances affecting the inheritance." (Settled Land Act 1882, sect. 21 (ii.); Improvement of Land Act 1864, s. 49.) [*PEARSON*, J.—The Settled Land Act there mentions "rentcharge in lieu of tithe" and no other; does not that exclude other rentcharges? and the other instances are all permanent charges; does not that exclude a terminable charge?] No doubt that may be contended (*Wolstenholme* on the Settled Land Act 1882, p. 34); but a contrary opinion has been expressed: (*Clerke* on Settled Land Act.) Sect. 53 of that Act is not really fatal to us, for if so, no such improvements could be paid for out of capital, since it must always be for the benefit of other parties that the tenant for life should pay. The form of the charges in this particular case shows clearly that they affect the inheritance. At any rate the improvements have been such as the court will sanction (Settled Land Act, s. 26 (2), iii.): and we have the proper certificates: (*Ib.* i. ii.) If the work had not yet been done we could insist on capital money being laid out in exactly the same way. [*PEARSON*, J.—That section is not retrospective.] The scheme of the Settled Land Act is to make the tenant for life master of the estate; and to throw upon the inheritance drainage and other charges, which, but for the Act, would fall on him. Sect. 33 is in our favour.

*Cookson*, Q.C. and *Church* for the trustees.—These are pre-existing charges, and the onus is on the tenant for life to show that, having incurred them voluntarily, he is not still liable for them. A retrospective operation must not be given to the Settled Land Act if it can be helped. Sect. 66 of the Improvement of Land Act 1864 is conclusive that these charges must be kept down by

the tenant for life. [PEARSON, J.—Suppose there are more than two years' arrears at the death of one tenant for life, what then?] Probably the commissioners could sell; that provision as to arrears is only material as between successive tenants. As to the argument, on the ground that these are proper improvements within the Settled Land Act, it is obvious that the provisions referred to are prospective.

*Cozens-Hardy*, Q.C. replied.

PEARSON, J.—I am very much afraid I cannot make the order I am asked to make on this summons. It seems to me to be a *casus omissus* from the Act altogether, and if that be so, as I have merely a statutory jurisdiction under this Act, I cannot supply the deficiency. The case is this: Sir Wyndham Knatchbull, being tenant for life of large estates, borrowed money under the Act of 27 & 28 Vict. from the Improvement Commissioners, in order to effect drainage improvements upon the estate. Everybody admits that those drainage improvements were properly done; everything connected with those drainage improvements was carried through in conformity with the Act then in force—the Act of 1864. Under that Act the scheme was this: The moneys so borrowed from the Improvement Commissioners for the purpose of drainage improvements were to be repaid to them with interest in a certain series of years, so that, if there was one tenant for life, or successive tenants for life, the tenant for life, or the tenants for life, each in their turn paid their proportion of those improvements, the first tenant for life getting the first benefit of the Act, and whilst the improvements were new paying the larger sum, the tenants for life in remainder paying smaller sums as the payments became reduced in consequence of a portion of the capital being paid off from year to year. I understand the sum annually paid at the present moment by Sir Wyndham Knatchbull, in order to repay the capital and to pay the interest, is no less than 1200*l.* a year, and the sum which would be necessary, in order to redeem this charge upon the estate, would be 16,000*l.* Sir Wyndham Knatchbull is desirous, as tenant for life, of selling a certain portion of the settled estates, and he says, and very reasonably, "I am desirous of paying off this charge upon the settled estates, because, if I sell the estates subject to the charge, the purchaser no doubt will value them as if they were perpetual charges, and deduct therefore from the purchase money which he is willing to give an unfair proportion in respect of it." I think it is very likely it would be so. The conclusion at which I might possibly arrive is that which I have thrown out in argument, that, if that be so, the question may arise as to whether when there is a charge of this kind (a very peculiar thing, construed by the Act of 1864), having regard to sect. 53 of the Settled Land Act, this is a case in which the tenant for life can properly sell. On that I give no opinion. I cannot help saying that, having regard to the peculiar phraseology of that section, upon which no construction has yet been placed by any competent authority, a question of that kind may arise; but whenever the question does arise, I hope the court before whom it comes will then be able to find some satisfactory mode of determining it. The argument in favour of the tenant for life, as

regards the payment off at the present moment of this charge upon the inheritance, turns very shortly upon one or two sections of the Settled Land Act. [His Lordship read sect. 21 (ii).] It is quite plain that this charge does not come within any of those that are subsequently mentioned in that section. But it is said that this is an incumbrance affecting the inheritance of the settled land, and that, inasmuch as the words are general, this authorises the payment off of these incumbrances. But, in answer to that, it occurs to me that the balance is greatly in favour of saying that it does not come within those words. I think the words "incumbrances affecting the inheritance of the settled land" must be taken to have been used in their ordinary sense, and not as meaning incumbrances with incidents such as these are, which require the tenant for life, if he lives sufficiently long, himself to pay off the whole of this charge; and although in one sense this is an incumbrance affecting the inheritance, so far as it leads the commissioners to advance the money for a charge upon the inheritance, it is in numbers and numbers of cases a charge which really to all intents and purposes rather affects the tenant for life than the tenant in remainder. It is plain that in a great many cases (and notably in the case before me, where I am told the tenant for life is only forty years of age, and there are only fifteen years more to run during which this charge will be paid), it is a charge or incumbrance which affects the estates of the tenant for life rather than the estates of the tenant in remainder, and I cannot help thinking that the words "incumbrances affecting the inheritance" mean, in the ordinary sense, incumbrances, such as mortgages, portions, &c. No one would contend that, under these words, a jointure rentcharge could be bought up. No one could contend that the trustees would be entitled to invest any part of the capital money in relieving the estate of such a charge as that; and when you come to look at the incumbrances which are specifically mentioned, and which in ordinary language would not be held to be included in "incumbrances," all those are perpetual, and I think that points the same way, and seems to show that the word incumbrances here is not used to apply to a specific incumbrance of this kind with incidents which affect the tenant for life far more than they affect those in remainder, and that I should not be justified therefore in deciding that this should be paid off under those general words in the preceding part of this section. Then it is argued with very great force that, under the 25th and 26th sections of the Settled Land Act, if the tenant for life had not made the drainage improvements, and were to come to the court now and ask the court to sanction these improvements being made out of capital money, he would be entitled to have them so paid: and it is said, therefore, I ought to consider that the Act would have in this respect a retrospective action, and that inasmuch as this might be done now, I ought to consider it as if it were done now, and to order the balance that is due with respect to these improvements to be paid out of capital moneys. In the first place, I must say that, as Mr. Cookson very properly pointed out, the language of the 26th section was entirely prospective, and not retrospective; and I should have great difficulty in that respect in applying that section to the present

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application. But, in the next place, I cannot help thinking that when this Act passed the tenant for life was tenant for life in this respect, that he was only tenant for life of these estates, subject to this particular charge affecting his life interest, and that it was not the intention of this Act, giving the tenant for life all the powers that it does, to relieve the tenant for life personally from liabilities which he took upon himself; and in that view I cannot hold that this section of this Act is retrospective, and I must decide, therefore, against this application. The costs as between solicitor and client may be paid by the trustees out of the estate.

*Cookson, Q.C.* asked for a declaration negating the application in terms, for the benefit of the trustees on future occasions.

*PEARSON, J.*—Yes. I should be glad if the case were taken to a higher tribunal; for, to my mind, it would be a great advantage if all these cases under the Settled Land Act were heard by the Court of Appeal in the first instance, and so secure some uniformity of authoritative decisions upon the various points. In some other similar case I may give a similar decision, which might be reversed.

Solicitors for tenant for life, *Lake, Beaumont, and Lake.*

Solicitor for the trustees, *H. J. Bell.*

#### QUEEN'S BENCH DIVISION.

July 4 and 5, 1884.

(Before *MATHEW* and *DAY, JJ.*)

THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY v. THE DENABY MAIN COLLIERY COMPANY. (a)

*Railway company*—Inequality of charges—Undue preference—"Agency commission" for developing particular trade—Equal rates for each of a "group" of places—"Passing only over the same portion of the line of railway"—The Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), s. 90—The Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), ss. 2, 6.

By the 90th section of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) it is provided that it shall be lawful for railway companies from time to time to alter or vary the tolls by their special Acts authorised to be taken either upon the whole or upon any particular portions of their railways as they shall think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway.

A railway company having induced a steamship company to coal their vessels at the port of G., on the understanding that they should be supplied with coal at a rate below the current price, made

B. an allowance of 8d. per ton on the rates for carriage of coal from the South Yorkshire coal-field to G. in respect of all coal shipped on board the said vessels, giving no public or other notice that they were doing so, or would make a similar allowance to other persons under similar circumstances.

The railway company also bona fide, and not with the object of giving a preferential rate of carriage, in consideration of B. providing vessels for the purpose of developing the coal trade between G. and English ports south of Harwich, and running the risk of the said traffic, allowed B. an "agency commission" of 6d. per ton on all coal shipped by him from G. by coastwise vessel to English ports south of Harwich, but no opportunity was afforded to the public in general or other persons sending coal by their railway to G. of earning the like payment by the like services.

Held, in an action by the railway company against a South Yorkshire colliery company sending coals by their railway to G. for balance of carriage account, the colliery company counter-claiming for overcharges, that both the allowance and the "agency commission" were breaches of the provisions of the 90th section, and that the colliery company were entitled to recover the charges made to them in excess of the charge made to B. for similar services.

The railway company also allowed B. a rebate of 2 per cent. on his net debit in respect of all the coal carried for him.

Held, that notwithstanding that the railway company were allowed to take B.'s empty waggons to any colliery with which he dealt, and so carried his coals more economically than those of the colliery seeking to recover overcharges, yet, as the railway company did not prove that the allowance adequately represented the saving, it was a breach of the 90th section.

The railway company charged the same rate for the carriage of coal to G. from each of forty-eight collieries grouped along a section of their line fifteen miles in length, of which the colliery seeking to recover overcharges was nearest G.

Held, that notwithstanding that the termini of the transit were different in the case of each colliery, the case came within the meaning of the words "passing only over the same line of railway," and that the charging of the same rates to the whole group was a breach of the section.

By the 2nd section of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) it is provided that no railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and by the 6th section, that no proceeding shall be taken for any violation or contravention of the above enactment except in the manner in the Act provided.

Held, that notwithstanding that the colliery company had refused to pay the alleged overcharges, their counter-claim to retain them was, in substance, an action for a contravention of the 2nd section of the Railway and Canal Traffic Act 1854,

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*which by reason of the provisions of the 6th section of the Act will not lie, the case of Evershed v. The London and North-Western Railway Company (36 L. T. Rep. N. S. 12; 2 Q. B. Div. 254; 3 Q. B. Div. 134; 3 App. Cas. 1029) being no authority to the contrary.*

THIS was an action brought by the Manchester, Sheffield, and Lincolnshire Railway Company against the Denaby Main Colliery Company for a balance of carriage account, the defendant company counter-claiming for overcharges from the 14th Dec. 1874 to the 14th Dec. 1880, being a period of six years before the commencement of the action, and for damages.

The action was referred, with power to the arbitrator to state a special case, which, at the request of both parties, the arbitrator accordingly did, the following being the material facts stated therein:—

The defendants are colliery owners, carrying on their business at the Denaby Main Colliery near Doncaster.

It is the business of the defendants to raise and sell coals for delivery in different parts of the kingdom and abroad. They deal only in coals raised from their own mines. Their colliery is situated on the line of the plaintiffs' railway and connected with it by sidings. A large portion of their coal leaves their colliery by the plaintiffs' line only, or along the plaintiffs' line, and thence on to the various lines connected therewith. The defendants' colliery has no direct communication with any other line of railway except that of the plaintiffs. The defendants sell coal at (amongst other places) Great Grimsby, Goole, and Hull.

Amongst the customers of the defendants are Mr. Bannister and Messrs. Josse and Co., both of whom carry on business in a large way as coal merchants at Grimsby. Messrs. Josse and Co. also carry on business at Hull and Goole. They buy coal not only of the defendants, but of a large number of other owners of collieries both in the South Yorkshire coalfield and elsewhere. The plaintiffs' railway is the only railway leading from the South Yorkshire coalfield (in which the defendants' colliery is situated) to Grimsby.

The plaintiffs carry coal for Bannister and for Josse and Co. as well as for the defendants. The plaintiffs carry coal for the defendants, for Bannister, and for Josse and Co. from the Denaby Main Colliery to Grimsby for shipment there. Upon all the coals sold by the defendants to Bannister or to Josse and Co. and carried by the plaintiffs from Denaby Main Colliery to Grimsby (whether for shipment or for land sale at Grimsby as hereinafter mentioned), the carriage has been paid by Bannister or Josse and Co., as the case might be. Upon coal sold by the defendants to other customers (whether for such shipment or land sale) the carriage has been paid sometimes by the defendants and sometimes by the customers. From Feb. 1874 to Dec. 1876 the plaintiffs made to Bannister an allowance or rebate of 8d. per ton from the published rate of carriage in respect of all coal shipped by certain steamers known as the Hamburg-American steamers, under the following circumstances:

The Hamburg and American Steam Shipping Company had a line of steamers to the West Indies. The agents of the plaintiffs induced them to make Grimsby a calling place for their ships.

They were accustomed to use Welsh coal. It was ascertained by the plaintiffs that if the Hamburg Company could get the South Yorkshire coal at a reduction of 10d. or 1s. on the then current prices they would buy coal at Grimsby in place of the Welsh coal. To enable this to be done, and in the hope that the South Yorkshire coal might thus be introduced to the West Indian market, the plaintiffs agreed to make to Bannister an allowance of 8d. per ton upon the rates for carriage of South Yorkshire coal from any colliery in the South Yorkshire coalfield to Grimsby (including the Denaby Main Colliery Company) in respect of all coal shipped by the Hamburg-American steamers. They did in fact make to Bannister such allowance on all such coals so shipped, but there was no evidence to show from what particular collieries in the South Yorkshire coalfield such coal came. They gave no public or other notice that they were doing so, or that they would make similar allowances to other persons under similar circumstances.

There was no contract on the part of Bannister that any definite quantity should be so shipped, and the services performed by the plaintiffs in respect of such coal were identical with those performed by them in respect of any other coal shipped at Grimsby. They did in fact carry for the defendants between Feb. 1874 and Dec. 1876 large quantities of coal for shipment at Grimsby, in respect of which they charged and received the full rate (during one portion of the time of 3s. 8d., and during the residue of 3s. 4d. per ton.) The last-mentioned coals, except in so far as may appear in this paragraph, were carried under the same circumstances as the coals shipped by the Hamburg-American steamers. The allowance in question was not known to the defendants at the time it was made, nor for several years afterwards, and was made to Bannister only in respect of coal shipped on board the said steamers, and not in respect of any other coal carried by the plaintiffs for him for shipment at Grimsby. After Dec. 1876 the Hamburg-American steamers ceased to call at Grimsby, and the allowance thus came to an end.

The coal sent to Grimsby from the various South Yorkshire collieries was partly for shipment, partly for land sale at Grimsby. There were different rates for the carriage, according as coal was for shipment or for land sale. The several rates charged from time to time during the period covered by the action for the carriage of coal for shipment and for land sale respectively were: From Dec. 1874 to the 30th June 1876, for land sale 4s. 2d., for shipment 3s. 8d.; from the 1st July 1876 to July 1878, for land sale 4s. 2d., for shipment 3s. 4d.; from Aug. 1878 to June 1879, for land sale 3s. 10d., for shipment 3s. 4d.; from July 1879 to Dec. 1880, for land sale 3s. 10d., for shipment 3s. 1d. These charges were made to everyone for whom the plaintiffs carried coal from the South Yorkshire coalfields, except Bannister and Josse and Co. Many years ago the plaintiffs agreed with Bannister to charge him in respect of coal for land sale the same rates as in respect of coal for shipment. The shipment rate was at that time 3s. 8d., and during the whole period covered by the action Bannister continued to be charged at the rate of 3s. 8d. for land sale coal, thus giving him an allowance at one time of 6d. and afterwards of 2d. per ton.



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From July 1876 to July 1878 the plaintiffs made Josse an allowance of 4d. per ton upon the rates charged in respect of his land sale coal.

Land sale coal for persons other than Bannister and Josse and Co. has to be taken into the goods yard of the plaintiffs, and there placed upon sidings and kept until taken away by the consignee. Charges for the occupation of sidings are made by the plaintiffs after the trucks have remained two days upon the siding. Bannister and Josse and Co. have coal yards of their own in Grimsby town connected with the plaintiffs' line, and land sale coal for them was during the whole period covered by the action delivered directly into their yards, and upon such delivery the plaintiffs had nothing further to do with it. It was to the interest alike of Bannister and Josse and Co. and of the defendants to keep the trucks, in which coals are delivered at Grimsby, as short a time as possible, but the fact that Bannister and Josse and Co. had their own yards, enabled them to return the trucks consigned to them upon the whole more promptly than the defendants could. Bannister and Josse and Co., and not the colliery owner, paid the carriage upon all coal delivered at their respective yards. By reason of these matters it cost the plaintiffs less per ton to carry coals to Grimsby town for delivery to Bannister and Josse and Co. than for delivery there to the defendants. The plaintiffs did not show to the satisfaction of the arbitrator that the allowance of either 6d. or 2d. a ton on all coal carried to Grimsby for Bannister, or that of 4d. a ton on all coal carried to Grimsby for Josse and Co. was adequately represented by the saving to the plaintiffs. No calculation or estimate of the amount of the saving appears to have been made when the allowance was agreed upon, or at any other time. There was no difference in the amount so saved when the allowance to Bannister was 6d. and when it was 2d., nor has any reason been given why a different amount was fixed upon as the allowance to Josse and Co. The arrangement to make an allowance of this description to Bannister was made many years ago, upon the occasion of his establishing a yard of his own, into which the coal might be delivered. The allowance to Josse and Co. began in 1876. The reason for making it is not otherwise explained than that it was made "at their earnest solicitation."

During the whole of the period covered by the action, the plaintiffs have allowed to Bannister and to Josse and Co. a rebate of 2 per cent. upon their respective nett, debits in respect of coal traffic of every description (and whether in the plaintiffs' or in owners' waggons) carried for them. This allowance has not been made to anyone else.

The plaintiffs make no separate charge for the return of empty waggons. Both Bannister and Josse and Co. own a large number of waggons, and deal with many collieries. The defendants own a much larger number of waggons than either Bannister or Josse and Co., and a large quantity of the coal purchased by Bannister and Josse and Co. from the defendants was carried in the defendants' waggons. Both Bannister and Josse and Co. allow the plaintiffs to take any of their empty waggons to any colliery with which Bannister and Josse and Co. respectively deal to which it may suit the plaintiffs to send them, no matter from what colliery they came when loaded. The

plaintiffs cannot return the empty waggons of the defendants to any place other than the Denaby Main Colliery. The above statements apply both to land sale coal and to coal for shipment.

By reason of the matters above stated, the coal carried for Bannister and Josse and Co. during the period covered by the allowances aforesaid, taken as a whole and including the dealing with empty waggons, was carried more economically to the plaintiffs than coal carried for the defendants. The plaintiffs did not prove to the satisfaction of the arbitrator that the allowance of 2 per cent. upon the net debits was adequately represented by the saving to the plaintiffs, and there is no necessary relation between the two values.

Between July 1874 and March 1880 the plaintiffs allowed to Bannister 6d. per ton on all coal shipped by him from Grimsby to English ports south of Harwich. The circumstances under which this allowance was made are as follows:—There was little trade of this kind, and Bannister undertook to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic, and in consideration of his doing so, and in view of the anticipated advantage to the company by the increased tonnage to be carried over their line, the plaintiffs agreed to give him 6d. per ton upon the number of tons shipped. This was equivalent in amount to an allowance of 6d. per ton upon the carriage account in respect of the coals in question. But I find that the arrangement was *bona fide* of the description above given, and whether legitimate or not was not made with the object of giving a preferential rate of carriage to Bannister. In the company's books the sums due were credited every quarter of a year to Bannister under the description of "agency commission for shipment of coal by coastwise vessel to ports south of Harwich." No opportunity was afforded to the public in general or to other persons sending coal by the plaintiffs' railway to Grimsby of earning the like payment by the like services. The average amount of coal subject to this arrangement was about 15,000 tons per annum.

The allowance to Bannister and Josse and Co. in respect of the carriage of coal for land sale (the 6d., 4d., or 2d. above mentioned), the allowance of 2 per cent. on net debits, and the payment of 6d. per ton on coal shipped from Grimsby to places south of Harwich, were unknown to the defendants until they were ascertained from discovery had in the action.

A difference of one halfpenny per ton has been during the period covered by the action a material factor in determining a contract for shipment, and a difference of three halfpence per ton has been during the same period a material factor in determining a contract for land sale. Each of the various allowances made to Bannister and Josse and Co. was sufficient in amount to constitute (if the defendants are entitled to complain of it) a substantial disadvantage to the defendants in their competition with Bannister and Josse and Co.

The questions arising upon the foregoing statement are whether: (1) The allowance of 8d. per ton to Bannister upon coal shipped by the Hamburg-American steamers; (2) The allowance which was at one time 6d., and at another 2d. per ton made to Bannister or that of 4d. per ton made to Josse and Co. upon coal carried to Grimsby for



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land sale there; (3) The allowance of 2 per cent. upon the net debits made to Bannister and Josse and Co.; (4) The payment of 6d. per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich, constituted breaches of the Railways Clauses Consolidation Act 1845, s. 90. (5) If either the allowance of 8d. per ton to Bannister upon coal shipped by the Hamburg-American steamers, or the payment of 6d. per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich was a breach of the Railway Clauses Act 1845, s. 90, upon what principle in either case is the amount of the overcharge to the defendants in this respect to be ascertained?

During the period covered by the action the plaintiffs had one uniform set of rates for the carriage of coal from about forty-eight different collieries to a number of places lying eastward of the said collieries, and served by the plaintiffs' railway.

These collieries were called "the group," and the rates from them to the said places lying to the eastward served by the plaintiffs' railway were called "the group rates."

The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery, and the member of the group farthest from the defendants' colliery is fifteen miles.

The group rates comprised the rates from each of the said collieries to a great number of towns and places in various parts of England.

All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery, and go away thence in an easterly direction.

Before the 1st Jan. 1880, and after the 4th Dec. 1880, coal going away to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was despatched to the place of destination. There was no "grouping" for traffic westward. The defendants' colliery being the farthest to the eastward of the collieries in the South Yorkshire coalfield paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coals going east.

Between the 1st Jan. 1880 and the 4th Dec. 1880 the rates for carriage of coal westwards from any of the collieries comprised in the group were the same.

The bulk of the coals sent from the defendants' colliery have always gone eastwards, but they have also had a substantial traffic westwards.

On the 8th June 1880 the defendants applied to the Railway Commissioners to restrain the plaintiffs from charging the group rates.

On the 20th July 1880 the Railway Commissioners gave judgment in favour of the defendants, and prohibited the plaintiffs from charging at equal rates between the various collieries comprising the group and the places lying to the eastwards, to which the group rates applied. It was not disputed for the purposes of the case that the decision of the Railway Commissioners was right.

The plaintiffs have ceased to charge the group rates since the 20th July 1880, and have thenceforward carried coals from the various members

of the group at differential rates. The rates thus established are in respect of coal carried from the defendants' colliery lower in every instance than the group rates.

The defendants have been charged the group rates down to the 20th July 1880.

For the purposes of the case it was to be assumed that the circumstances under which payments have been made do not preclude the defendants from opening the accounts.

The defendants contend that the group rates were a violation of sect. 90 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) and of sect. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), and that they are entitled under either of these enactments to recover the difference between the amount actually paid by them for carriage of coals, and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the groups, and not only such differences, but damages for breach of the statutory duty. The plaintiffs contest each of the above claims.

The questions for the opinion of the court are:

1. Did the group rates constitute a breach of the Railways Clauses Consolidation Act 1845, s. 90?

2. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

3. Does an action lie for breach of the Railway and Canal Traffic Act 1854, s. 2?

4. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

The 2nd and 6th sections of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) are as follows:

2. Every railway company, canal company, and railway canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and every railway company and canal company, and railway and canal company, having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have a terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals, by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

6. No proceeding shall be taken for any violation or contravention of the above enactment, except in the manner herein provided, but nothing herein contained

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shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal, or railway and canal company, under the existing law.

*Webster, Q.C., Forbes, Q.C., and Lofthouse* for the plaintiff plaintiff.

*The Solicitor-General (Sir F. Herschell, Q.C.), Littler, Q.C., and C. A. Russell* for the defendant company.

The arguments sufficiently appear in the judgment of the court.

*Cur. adv. vult.*

July 5.—The judgment of the court was delivered by

MATHEW, J.—In this case the defendants, who are colliery owners, carrying on their business at the Denaby Main Colliery, sought to recover from the plaintiffs by their counter-claim the amount of overcharges of which they complained as having been made by the railway company against them from the 14th Dec. 1874 to the 14th Dec. 1880, being six years before the commencement of the action. Several questions are raised in the case, in each instance the complaint of the defendants being that there had been an inequality of charge, other customers of the railway company having had preference shown to them, and the counter-claim was brought to recover the overcharges made to them upon the ground that they were entitled, under sect. 90 of the Railways Clauses Consolidation Act, to be treated equally with the persons mentioned in the case with whom the more favourable arrangements had been made by the railway company. Now, the first question put to us was, whether the allowance of 8d. per ton made to Bannister upon coal shipped at Grimsby by the Hamburg-American steamers was an allowance of which the defendants were entitled to complain, and with reference to which they were entitled to say that they had been overcharged. The circumstances under which this allowance was made are detailed in the special case, and it further appears there that the railway company gave no public or other notice that they were making it, or that they would make similar allowances to other persons under similar circumstances, and also that the allowance in question was not known to the defendants at the time it was made, nor for several years afterwards, and the allowance was only in respect of the coal shipped on board the Hamburg-American steamers, and not in respect of any other coal carried by the plaintiffs for Bannister for shipment at Grimsby. Now, the 90th section of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) is this: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: provided that all such tolls be at all times charged

equally to all persons, and after the same rate, whether per ton, per mile, or otherwise in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." It was contended by the defendants that the provisions of that section had been violated; and they pointed out that there had been an inequality within the mischief of the Act in respect of the allowance made to Bannister up to the month of Dec. 1876, when the allowance ceased. It appears to us to be clear that up to that date the provisions of this 90th section were violated by the defendants' since the effect of their conduct was to enable Bannister to carry on a portion of his trade more advantageously than others of the public, including the defendants, Bannister practically obtaining a monopoly of the shipment by the Hamburg-American line. The case of *Oxlade v. The North-Eastern Railway Company* (26 L. J. 129, C. P.) appears to us a decisive authority against the railway company on this point. That case shows that for a company to lower their rates for the purpose of forming a particular traffic, is giving an undue preference to that traffic, and is not legitimate, and that was what was done with regard to the trade carried on by Bannister. Then the next question put to us is the question as to an allowance, which was at one time 6d. and at another 2d. per ton made to Bannister, and an allowance of 4d. per ton made to Josse and Co. upon coal carried to Grimsby for land sale there, and also as to the further allowance of 2 per cent. upon the net debits made to Bannister and Josse and Co., the circumstances of which are set out in the case. Those allowances appear to come under the principle of *Oxlade v. The North-Eastern Railway Company* (*ubi sup.*), and our decision with reference to them must follow our decision on the first question, since it appears abundantly from the findings of the learned arbitrator that the reason for these allowances is not an adequate reason, and that they do not represent any saving to the railway company from the more economical carriage of the goods in either case. The learned arbitrator finds that no calculation or estimate of the amount of the saving appears to have been made when the allowance was agreed upon, or at any other time, and that there was no difference in the amount so saved when the allowance to Bannister was 6d. and when it was 2d., nor was any reason given why a different amount was fixed upon as the allowance to Josse and Co. The arrangement to make an allowance of this description to Bannister was made many years ago, upon the occasion of his establishing a yard of his own, into which the coal might be delivered. The allowance to Josse and Co. began in 1876, and the reason for making it is not otherwise explained than that it was made "at their earnest solicitation." It also seems clear to us from the finding of the learned arbitrator with reference to the allowance of 2 per cent. on the net debits, that a preference within the meaning of sect. 90 was given to the

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persons in whose favour those deductions were made. Then we come to the fourth question as to whether the payment of 6d. per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich constituted a breach of the section. The question really appears to us to be a question of fact, and we have to infer from the statements made by the learned arbitrator what the character of the allowance to Bannister really was. [The learned Judge read the findings on this point set out in the case.] We think that the material finding is that no opportunity was afforded to the public in general, or to other persons sending coal by the plaintiffs' railway to Grimsby, of earning the like payment by the like services. We consider upon these findings that this was an allowance which, in effect, was a reduction upon the charges for carriage made to Bannister. The excuse of the railway company would seem to be that they lowered their rates of carriage to Bannister to enable him to develop the traffic with profit to the company. They cannot, in order to obtain such an advantage, compel other persons to carry on their business on terms less profitable to them. The allowance was made, it may be, indirectly within the meaning of sect. 90, but it appears to us to have certainly been made in favour of Bannister, and against the defendants and others in the same trade, and we think that, having regard to the arrangement with Bannister, there was an overcharge in respect of the coal carried to Grimsby for the defendants. Then we are asked with reference to the coal shipped by the Hamburg-American steamers and for ports south of Harwich, upon what principle in either case is the amount of the overcharge to the defendants to be ascertained. We did not gather from the argument of the learned counsel what the difficulty was that was felt, and we can only answer that the amount of the overcharge is to be ascertained in accordance with the principle laid down in the case of *Evershed v. The London and North-Western Railway Company* (36 L. T. Rep. N. S. 12; 2 Q. B. Div. 254; 3 Q. B. Div. 134; 3 App. Cas. 1029). The defendants are entitled to recover the charges made to them in excess of the charge made to Bannister for similar services. The second part of the case raises another and a different question, and with respect to it four questions are put to us. It appears that complaint was made by the defendants of certain overcharges which are described in the case, and from the statements therein it would seem that there were about forty-eight different collieries from which, during the period covered by the action, the plaintiffs had charged a uniform set of rates of carriage to a number of places lying eastward of those collieries, and served by the plaintiffs' railway. These collieries are called "the group," and the rates from them to the places lying to the eastward served by the plaintiffs' railway were called "group rates." The defendants' colliery is the easternmost of the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the member of the group farthest from the defendants' colliery is fifteen miles. All coals going from any of the collieries comprised in the group to any of the places mentioned must pass the defendants' colliery, and go away thence in an easterly direction. The defendants applied to the Railway Commissioners to restrain the plaintiffs

from charging the group rates. The Railway Commissioners gave judgment in favour of the defendants and prohibited the plaintiffs from charging at equal rates between the various collieries comprising the group and the places lying to the eastwards to which the group rates applied. It is not disputed for the purposes of this case that the decision of the Railway Commissioners was right. Upon these facts the question put to us is, whether the "group rates" constituted a breach of the Railways Clauses Consolidation Act 1845, s. 90. We think the "group rates" were a violation of that section, and that the overcharge may be recovered in accordance with *Evershed's case*. We cannot adopt the narrow construction of sect. 90 contended for by the plaintiffs' counsel, namely, that the section only applies where the termini of the transit correspond. In the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there would appear to be that kind of inequality that sect. 90 is intended to prevent. In such cases part of the services to the particular customer would be practically rendered gratuitously to the disadvantage of others, and sect. 90 therefore applies. Then we are further asked, if sect. 90 applies, are the damages of the defendants for the breach of that section limited to the amount of the overcharges, and what is the measure of such overcharges, or can general damages also be recovered? To that we answer that with respect to the question whether general damages can be recovered in addition to the overcharges, we see no ground in the statement of facts before us upon which an action for damages would be maintainable. Then the third question is. Does an action lie for breach of the Railway and Canal Traffic Act 1854, s. 2? We are of opinion that no action lies for any contravention of the Act of 1854. The 6th section of that Act seems conclusive upon this question. The terms of that section are, "No proceeding shall be taken for any violation or contravention of the above enactment except in the manner herein provided. But nothing herein contained shall take away or diminish any right, remedy, or privilege of any person or company against any railway company under the existing law." The question put to us is, whether an action brought to recover overcharges, which are overcharges by reason of the provisions of the 2nd section of the statute, will lie or not; and the ingenious suggestion was made in both arguments that an action in respect of such overcharges was not an action for anything done in contravention of the statute, because the action was brought for the detention of money. But the money would be perfectly properly charged, and perfectly properly detained, were it not for the prohibition in the Act. It is therefore perfectly clear that in substance the action is brought for something done in contravention of the Act, and the 6th section is conclusive that no such action can be maintained. We were much pressed with the case of *Evershed v. The London and North-Western Railway Company* (36 L. T. Rep. N. S. 12; 2 Q. B. Div. 254; 3 Q. B. Div. 134; 3 App. Cas. 1029), and it was argued that that case was a decision that an action would lie under the 6th section of this Act. We only say with

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reference to that case that, whatever the language in some of the judgments may be, the point was not presented to the court, and no opinion was expressed upon it, the decision being that sect. 90 of the other Act had been infringed, and that for the violation of that an action would lie.

Solicitors for the plaintiff company, *Cunliffe, Beaumont, and Davenport*, for *R. Lingard-Monk*, Manchester.

Solicitors for the defendant company, *Indermaur and Co.*, for *F. W. Fisher*, Doncaster.

Dec. 1 and 2, 1884.

(Before GROVE and HAWKINS, JJ.)

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*Bread, sale of—Baker not provided with scales and weights—Delivery of bread from a cart at a customer's house in pursuance of a previous order—6 & 7 Will. 4, c. 37, s. 7.*

By 6 & 7 Will. 4, c. 37, s. 7, "Every baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales, with proper weights . . . and in case any such baker or seller of bread . . . shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights . . . then, and in every such case, every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding five pounds."

*Held, that this section applies to cases where bread is delivered in pursuance of a previous order, and not merely to cases where the baker sends out bread for sale in a cart.*

CASE stated by justices.

1. The appellant was convicted before us at a petty sessions held at Cheadle on the 23rd May 1884, on an information which charged "that he being a baker of bread carrying on business at Longton, on the 10th April 1884, at the parish of Draycott, did unlawfully cause his servant to carry out and deliver bread from a cart without being provided with a correct beam and scales, with proper weights, contrary to 6 & 7 Will. 4, c. 37, s. 7.

2. The following facts were proved before us:

(1.) The appellant, George Ridgway, is a grocer, provision dealer, and baker, carrying on business amongst other places at a shop in Longton. On the 10th April 1884 the appellant's manager caused his servant, one Bernard Swainey, to take and deliver to Miss Ratcliffe, a customer who resided at Draycott, which was some miles distant from the shop of the said George Ridgway at Longton, amongst certain articles of grocery, a quartern loaf of bread from a cart, not at the time being provided with weights and scales mentioned in the 6th and 7th sections of the Act.

(2.) The appellant's traveller had called at Miss Ratcliffe's house on the 9th April 1884, and had taken from her an order for a quartern loaf of bread at the price of 5d., and certain articles of grocery which were together under the value of 10l.

(3.) The order so given by Miss Ratcliffe was

(a) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

entered in a book by the appellant's traveller at the time, and was on the same day given by him to the manager of the appellant's shop at Longton to make up.

(4.) The goods ordered by the customer of the traveller, including the quartern loaf of bread, were selected and appropriated by the manager on the 10th April 1884. The loaf was, immediately prior to being placed with the remainder of the goods set apart for the customer, weighed by the manager, and found to be of the required weight of 4lb.

(5.) The goods so ordered were delivered by Bernard Swainey, a servant of the appellant, to Miss Ratcliffe, on the 10th April, who paid the traveller on the 23rd April 1884 for the goods supplied in pursuance of the order given on the 9th April preceding.

(6.) The usual course of dealing between the appellant and Miss Ratcliffe was that the traveller should receive an order for goods on one Wednesday, that the goods should be delivered on the following day, and that payment should be made by Miss Ratcliffe for such goods to the traveller on his next subsequent visit.

(7.) The cart from which Bernard Swainey, the appellant's servant, delivered the goods to Miss Ratcliffe was despatched by the manager, on the morning of the 10th April 1884, and contained parcels of goods, all of which had been previously ordered by customers in a similar manner to those ordered by Miss Ratcliffe, and contained no bread or articles which had not been so ordered.

(8.) The loaf of bread so ordered and delivered to Miss Ratcliffe was afterwards weighed by her own scales, and found to be of the full weight of 4lb.

3. It was contended on behalf of the appellant that he was not obliged to provide his cart with weights and scales when he went to deliver the bread under the circumstances set forth. That the sale took place when the order for the loaf of bread had been given and accepted, and the loaf had been appropriated.

4. It was also contended that 6 & 7 Will. 4, c. 37, s. 7, applied only to bakers or sellers of bread who should convey and carry out bread for sale, and their journeymen, servants, or persons employed by them.

5. We considered it doubtful whether under the circumstances set forth the sale was complete until delivery, and we considered that in point of law there was nothing to alter the defendant's position from that of a baker to a carrier. We also thought that the circumstances in *Robinson v. Cliff* (34 L. T. Rep. N. S. 689; 1 Ex. Div. 294; 45 L. J. 109, M. C.) were so nearly identical with the circumstances in this case that we were bound on the authority of that case to convict, and we accordingly convicted the defendant in the penalty of 1s. and costs, and agreed to grant a case on the application of the defendant's solicitor.

6. If our decision is right the conviction is to stand, but if otherwise the summons is to be dismissed.

*John Ross* for the appellant.—The Legislature intended to provide for the sale of bread under two different circumstances, one being when the sale takes place in the baker's shop, and the other when the baker is hawking bread in a cart; and the Act does not apply to such a case as this,

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where there is a delivery of a specific loaf previously sold. [HAWKINS, J.—When do you say the loaf was sold?] No doubt that is a difficult question to answer, but I submit the sale took place when the loaf was appropriated by the baker to that particular order. It is not necessary for me to go so far as to say that the sale was completed so as to include the right of rejection by the purchaser. The vendor may be the agent of the purchaser for the purpose of selecting the goods sold (Benjamin on Sales, 2nd edit. p. 265), and in this case the selection of the loaf by the appellant's manager was a selection by the purchaser's agent under the circumstances of this case. I admit that, unless I can distinguish the case of *Robinson v. Cliff* (34 L. T. Rep. N. S. 689; 1 Ex. Div. 294) from this case, it is an authority against my contention, but there the bread was taken out for sale in the cart, and there was no previous order; the facts are entirely different. The judgment of Denman, J. in that case is in favour of the contention that the statute does not apply to a case where the bread is delivered in pursuance of a previous sale.

Dec. 2.—GROVE, J.—In this case, which was argued yesterday by Mr. Rose on behalf of the appellant, I have come to the conclusion that the appeal must fail. The appellant was convicted on an information which charged him with having unlawfully caused his servant to carry out and deliver bread from a cart without being provided with a correct beam and scales with proper weights, contrary to 6 & 7 Will. 4, c. 37, s. 7. The facts proved were, that the appellant's manager, the appellant being a grocer, provision dealer, and baker, having a shop at Longton amongst other places, caused his servant to deliver to a customer, who resided some miles distant from the shop at Longton, certain articles of grocery and a quartern loaf of bread from a cart not at the time being provided with weights and scales. The appellant's traveller had called at the customer's house on the 9th April 1884, and she gave him an order for a loaf of bread and certain other articles of grocery. The order was entered in a book by the traveller at the time, and on the following day the goods, including the loaf of bread, were selected and set apart by the manager, and on the same day they were delivered to the customer. The usual course of dealing between the appellant and the customer was, that the traveller should receive an order for goods on one Wednesday, that the goods should be delivered on the following day, and that payment should be made to the traveller on his next subsequent visit. The cart from which the appellant's manager delivered the goods was despatched by the manager on the morning of the 10th April, and contained parcels of goods, all of which had been previously ordered in a similar manner to those ordered by Miss Ratcliffe. The question is, whether the cart ought to have been provided with scales. It was contended that the statute only applies to a baker who, besides selling bread in his shop, sends a cart round the country hawking bread. The contention on the other hand is, that it applies to any baker who delivers bread to a customer, whether ordered before or not. The 6th section enacts that "every baker or seller of bread, beyond the limits aforesaid, shall cause to be fixed in some conspicuous part of his, her, or their shop, on or near the counter, a beam and

scales with proper weights or other sufficient balance, in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid." That section is material to this case, inasmuch as it shows what the object of the statute is; but the section on which this case turns is the 7th, which provides that "every baker or seller of bread, beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with, and shall constantly carry in such cart or other carriage, a correct beam and scales with proper weights or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid; and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out and deliver any bread without being provided with such beam and scales with proper weights or other sufficient balance, or whose weights shall be deficient, &c." Now it is contended on behalf of the appellant that the true construction of this section is, that it only applies to a baker who hawks bread about; that is to say, it only applies when the whole transaction of sale takes place when the bread is delivered, and that it does not apply to those cases where the bread is delivered in consequence of a previous order. I am of opinion that this construction is too limited, and that the Act goes further. It is extremely important, when any difficulty arises on the construction of a statute, to look at the object sought to be effected by the Act. Here the object of the Act was to provide that whenever the bread is delivered the purchaser is to have an opportunity of seeing it weighed. If this were not so the Act would to a great extent be inoperative, because I think the majority of people order what bread they require before it is sent round for delivery in the baker's cart, and all such cases would be outside the Act if the true construction is that the Act only applies to those cases where the whole transaction of sale takes place at the time when the bread is delivered. In my opinion the whole object of the statute is to enable the customer to have the bread weighed when it is delivered. I need not decide whether it would be necessary for the baker to be provided with scales and weights on delivery in a case where the customer goes to the shop, sees the loaf weighed, and then, instead of taking it away, asks the baker to send it; but probably such a case would not be within the meaning of the section; that is not the case here. If the first part of the 7th section stood alone, which provides that every baker or seller of bread who conveys or carries out bread for sale in and from any cart or carriage shall be provided with weights and scales, it might be said that it applied only to those cases where the bread was taken out for sale and not merely for delivery; but the object of the Act is clearly indicated by the words, "in order that all bread sold by every such baker or seller of bread, and by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers

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thereof." Then the section goes on to enact that, in case any such baker or seller of bread shall at any time "carry out and deliver any bread without being provided with such beam and scales," &c.; and I think those words "carry out and deliver" are important as showing clearly that the object of the Act is to provide an opportunity to the customer of having the bread weighed on delivery. This also seems to be the view taken by the court in the case of *Robinson v. Cliff* (*ubi sup.*). Bramwell, B. there says: "The statute is somewhat peculiar in its provisions and contains minute regulations. I incline to think that the counsel for the appellant was so far correct in contending that the earlier part of sect. 7 is applicable to hawkers of bread only, and that sect. 6 relates to bakers who keep shops; but then it seems to me clear that the penal clause in sect. 7 applies to the sale and delivery of bread by both classes of bakers. I doubt whether the appellant took out the bread in his cart 'for sale;' but, at any rate, he took it out for the purpose of delivery; and the words in the penal portion of the 7th section are 'shall at any time carry out and deliver any bread,' which must mean delivery after a previous sale, and therefore the appellant is liable to be convicted for an unlawful delivery, even although the words 'for sale' be read in after the words 'carry out.'" In the same case Mellor, J. says: "The statute seems to have contemplated three occasions upon which a customer ought to have an opportunity of weighing the bread which he buys—first, it may be sold at a shop; secondly, it may be sent out and sold to promiscuous customers; thirdly, it may be delivered at the house of a customer who has given a previous order. It is proper that a customer on each of these occasions should have the opportunity of protecting himself by causing the bread to be weighed; and if the baker were not obliged to provide himself with scales, the customer might have no means of ascertaining whether the proper weight is delivered to him." It is true that the judgment of Denman, J. is based on different grounds, but I do not think it really assists the appellant's contention in this case. He says: "In my opinion the words 'for sale in and from any cart or other carriage' in the 7th section were inserted in order to prevent it from extending to cases where the bread is merely in transit from one place to another, or is being taken out for charitable purposes, as, for instance, to be given to the poor, or where it is carried about for delivery in baskets without a cart." I agree that the section would not apply where there is no sale, as in the case of a gift to a poor person or some charitable institution, for then the baker can give more or less as he pleases. At any rate the judgments of Bramwell, B. and Mellor, J. are directly applicable to this case. No doubt the facts in that case were different, because there the baker, or his servant, went to the customer's house to get an order, and it may be said that there was no previous bargain and sale, but the judgment of the court did not turn on that point. Mr. Rose contended that the sale of the bread in this case should be construed in the same way as any mercantile sale, and referred to Benjamin on Sales, p. 265, 2nd edition, where there is a quotation from Blackburn on Sales, that "where from the terms of an executory agreement to sell unspecified goods the

vendor is to despatch the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an application is made finally and conclusively by the authority conferred in the agreement, and, in Lord Coke's language, 'the certainty, and thereby the property begins by election.'" But, in my judgment, the question whether the property passed at any particular moment is not material to the decision of this case, because, as I have said before, the object of the Act was to prevent fraud, and to give the purchaser an opportunity of having the bread weighed at the time of delivery. I am therefore of opinion that the conviction must be affirmed.

HAWKINS, J.—In the course of the argument I had considerable doubt whether the statute applied to this case, but I have come to the conclusion that it does, and that this conviction must be affirmed. The 4th section of the Act enacts that all bread shall be sold by weight, the words being, "that from and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight." The 6th section provides that every baker shall cause to be fixed in some conspicuous part of his shop, on or near the counter, a beam and scales, with proper weights, in order that all bread there sold may from time to time be weighed in the presence of the purchaser. Then comes the 7th section, where it is enacted "that every baker or seller of bread beyond the limits aforesaid, and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage, shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales, with proper weights or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person, may from time to time be weighed in the presence of the purchaser or purchasers thereof, except as aforesaid." It is clear from those words that the object of the Act is that the bread should be sold by weight, and that the purchaser should have an opportunity of seeing that it was of the proper weight. The same section then goes on to say that, "in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time carry out and deliver any bread without being provided with such beam and scales, &c.," he shall be liable to a penalty. So that the first part of the section throws on the baker a liability to provide proper scales and weights, and the latter part imposes a penalty if he should "carry out or deliver" any bread without being provided with scales and weights. Now, apply these sections to the present case. I do not think the case of *Robinson v. Cliff* covers this case, because there the facts were entirely different. In that case it is perfectly certain there had been no sale until the cart drove up to the house of the customer. The baker there went to the customer's house, or shop, and asked how much bread was wanted. There was no previous contract of sale whatever; the baker had taken out bread for sale, and not bread which had previously been sold, and



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there was a complete bargain and sale at the time of delivery. That is different from the present case. Here it was contended that the cart did not carry out bread for sale. The customer gave the order to the traveller, who passed it on to his master, and the baker's manager took a loaf from the shelf, weighed it, and put it aside for the express purpose of sending it to the customer. Although the bread was selected by the baker to comply with that particular order, there was no obligation on the customer to take that specific loaf. Could an action of trover or detinue have been maintained against the baker for that particular loaf? I think not. The object of the statute is, that the purchaser should have an opportunity of seeing the loaf weighed, and in this case I do not think the purchaser had such an opportunity. It would be straining the law to say that the baker was the agent of the customer to select the loaf. There was an order for a loaf, and a contract to supply a loaf, but there was no loaf appropriated until it was delivered in fulfilment of the contract. I think the word "deliver" in the statute means a delivery in pursuance of a previous contract for sale, and when the baker so delivers bread he should be provided with a proper beam and scales, with proper weights. If Miss Ratcliffe had gone herself, or sent her servant, to the baker's shop, and either she or her servant had seen the loaf weighed and put aside, and asked the baker to send it, I am far from saying that it would have been necessary for the baker to be prepared to weigh it again on delivery. I think the statute applies whenever there is a delivery in pursuance of a previous order and contract for sale, and I agree with my brother Grove that this conviction must be affirmed.

*Conviction affirmed.*

Solicitors for the appellant, Purkis and Co., agents for A. B. Sword, Hanley.

Wednesday, June 11, 1884.

(Before MATHEW and DAY, JJ.)

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON-IN-MAKERFIELD v. THE JUSTICES OF THE PEACE FOR THE COUNTY PALATINE OF LANCASTER. (a)

*Highway—Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13—Expiration of turnpike trusts in 1877—Disturbed road—18 & 19 Vict. c. c.—Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), ss 47, 49, 50, 51—Cesser of turnpike road—Contribution from county to repair.*

*By the Newton District Improvement Act 1855 (18 & 19 Vict. c. c.), which incorporated the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), the maintenance of all the highways within a district which was traversed by a turnpike road running from Warrington to Wigan, became vested in commissioners, who were the "highway authority" for the district, which was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13.*

*The turnpike trust expired in 1877. On a claim being made by the commissioners under sect. 13*

*of the Highways and Locomotives (Amendment) Act 1878, that the "county authority" should contribute one-half of the expenses incurred by the commissioners as the "highway authority," it was contended on behalf of the justices, who were the "county authority," that the section did not apply, because the local Act of 1855 had caused a cesser of the character of the turnpike road with respect to that part which traversed the Newton district, and that the section applied only to those roads which wholly ceased to be turnpike roads between 1870 and the passing of the Act.*

*Held, that, notwithstanding the local Act of 1855, the road did not cease to be a turnpike road within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878 until 1877, when the turnpike trust expired, and therefore one-half of the expenses incurred by the commissioners maintaining the road within their district must be paid by the county authority.*

SPECIAL CASE.

1. The plaintiffs in this case are the Improvement Commissioners for the district of Newton-in-Makerfield, in the county of Lancaster (hereinafter called the commissioners), and are the highway authority for the said district, and the said district is a highway area within the meaning of the Highways and Locomotives (Amendment) Act 1878.

2. The defendants are the justices of the peace for the county of Lancaster (hereinafter called the said county authority), the said justices assembled in annual general session pursuant to the provisions of 38 Geo. 3, c. 58, are the county authority as defined by the Highways and Locomotives (Amendment) Act 1878, and the said justices assembled as aforesaid at the annual general session held on the 26th Dec. 1878, did by order declare under the powers in them vested by the 20th section of the last-mentioned Act that the contribution towards the expenses incurred in repairing the main roads within the hundred of West Derby should be paid out of a separate rate to be raised and charged upon the said hundred of West Derby.

3. The parties have concurred in stating the facts and circumstances hereinafter mentioned in the form of a special case for the opinion of the High Court of Justice, Queen's Bench Division.

4. The said commissioners were incorporated by the Newton District Improvement Act 1855 (18 & 19 Vict. c. 100), which Act incorporates amongst other Acts the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34).

5. The commissioners' district comprises the limits of the parish of Newton-in-Makerfield, in the county of Lancaster.

6. The district is traversed by a road running from south to north from Warrington to Wigan.

7. The said road was maintained under the powers of a private Act of 13 Geo. 1, c. 10, and 20 Geo. 2, c. 8, 10 Geo. 3, c. 70, 33 Geo. 3, c. 164, 53 Geo. 3, c. 131, 3 Will. 2, c. 74, and 35 & 36 Vict. c. 85, and was known as the Warrington and Wigan turnpike-road.

8. Upon the passing of the Newton District Improvement Act 1855, the maintenance of all streets and highways within their district, including the said road, became vested in the commissioners by virtue of sects. 47, 49, 50, and

(a) Reported by H. D. BONEV, Esq., Barrister-at-Law.



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51 of the said Towns Improvement Clauses Act, and the trustees of the said turnpike road thereupon ceased to repair the said road within the limits of the said district.

9. The Warrington and Wigan Turnpike Trust expired in 1877.

10. In 1878 was passed the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13 of which enacts that,

For the purposes of this Act and subject to its provisions any road which has within the period between the 31st Dec. 1870 and the date of the passing of this Act ceased to be a turnpike road, and any road which being at the time of the passing of this Act a turnpike road may afterwards cease to be such, shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th Sept. 1878, by the highway authority in the maintenance of such road, shall as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

11. Separate accounts of the expenses of the maintenance of the said road during a period between the 25th March 1882 and the 25th March 1883 have been duly kept by the commissioners in the form prescribed by the county authority, and have been audited by the Local Government Board auditor, and forwarded to the county authority within the time prescribed.

12. The accounts so audited show an expenditure on the said road for the period aforesaid of 121l. 1s. 8d., one-half of which is 60l. 10s. 10d.

13. It is admitted, for the purposes of this case, that all the requirements of sect. 18 of the said Highways and Locomotives (Amendment) Act 1878, and all other requirements of or directions issued by the said county in respect thereof, have been duly complied with, and that no objections shall be taken to an order for payment as hereinafter mentioned upon the ground that no general certificate of such satisfactory maintenance has been in fact given.

14. The said commissioners, as such highway authority as aforesaid, have under sect. 13 of the said Highways and Locomotives (Amendment) Act 1878 demanded from the said justices, as such county authority as aforesaid, payment of the said sum of 60l. 10s. 10d., being one-half of the said sum of 121l. 1s. 8d., the expenses incurred by the said commissioners between the said 25th March 1882 and the 25th March 1883 in the maintenance of such part of the said road as is within the limits of the said district.

15. The said justices, as such county authority, refuse to pay the said sum or any part thereof.

The question for the opinion of the court is:

Whether the said county authority, under the circumstances above stated, is liable by virtue of the Highways and Locomotives (Amendment) Act 1878, or otherwise, to pay out of the said county rate the said sum above demanded or any part thereof.

In case the court shall be of opinion that the said county authority is so liable judgment is to be entered for the plaintiffs with costs; otherwise for the defendants with costs.

*Wills, Q.C. (A. Glen with him) for the plaintiffs.*—The road ceased to be a turnpike road since 1870, viz., when the turnpike trusts expired in

1877. The special legislation in 1855 did not deprive the road of its character as a turnpike road; it remained a turnpike road until the expiration of the trusts. He cited the following cases:

*The Justices of Lancaster v. Mayor of Rochdale*, 49 L. T. Rep. N. S. 368; 8 App. Cas. 494;

*The Justices of the West Riding v. The Queen on the prosecution of the Mayor, Aldermen, and Burgesses of Sheffield*, 49 L. T. Rep. N. S. 786; 8 App. Cas. 781.

*Gorst, Q.C. (Blair with him) for the defendants.*

—Sect. 13 of the Highways and Locomotives (Amendment) Act 1878 does not apply, because the road ceased to be a turnpike road before 1870. In the *Rochdale case* (*ubi sup.*) the House of Lords held that the road had not ceased to be a turnpike road and become a "main road" between 1870 and 1873, within sect. 13. The present case is identical with that of the *Rochdale* and *Halifax* road in the *Rochdale case*. A piece was cut off the Wigan and Warrington road in 1855, and in 1877 the trusts expired. The court is now asked to hold the county liable for the repair of the piece cut off in 1855. To satisfy the terms of sect. 13 the whole road must cease to be turnpike after 1870. In the *Sheffield case* (*ubi sup.*) the House of Lords held that some portion of road removed by a provision in the Turnpike Acts, and other portions removed by an agreement from the operation of the turnpike trusts, were still turnpike roads within the meaning of sect. 13 of the Act of 1878. So that, unless there is a distinction between the *Rochdale case* and the *Sheffield case*, they are not consistent. The distinction may be that in the *Rochdale case* several clauses of the Towns Improvement Clauses Act 1847 were incorporated, giving the management of the roads to the commissioners, whereas in the *Sheffield case* there was, as to two roads, the mere provision in sect. 34 of the Turnpike Act (6 Will. 4, c. 53), that no part of the money arising by virtue of that Act should be laid out on any highway in the town, nor should any toll be collected there. In this case the Towns Improvement Clauses Act 1847 is incorporated with the local Act.

*MATHEW, J.*—This is an action by the highway authority for the district of Newton, in the county of Lancaster, against the county authority, to recover contribution in respect of the expense of maintaining a road within the district of the plaintiffs. The road had been part of the turnpike road between Warrington and Wigan, and there had been with respect to that part of the road what I will describe compendiously as special legislation in the year 1855, the result of which was that the cost of maintaining that part of the road was transferred from the turnpike trust to the commissioners of Newton district. It appeared further in the statements of the case that the turnpike trust in respect of the whole road from Warrington to Wigan had ceased in 1877. On that it was contended by the plaintiffs that the state of things had arisen which was contemplated by the Act of 1878, s. 13, viz., that the turnpike road had ceased to be a turnpike road within the meaning of that section, and that it followed that, according to the provisions of that section, the highway authority became entitled to recover contribution from the county authority towards the maintenance of the whole of the

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road, including that part of the road in question. It is agreed that all proper steps have been taken in maintaining the road and demanding contribution, and the defendants have refused to pay. The question is whether the plaintiffs are entitled to recover contribution or not. The case presented to us on the part of the plaintiffs by Mr. Wills in his argument, stated shortly, was this: There had been special legislation, no doubt, in 1855, with respect to the part of the road in question; but that special legislation did not cause that part of the road to cease to be part of the turnpike road, and no cesser within the meaning of sect. 13 took place until the turnpike trust expired. When that happened (in the year 1877), the Act which followed in the year 1878 became applicable, and the plaintiffs were entitled to recover. The argument presented on the other side by Mr. Gorst was this: The special legislation as to this part of the road had caused a cesser of the character of the turnpike road with respect to this part of it; sect. 13 can only apply to the case where the whole of the turnpike road ceases to be a turnpike road within the meaning of the Act, and as part had ceased to be turnpike road, and as the section only applies to the whole road, the section is not applicable at all, and the defendants are not liable. It is singular that in this discussion Mr. Wills relied with the utmost confidence on the *Rochdale case*, and on the *Sheffield case*, which he said logically followed as a consequence of the *Rochdale case*, and Mr. Gorst, with equal confidence, argued that the *Rochdale case* was in his favour, and he left the *Sheffield case* to take care of itself. He pointed out that the judgment of the Queen's Bench Division established his argument, and that the ground of the decision of the *Rochdale case*, by the court of which I was a member was, as he puts it, that there being a cesser, as it was admitted, of the turnpike character of part of the road, sect. 13 did not apply to such a case, and therefore Mr. Gorst said his point was established. Having taking part in that decision, I was astonished at his gloss on it, for I am sure it was not my intention, nor that of Williams, J., to decide anything like that which Mr. Gorst understood the case to determine. The language of the judgment cannot be clear, as Mr. Gorst misunderstood it; but, if the judgment were to be delivered again, I should be content to express the meaning of the court in the language in which it was conveyed. What we meant to decide was this: that the special legislation in that case with respect to part of the road was not a cesser within the meaning of sect. 13. It was said that we drew a distinction between a part of the road and the whole of the road. Our conclusion would have been exactly the same if the whole of the turnpike road had come under the operation of the special legislation. We thought that the provisions made by the special legislation for the maintenance of that part of the road did not cause it to cease to be a turnpike road, and that it was a turnpike road not only in a technical, but a physical sense. It was a main artery of communication between two great towns, and it did not seem to me to cease to be a turnpike road because, on the town having sprung up beside the borough, the Legislature thought fit to specially legislate with respect to that part of

the road which lay within the borough. Our judgment was a short one. Mr. Gorst says it was misunderstood in the Court of Appeal, and we were supposed to have decided that there had been a cesser as to part of the road, and that therefore the cesser as to part precluded the operation of sect. 13. But I cannot adopt that view. I think the Court of Appeal appreciated precisely what we had decided, and the Court of Appeal differed from us. The Court of Appeal thought the special legislation had determined the road. We thought it had not. That was the difference between us, and that was presented to the House of Lords. It is an extremely narrow point on the construction of the word "cesser" in sect. 13. The House of Lords took the view of the Queen's Bench Division, and differed from the Court of Appeal, also appreciating clearly the point of difference between the two inferior tribunals. The *Sheffield case* presented in one respect the same point which had been argued in the *Rochdale case*, the only material difference between the two being that in the *Sheffield case* there had been cesser by expiration of the turnpike trust. The case was argued in the House of Lords with all that fullness and aptness of illustration and learning which we invariably expect from Mr. Wills, and he convinced the House of Lords, and it was impossible (if I may say so) not to have been convinced by his argument. The ground of the decision is clear. The argument was, that the special legislation in that case, which applied to one of the roads, and the agreement which applied to another of the roads, had no operation to extinguish the character of turnpike road that the whole road possessed. Again, it was said that the character of a turnpike road is physical as well as technical. Lord Blackburn entirely adopted the view that the effect of the special legislation and the agreement was not to destroy the character of any portion of the road as a turnpike road. The effect of the legislation and the effect of the agreement was only to provide another source for the maintenance of a part of the turnpike road. So it was held that the highway authority was entitled to call on the county authority for contribution on the ground that on the expiration of the turnpike trust sect. 13 came into operation. That being so, this case comes before us, and seems to be concluded by the *Sheffield case*. There is no material technical difference between the special legislation in that case and this. The object was the same, to provide a special fund for the maintenance of part of the road, because of the additional burden put on that part of the road by reason of it being within the borough dealt with by the special legislation. The case is on all-fours with the present one. In that case, as in this, there was an expiration of the turnpike trust; in that case, as in this, in 1877 the road was remitted to its original character and came under the operation of the Act of 1878, which provided for its maintenance. It is said that the Legislature can hardly have intended to transfer the burden, which had so long been borne by the Newton Commissioners, to the county. We have nothing to do with that, and have only to deal with the Act of Parliament. But I can see good reason why the Act should have been passed dealing with such a case as the present. The case falls within the terms of the

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Act, and our judgment must be for the plaintiffs with costs.

DAY, J.—This case seems to me to be concluded by authority. Sect. 13 of the Highways and Locomotive Amendment Act 1878 has received a judicial construction in the case of *Justices of Lancaster v. Mayor of Rochdale*; and I understand that decision to be simply that the words “any road” used in that section must be taken to mean the whole as distinguished from part of such turnpike road, and consequently that, whether part of a turnpike road has or has not ceased to be a turnpike road after the 31st Dec. 1876, yet so long as any other part remains turnpike road the county are not liable for the costs of any repairs under sect. 13. That decision seems to me to be quite consistent with the present contention of the plaintiffs, which is, as I understand it, to the effect that this Wigan and Warrington turnpike road, so considered as a whole, and irrespective of any previous dealing with such part as passes through or lies within the Newton district, ceased to be a turnpike road by reason of the efflux in 1877 of the time within which the turnpike trust was limited, and that, consequently, sect. 13 applies; and that, therefore, one-half of the expenses incurred by the highway authority (here the plaintiffs) in the maintenance of such road shall as to every part thereof which is within the limits of any highway area (here the Newton district) be paid to the highway authority of such area by the county authority (here the defendants). I should have been prepared—bound as I am by the judicial interpretation put upon the words “any road” as used in sect. 13, by the House of Lords in the case already cited—to hold that the present contention of the plaintiffs is well founded, even in the absence of any further authority; but the matter seems to me to be definitely concluded in favour of the plaintiffs by the further judgment of the House of Lords in the case of *Justices of the West Riding v. Corporation of Sheffield*, which cannot be substantially distinguished from the one before us. I may add that I think the decision in the *Sheffield* case follows logically upon the decision in the *Rochdale* case, although no doubt the mischief contemplated and averted by the learned Lords in the former case necessarily followed upon their judgment in the latter one.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs, *Field, Roscoe, and Co.*  
Solicitors for defendants, *Riddale and Son.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Wednesday, Nov. 12, 1884.

(Before STEPHEN and KAY, JJ.)

Re BRIGHTMORE; *Ex parte* MAY. (n)

*Bankruptcy petition—Presented in wrong court—Bonâ fide mistake—Sect. 95, sub-sect. 3, of the Bankruptcy Act 1883.*

*By a bonâ fide mistake a bankruptcy notice was issued against a debtor from a court within the jurisdiction of which he did not reside; at the hearing of the petition the debtor raised an objec-*

*tion to the jurisdiction, and the petition was dismissed by the registrar.*

*Sect. 95 sub-sect. 3 of the Bankruptcy Act 1883 provides that “nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong court.”*

*Sect. 97 provides that “any proceeding in bankruptcy may at any time and at any stage thereof, and either with or without application by any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have commenced.”*

*Held, on appeal, that the registrar had jurisdiction to make a receiving order, and that the order dismissing the petition was wrong.*

*Held, further, that the Divisional Court had power to make a receiving order, the registrar having failed to do so.*

In July 1884 the appellant May obtained judgment against the debtor Brightmore, in an action in the High Court of Justice, and upon this judgment a bankruptcy notice was issued, and a petition presented against the debtor in the Greenwich County Court on the 6th Aug.

The hearing was fixed for the 17th Aug., and adjourned till Sept. 2 at the debtor's request.

On the 29th Aug. the petitioning creditor received a notice that the debtor intended to dispute the petition on the ground that he did not “reside or carry on business within the jurisdiction of the Greenwich County Court.”

In letters received from the debtor, his address was given as Albert Works, North Woolwich, and North Woolwich in general is within the Greenwich County Court district, but the Albert Works are outside the boundary, and in the East Ham County Court district.

Upon the hearing of the petition the deputy-registrar, in pursuance of the debtor's objection, dismissed the petition, and this was an appeal by the creditor against the decision of the registrar.

*F. C. Willis* for the appellant.—In the case of a *bonâ fide* mistake, such as this clearly was, there is a difference between the old Act and the new, and I admit that an objection of this kind would formerly have been fatal. But by the Act of 1883 the Legislature evidently aimed at the elimination of technical difficulties of the kind. Sect. 95, sub-sect. 3, the section which provides the place for the hearing of a petition, expressly adds that “nothing in this section shall invalidate a proceeding by reason of its being taken in the wrong court.” By sect. 97, sub-sect. 2, the registrar was empowered to transfer the proceedings. Two courses were open to him, either to hear the petition in spite of the mistake, which by sect. 97, sub-sect. 2, he was also entitled to do, or to transfer the proceedings to the proper court. He adopted neither course, but dismissed the petition, thereby causing a delay of at least six weeks.

*E. C. Willis, Q.C.* (with him *Garrett*), for the debtor.—There was no right to present a petition in the Greenwich court. [STEPHEN, J.—But there was a right to order a transfer.] I submit not, for in sect. 97, sub-sect. 2, it is said that a transfer may only be made by the “prescribed authority and in the prescribed manner,” and by sect. 168,

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the interpretation clause, "prescribed" means "prescribed by the rules." These rules are G. R. 16, 17, and 18. The object of the section was not to protect parties who had taken a proceeding in the wrong court, but only to preserve from being reopened proceedings which had culminated.

STEPHEN, J.—The two sections must of course be taken together, and they lead me to the conclusion that the registrar had jurisdiction in this case to make a receiving order, and that, if he had exercised this jurisdiction, he would have been protected by both sections. By sect. 97, sub-sect. 2, he might either have retained the proceedings in his own court, or ordered a transfer, but he did neither. The whole objection is of the most trivial and technical character, and there can have been no reason whatever to prevent the matter from being decided in the Greenwich County Court. We are quite satisfied that the learned registrar might have made a receiving order, and our only doubt is whether we ought not to make such an order now without remitting the case to him.

CAVE, J.—I am of the same opinion, and it seems to me that the sections which have been referred to are expressly framed in order to meet such circumstances as have been described, and cases in which a creditor may be in *bonâ fide* ignorance of the district in which a debtor lives or carries on business. Where, by a pure mistake and misadventure, a petition is presented in the wrong court, authority is given to hear the petition, although of course, if the error was wilful and deliberate, the case would be different. Here there is no suggestion that the petition was wilfully presented in the wrong court, and the proper thing for the registrar to do was to hear the petition. He certainly was wrong in dismissing it unheard. If nothing more than we have heard was before the learned registrar, I think we ought to make the order now.

F. C. Willis.—The debt was admitted, and the only question was that of jurisdiction.

STEPHEN, J.—We think then that it is best to make a receiving order now, and the debtor can apply for a review if he chooses.

*Order accordingly.*

Solicitors for the petitioning creditor, May, Sykes, and Batten.

Solicitor for the debtor, A. G. Ditton.

Thursday, Nov. 20, 1884.

(Before MATHEW and CAVE, JJ.)

Re TAYLOR; *Ex parte* THE BOARD OF TRADE. (a)

*Composition* — Business carried on by official receiver—Expenses paid by him—Repayment by trustee.

Where the business of a debtor is carried on by the official receiver, who makes payments out of his own pocket for the purpose, and a composition is then sanctioned, the right order for the County Court judge to make is, that the official receiver shall forthwith deliver up possession of the debtor's estate to the trustee under the composition, and that the trustee shall reimburse the official receiver out of the first moneys which come to his hand from the realisation of the assets.

*Semble*, that the official receiver is not entitled as a condition precedent to delivering the debtor's estate into the hands of the trustee to demand payment of the amount spent by him from the trustee, or an undertaking to pay the same as a first charge upon the assets.

This was an appeal by the official receiver against an order of the County Court judge sitting at Leeds.

On the 6th Aug. 1884 a receiving order was made against the debtor upon a creditor's petition.

On the 20th Aug. the first meeting of creditors was held and a composition of 12s. 6d. in the pound was offered.

On the 1st Sept. the second meeting was held, and the composition was accepted by the creditors and a trustee was appointed.

On the 23rd Sept. the composition was sanctioned by the court.

On the 20th Aug. the debtor and the gentleman who was subsequently appointed trustee instructed the official receiver to carry on the business, and he himself said that it was expedient in the interest of the creditors that the business should be so carried on, and, in order to do this, was compelled to make purchases to the amount of 131l. 2s. 6d. The County Court judge ordered the official receiver to deliver up possession to the trustee of the debtor's estate, and directed that the claims of the official receiver should be paid out of the estate in due order of priority. Against this order the official receiver appealed, on the ground that he was entitled to receive from the trustee as a condition precedent to the delivery of possession either payment of the amount spent by him, the official receiver, or an undertaking that such amount should be a first charge upon the assets.

The *Solicitor-General* (with him *Muir Mackenzie*) for the appellant, the official receiver.—The official receiver was bound, in order to keep the business going, to make these payments, and he did so on the authority of the debtor and of the trustee. The Rules (G. R. 168 and 249) are not, I think, very material to the decision of the present question, but perhaps I had better read them: [this was then done.] They bind the official receiver to deliver up possession and to account to the trustees. This the official receiver was prepared to do, but he said, "Unless you pay my expenses or undertake to pay them, I may be out of pocket." This surely he was entitled to do, and in any case, as he had ordered the goods on his own responsibility, he could not be compelled to deliver possession of them before he was indemnified. I do not know the meaning of the phrase "due order of priority," nor, so far as I am aware, is there any rule or statute to interpret them.

*Herbert Reed* for the respondent trustee.—The grounds taken now are entirely different from those in the notice of appeal. When the composition was sanctioned the official receiver refused to hand over any goods until the trustee, personally, gave him a cheque for the amount of the goods bought by him. We are prepared to pay as soon as we obtain any assets, but we have none at present. [CAVE, J.—The expenses were incurred with the full knowledge of the debtor and the trustee.] The trustee was not appointed then. This appeal involves a

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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question of principle, for it appears that official receivers all over the country have been in the habit of demanding personal payment by the trustee as a condition precedent to handing over the estate. [MATHEW, J.—Questions of principle very often mean questions of temper. The *Solicitor-General* here produced a letter showing that the official receiver had offered to be satisfied with an undertaking that his expenses should be a first charge upon the assets.] We are dealing here only with the question of principle involved in the notice of appeal, and I am afraid I must trouble your Lordships with an inquiry into the position of the trustee and the official receiver. The latter is in no better position than a receiver appointed by the court, and this position is well defined in *Ex parte Isard*; *Re Bushell* (48 L. T. Rep. N. S. 502; 23 Ch. Div. 75). He is therefore only entitled to an indemnity out of the assets, and has no claim to immediate payment. His position is also defined in sect. 70 of the Bankruptcy Act 1883, and he has no right to burden the estate without the leave of the creditors or of the Board of Trade. [MATHEW, J.—He is to protect the estate, and may appoint a special manager. CAVE, J.—It is merely a question between him and the Board of Trade, and your argument comes to this, that he may appoint a subordinate special manager who may do what the official receiver may not do, although he may be removed by the official receiver.] A special manager is not a subordinate, because his appointment must be notified to the Board of Trade. I repeat that the position of an official receiver is well defined in *Ex parte Isard*. [CAVE, J.—Those old cases are of very little value upon a question of this kind, because the official receiver is only accountable to the Board of Trade if, in these matters, he exceeds his authority.]

MATHEW, J.—I am of opinion that the order of the learned County Court judge in this case was entirely wrong, and that it should be varied to the following effect, "That the official receiver do forthwith give up to the trustee possession of the debtor's estate, and that the trustee do pay to the official receiver the amount which shall be found due to him out of the first assets which shall come to his hand out of the estate." Now Mr. Reed has contended that the original order was right, and that the words "in due order of priorities" would have given to the official receiver all that he now claims, and there is no doubt that the original intention of the creditors was that the moneys paid by the official receiver should be paid before any other payment was made out of the assets in order to meet their claims. That no doubt was the original intention of the creditors, and it may be said that they construed the order in that way. But the trustee, or his solicitor for him, took a different view of the circumstances, in which view we are of opinion that he was entirely in the wrong. To this view he has since adhered, and his persistency is excused upon the ground that the question which was at the bottom of the difference was one of principle. Now I have found in my experience that, when it is contended that a question is one involving deep principle, it is really a question of which the decision does not greatly affect the parties themselves, but one which, they say, will be of immense importance to other parties. In the result a question of principle often turns out to be nothing

more in reality than a question of costs. The official receiver took, in the first instance, a different position from that which has been taken for him here, and apparently did demand an undertaking from the trustee as a condition precedent to handing over the property, but, in a letter of the 24th Oct., he retired from that position, and intimated that he would be willing to accept a first charge upon the assets. This offer was, however, not accepted, perhaps because there was so deep a question of principle involved, and the matter was brought before this court for decision. With regard to the order of the County Court judge, we think, with all due respect, that it was not expressed in clear and intelligible language, and that the order ought to be varied in the manner I have indicated. For it is clear that the position of the official receiver was very similar to that of a receiver and manager in the Court of Chancery, and it is quite clear that under such circumstances as these a receiver in the Court of Chancery would be entitled to be paid out of the first assets which came to hand. With regard to the question of costs, we think that the trustee has been altogether wrong from beginning to the end. The case ought never to have come into the court below, and certainly ought never to have been brought into this court. The trustee must therefore pay the costs in this court and in the court below.

CAVE, J.—I am entirely of the same opinion.

*Order varied accordingly.*

Solicitor, the Board of Trade Solicitor.

Solicitor for trustee, A. Scott Lawson, for Bointon and Foster, of Leeds.

Thursday, Dec. 4, 1884.

(Before MATHEW and CAVE, JJ.)

ARDEN v. DEACON. (a)

*Secured creditor—Amendment of proof—Appeal—Twenty-one days—R. S. C., Order LVIII., r. 15—Rights of second mortgagee—Bankruptcy Act 1883, schedule 2—Rules 11, 12, 13, and 15—Trustee appearing without notice—Costs.*

*Upon a technical objection to the effect that an appeal against the decision of a County Court judge had not been brought within twenty-one days prescribed by Order LVIII., r. 15, the Court elected, in doubt whether the posting of the notice of appeal on the twenty-first day was sufficient, to exercise the power of extending the time given by rule 112 of the Bankruptcy Rules 1883, and hear the appeal.*

*Upon a contention that the provisions of schedule 2 of the Bankruptcy Act 1883 concerning the amendment of proof by a secured creditor could not have been intended to apply in cases where the amendment of the proof would affect the interests of a second mortgagee, and where some person other than the first secured creditor and the trustees are interested:*

*Held, that this contention could not be upheld.*

*Held, further, the trustee having appeared without being served with notice of appeal, that the trustee could not be allowed his costs.*

THIS was an appeal against an order made by the County Court judge of Staffordshire, sitting at

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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Burslem, on the 27th Aug. 1884, allowing a secured creditor to amend the proof formally tendered by him to the trustee in the bankruptcy of Arden. The appeal was lodged by the sister of the bankrupt, who held a second mortgage on the property of the bankrupt. It was entered on the 17th Sept., and on the same day a copy of the notice of appeal was sent to the registrar of the County Court of Stafford by post, and to the respondent at his place of abode.

The bankrupt, a brewer, had purchased his brewery from the respondent for 30,000*l.*, of which 18,800*l.* was allowed to remain unpaid and secured to the respondent by a mortgage upon the premises, upon the terms that the mortgagor should pay to the mortgagee a sum of 2000*l.* on the 24th Dec. 1883. Upon default of the mortgagor, the mortgagees sued him upon the above-mentioned covenant in the mortgage deed, and the mortgagor filed his petition in bankruptcy.

At the time of the bankruptcy the appellant, a sister of the bankrupt, had also a mortgage upon the brewery premises for 3500*l.* or thereabouts.

At the first meeting of creditors Deacon proved for 3000*l.*, estimating the value of his security at 16,000*l.* Subsequently he desired to amend his proof, and the County Court judge allowed him to do so on the ground that the first proof had been made under a *bond fide* misapprehension of the value of the property.

Against this decision the second mortgagee, Miss Louisa Arden, appealed.

*Bigham, Q.C.* (with him *Boddam*) for Deacon.—I wish to take a preliminary objection. The twenty-one days within which an appeal must be brought under R. S. C., Order LVIII., r. 15, had expired. The rule is, that notice of appeal must be given within twenty-one days, and that at the same time notice must be given that the appellant does not wish for a hearing of the appeal sooner than four days from that time. This is for the purpose of allowing time for the hearing of the argument. As a matter of fact this notice of appeal did not reach us until the 18th Sept., and the twenty-one days expired on the 17th. The practice is established:

*Ex parte Viney*, 36 L. T. Rep. N. S. 46; L. Rep. 4 Ch. Div. 794; and in

*Ex parte Saffery*, 35 L. T. Rep. N. S. 715; 4 Ch. Div. 555.

MATHEW, J.—We do not feel sure whether the posting was not sufficient, and therefore, under the circumstances, we will exercise our power of extending the time.

*Cooper Willis, Q.C.* (with him *Plumptre*) for the appellant.—The case is one of mistake in valuing a security, and my client has been injured by the allowance of an amendment. My client is a second mortgagee, and that fact may have some influence in determining the construction which your Lordships will put upon the rules relating to the amendment of proof by secured creditors. These are contained in schedule 2 of the Bankruptcy Act 1883, under the heading "Proof by Secured Creditors," and especially in rules 9, 11, 12, 13, and 15 of that schedule. I admit that the new Act gives far greater powers of amendment to secured creditors, but it cannot have been intended to apply these rules in cases in which there are second mortgagees.

MATHEW, J.—Mr. Willis's contention amounts to this, that the rules do not apply where there are other mortgagees besides the secured creditor. I am satisfied that that contention cannot be allowed to prevail, and that the second mortgagee has no such right or interest as is claimed. The first mortgagee cannot be excluded from his rights.

CAVE, J.—I am entirely of the same opinion.

*Aspland* for the trustee.—The trustee has not been served with notice of the appeal, but it was necessary for him to be represented at this hearing, and I ask for his costs.

MATHEW, J.—We refuse to give them; he had no right to come here without being served with notice.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Jennings, Son, and Burton*.

Solicitors for the respondent, *Ashurst, Morris, Crisp, and Co.*

Solicitors for the trustee, *Duffield and Bruty*.

## CROWN CASES RESERVED.

Nov. 29 and Dec. 20, 1884.

(Before LORD COLERIDGE, C.J., GROVE, J., HUDDLESTON, B., MANISTY and MATHEW, JJ.)

REG. v. POWELL. (a)

*False pretences—Obtaining premium on policy of insurance—Policy treated as lapsed—Suppression of material facts—Knowledge by prisoner of facts which would have prevented payment—Misrepresentation by conduct.*

*P.*, an agent of a life assurance company, received from *V.* the premium for the year 1883 to 1884, on a policy effected by *V.* with the company in 1881, but, instead of giving *V.* the official receipt, gave him an informal receipt, appropriated the money and returned the official receipt to the company, who treated the policy as lapsed.

On the 7th April 1884, *P.* called on *V.* for the premium for the year 1884 to 1885. *V.* being then unable to pay, *P.* called again on 21st April, the days of grace allowed by the policy having to the knowledge of *V.* expired on the 15th April, and told *V.* that payment on that day "would be effectual," and *V.* understood that *P.* was to "apply to the company to let the policy go on." The company were in the habit of allowing lapsed policies to be revived, upon the payment of overdue premiums; and upon the representations thus made by *P.*, *V.* paid him a sum of money. Upon a case reserved at the trial of an indictment which charged *P.* with having obtained this sum of money by false pretences:

Held, by the majority of the court, that *P.*'s conduct on the 7th and 21st April amounted to a representation that the policy had not lapsed nor become void, and that he had authority to say that the payment on the 21st would keep the policy alive for another year, and that there was, therefore, sufficient evidence to support the conviction. Grove and Manisty, JJ. dissentientibus, on the ground that the payment of the premium in 1883 to *P.*, as agent of the company, was a payment to

(a) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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*the company, and that the policy had not therefore lapsed or become void, except so far as both V. and P. knew that it had lapsed on the 15th April.*

CASE stated by the Recorder of Grantham, which was as follows:—

At the quarter sessions for the borough of Grantham, held before me on the 31st Oct. 1884, the defendant, Walter Powell, was tried for obtaining money under false pretences from one David Vellam.

The indictment charged that Walter Powell, on the 21st April 1884, unlawfully, knowingly, and designedly did falsely pretend to one David Vellam that a certain policy of insurance on the life of the said David Vellam, effected with the Western Counties and London Life Assurance Company at Plymouth, of which company the said Walter Powell was then agent, was then in full force and existence and not lapsed nor become void, and that the current year's premium thereon was then due and payable, and that he, the said Walter Powell, as an agent of the said company, was then entitled to receive the same premium from the said David Vellam, by means of which said false pretences the said Walter Powell then and there unlawfully, knowingly, and designedly did obtain from the said David Vellam a certain sum of money amounting to the sum of 3*l.* 2*s.* 8*d.* the moneys of the said David Vellam, with intent thereby then to defraud, whereas in truth and in fact the said policy of insurance on the life of the said David Vellam was not then in existence, but had lapsed and become void, nor was the premium for the then current year due and payable, nor was the said Walter Powell entitled to receive the same premiums from the said David Vellam as he the said Walter Powell did then so falsely pretend to the said David Vellam as aforesaid, and the said Walter Powell at the time he so falsely pretended as aforesaid well knew the said pretences to be false, &c.

The defendant was an agent to the Western Counties and London Life Assurance Company, his business was to obtain applications for policies of insurance, and also to collect the annual premiums due from persons insured in the company; for these services he was paid by commission.

The said David Vellam had in the year 1881 insured his life in the said company through the agency of the defendant at an annual premium of 4*l.* 1*s.* 8*d.* The premium on the policy of insurance was payable annually on the 1st April.

By the terms and conditions indorsed on the back of the said policy it was provided that it should become void if any yearly or half-yearly premium should be in arrear for the space of fifteen days.

By a memorandum at the foot of the said terms and conditions notice was given that no renewal receipt for any policy would be regarded by the company as a valid except the usual receipt issued from the office and signed by two directors and the secretary.

It was the duty of the defendant to receive from the said David Vellam the premiums as they annually fell due. For this purpose he was intrusted each year with the company's form of receipt duly signed, and it was his duty on payment of the money to countersign this receipt and hand it over to the assured.

In the beginning of April 1883 the said David Vellam duly paid his premium to the defendant and received from him in acknowledgment an informal receipt signed by the defendant. Vellam several times asked for the official receipt, but the defendant always made excuses for not giving it.

The defendant did not account to the company for the premium of 1883, and returned the official receipt to the company to be cancelled. The company thereupon treated the policy as lapsed.

On the 7th April 1884 the defendant called on Vellam saying that he had called for the premium due on the 1st April for the year 1884-5. Vellam replied that he was unable to pay then, as he had not the money, but that he hoped to be able to obtain the money before the 15th April.

On the 21st April the defendant again called on Vellam for the premium. Vellam then paid the defendant the sum of 3*l.* 2*s.* 8*d.* on account. It was in respect of the obtaining of this sum that the defendant was indicted.

On the 21st April the days of grace had expired. Vellam was aware of this. He considered that his policy had been in force up to the 15th April. The defendant told him that the payment on the 21st April "would be effectual." Vellam also understood that the defendant was to "apply to the company to let the policy go on." These were in Vellam's language the inducements which led him to pay the 3*l.* 2*s.* 8*d.* to the defendant.

The company were in the habit of allowing lapsed policies to be revived on the payment of overdue premiums provided they were satisfied as to the state of the health of the assured.

There was no evidence before me to show what in such cases were the duty and authority of their agents.

It was contended by the defendant's counsel that there was no evidence to show that the money had been obtained through the pretence charged in the indictment, or through any misrepresentation of existing facts.

I ruled that, if the defendant represented to Vellam that he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3*l.* 2*s.* 8*d.*, such representations, if false to the knowledge of the defendant, would be a false pretence within the terms of the indictment, and I so directed the jury.

The prisoner was convicted, and I passed a sentence of six months' imprisonment with hard labour, but respited execution of the judgment and discharged the defendant on recognisance of bail to render himself in execution.

The questions for the opinion of the court are:

1. Whether I ought to have directed a verdict of not guilty.
2. Whether my direction to the jury was incorrect.

If the court answer either of these questions in the affirmative the conviction is to be quashed; otherwise to stand affirmed.

GILBERT GEORGE KENNEDY,  
Recorder of Grantham.

14th Nov. 1884.

Lindsell (with him Waddy, Q.C.), on behalf of the defendant, submitted that there was no evidence to support the indictment with which the defendant was charged; and contended that the company, by their agent, having been paid



the premium for the year 1883 to 1884, the policy, although treated as lapsed, had not in fact lapsed. The question was, whether on the 21st April 1884 the defendant knew that the policy had in fact lapsed, and, inasmuch as the policy had not lapsed, he could not possibly be convicted of falsely pretending that it had not lapsed. The prosecution were driven to rely, in support of the indictment, upon the conduct of the defendant, and whatever the defendant knew with regard to the policy, no conduct of his which represented that which proved to be in fact true could be held to be a false representation; and, with regard to the representation as to his authority to receive the premium, if the policy had not in fact lapsed, he was the person entitled as agent of the company to receive it, and was guilty of no false pretence.

*Curr. adv. vult.*

*Dec. 20.*—*MANISTY, J.*—This is an indictment which charges the defendant with having on the 21st day of April 1884 obtained a sum of money from one Vellam by means of certain false pretences. It is necessary to state the circumstances under which the false pretences are alleged to have been made. Before doing so, however, I may say that the defendant was an agent to the Western Counties and Life Assurance Company for obtaining applications for policies of insurance and for collecting the annual premiums due from persons insured in the company; and it was his duty to receive from Vellam the premiums as they annually fell due upon a policy which Vellam had effected with the company. The charge against the defendant is that on the 21st April 1884 he falsely pretended to Vellam that a premium was due from Vellam on his policy for the year 1884 to 1885; that such policy was in full force and existence and not lapsed nor become void; and that he was entitled to receive that premium. By means of this alleged false pretence he is charged with having obtained the sum of 3*l.* 2*s.* 8*d.* on the 21st April 1884 from Vellam. Now, can this charge be sustained? The question is whether any representations were made by the defendant to Vellam which were false to the knowledge of the defendant but not to the knowledge of Vellam, by means of which Vellam was induced to make the payment—the facts being that in April in the previous year the defendant had received from Vellam the premium on his policy for that year, and had not accounted to the company for it, he having given to Vellam an informal receipt, and returned the official receipt to the company to be cancelled. By the terms of the policy no renewal receipt for any policy would be regarded by the company as valid except the usual receipt issued from the office, and whether the defendant embezzled the money he received or not is not before us. It is found, however, that it was the duty of the defendant to receive the premiums as they annually fell due, and what are the facts with regard to the alleged false pretence? On the 7th April, within the days of grace, the defendant called on Vellam for the premium due on the 1st. Vellam replied that he was unable to pay then as he had not the money, but he hoped to be able to obtain it before the 15th April, when the days of grace would expire. There is no false pretence there, and the premium for the previous year had been paid to the authorised agent of the company, but not

accounted for by him. In my opinion, that payment in 1883 was a good payment as against the company and the policy was in force on the 1st April 1884. It is only by compounding what may have been an offence in 1883 with what may have been an offence in 1884, namely, the embezzlement, if such it was, of the two premiums, that this charge is attempted to be substantiated. But embezzlement is not the charge with which the defendant is indicted. The only day on which it is said that any false pretences were made was on the 21st April, when the defendant again called on Vellam. On that day Vellam paid the defendant not the whole amount, but 3*l.* 2*s.* 8*d.* on account, and it is in respect of that sum that the defendant is indicted. Now, what is the false pretence? And here is where we come to what is to my mind the essence of the whole pretence alleged. Did he make any false pretence to Vellam; if so, what was it? On the 21st April the days of grace had expired. Vellam was aware of this. He was aware that the policy had lapsed, and the false pretence alleged is that the defendant falsely pretended that the policy was in full force. Both parties knew it had lapsed. Vellam “considered that his policy had been in force up to the 15th April; the defendant told him that the payment on the 21st April would be effectual.” Effectual for what? And that must not, in my judgment, be taken without what follows, and we must not pick out one or two words from which to arrive at it. What did that mean? Why, that “I, the agent, will undertake that the policy shall be renewed.” There is no such charge here, however; the charge is that he falsely pretended that the policy was in full force. Had he been indicted for falsely pretending that he could get the directors to renew the policy, it might be different; but the indictment charges him with having falsely pretended that he was entitled to receive the premium. So he was entitled to receive it, but subject to his getting the approval of the directors to the renewal of the policy. Vellam understood that the defendant was to apply to the company to get the policy renewed. He knew that unless the company was applied to the policy would not be renewed, and in Vellam’s language “these were the inducements which led him to pay the 3*l.* 2*s.* 8*d.* to the defendant.” The company were in the habit of allowing lapsed policies to be renewed on the payment of overdue premiums, provided they were satisfied as to the state of the health of the assured, so that both parties knew that all that could be done was to get the directors to consent to the renewal of the policy. Upon the state of facts applied as I apply them, I am at a loss to see how there can be any evidence of a false pretence as charged in the indictment. It may be he is liable to be indicted for embezzlement at this moment, if he put the premiums into his pocket, but that is another thing. I am of opinion that this conviction cannot be sustained, upon the evidence, and I also think that there was a misdirection on the part of the learned recorder. His direction to the jury was this: “I ruled that if the defendant represented to Vellam that he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3*l.* 2*s.* 8*d.*, such representations, if false to the knowledge of the defen-

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dant, would be a false pretence within the terms of the indictment." Now, the defendant received that payment, as it is found, subject to the approval of the directors; it is found that he did not take it as "a practically effectual payment," and that he could only intercede with the directors. I think that that was a misdirection, and that upon both these grounds the conviction cannot be sustained.

HUDDLESTON, B.—I regret that I am unable to agree with my brother Manisty. The facts appear to be these: that Vellam in 1881 insured in this office through the defendant. I presume that all the premiums were paid until the month of April 1883, and in that month Vellam paid to the defendant the amount of the premium then due, and I agree with my brother Manisty that the payment may have been effectual; but the defendant embezzled that money—at any rate, he failed to pay it to the company; and what I must now consider is what the company did in that state of things. Vellam having paid the money to the defendant, the defendant appropriated it to his own use, and returned the official receipt to the company to be cancelled. That receipt is a document signed by two of the directors and the secretary, and delivered to the defendant in order that he might deliver it to Vellam; and it is found as a fact that the defendant, having embezzled the money, in order to conceal the embezzlement did not give the receipt to Vellam, but returned it to the company, who treated the policy as lapsed. Now, the defendant knew that the policy had been treated as lapsed, but Vellam did not know that; and when the defendant came to Vellam on the 7th April 1884, Vellam did not know that the company had treated the policy as lapsed. Consequently, when the defendant called for the premium on that day, Vellam was under the impression that his policy was in full force and existence. Not being in a position to pay on the 7th April, on the 21st April the defendant comes again to Vellam, and at that time the policy of 1883 had lapsed, and there was no policy in existence of 1884. Now, what did the defendant really represent when he came then? He represented this, that "your policy is in existence, although the days of grace have expired, and if you pay me now your payment will be effectual." Effectual for what? Why, a policy for the year 1884 to 1885, when the defendant knew there was no policy of that date. "If you pay it now, you will be able to keep the policy in existence, and I am authorised to say so." He was not authorised to say so, and when I look at the charge in the indictment, that, in my opinion, is supported in every way by the evidence. The company had done all they could to make the policy a lapsed policy, for they had treated it as a lapsed policy. The defendant said that a payment made on the 21st April "would be effectual;" that is to say, he represented that the current premium was then due, whereas it was not then due, and he further represented that he was entitled to receive the premium. He was not entitled to receive the premium when the policy of 1883 had lapsed, and how could he be authorised to receive the premium of 1884 under such circumstances? Then, as to the question whether the learned recorder misdirected the jury, what is the meaning of "a practically effectual payment?" That, in my opinion, was to say that the payment would prac-

tically be sufficient to keep the policy alive, notwithstanding that the days of grace had expired. It is not necessary that the representation should be made in actual words. In *Reg. v. Giles* (34 L. J. 50, M. C.), Blackburn, J. said, "It is not requisite that the false pretence should be made in express words if the idea is conveyed." What is the idea which is conveyed from the words used, and the conduct of the defendant here? It is that "I can put you in the same position, if you pay this money, as you would have been in had the policy not lapsed." In my opinion, there was no misdirection, and the false pretence with which the prisoner was charged is fully sustained by the evidence, and the conviction was therefore right.

GROVE, J.—I agree in this case with my brother Manisty. It appears to me that the defendant is not shown to have been guilty of the false pretence alleged in the indictment. Now, what are the requisites which are necessary in order to sustain an indictment for false pretences? They are, first, that the representation is false in fact; secondly, that it is false to the knowledge of the person making it; and, thirdly, that the goods or money were obtained by reason of the false pretence. Now, was the pretence here false in fact, if taken to refer to the policy of 1883? I think that the alleged pretence was true, because in 1883 to 1884 the policy had not lapsed, and I agree with my brother Manisty that, although the defendant did not give the official receipt, yet that, he being the authorised agent to receive moneys, that payment was a good one, and an action could have been sustained, had Vellam died during that year, to recover the amount for which he was insured under the policy. Now, it is said that at the foot of the policy notice is given "that no renewal receipt for any policy would be regarded by the company as valid except the usual receipt issued from the office and signed by two directors and the secretary." It may be that they would not accept, for the better regulation of their business, as evidence of any renewal any receipt except the official receipt. But would that free them? Suppose that the defendant had received a premium in due time, and had said he could not give the official receipt for it, as he had left such receipt in his office, and had then absconded. Could not Vellam's representatives have recovered under the policy, in the case of his death during the year, in respect of which that premium was paid? My brother Manisty agrees with me that they could, and I do not understand my brother Huddleston to disagree with that. It is an important fact, and it is, in my opinion, a fact that the policy of 1883 had not lapsed. Then, what is the false pretence alleged here? The representation is not that the company had treated the policy as lapsed. The alleged representation is that the policy had in fact lapsed; there is no allegation that the defendant falsely pretended that the company had treated the policy as lapsed. The representation alleged was that the policy was "then in full force and existence, and that he, the said Walter Powell, as an agent of the said company, was then entitled to receive the same premium." I say that, as far as the year 1883 to 1884 is concerned, that representation was true. Therefore, if he made that representation, he made a true representation, and he cannot be indicted for that. The allegation in the indict-

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ment is that "in truth and in fact the said policy of insurance on the life of the said David Vellam was not then in existence, but had lapsed and become void." But if the defendant said what he is alleged to have said he spoke the truth, and I do not see that there is any false pretence as alleged. It is the false representation whereby he obtained the sum of 3l. 2s. 8d. in respect of which he is indicted; and I know it is said by my brother Huddleston that in applying for the premium of 1884 to 1885, the defendant must be taken to have implied that the policy of 1883 to 1884 was in existence. Well, if he did, he was right; it was not void, and you cannot make a thing false by joining to it a truth. It is possible that he may have repented, or it may have been by oblivion on his part, and he may have subsequently settled the matter with the company. I do not say it is probable, I say it is possible. As far as the year 1883 to 1884 is concerned, we do not know whether the policy was actually treated by the company as lapsed. Now, we go on to the year 1884 to 1885. It is alleged that the defendant, "at the time he so falsely pretended as aforesaid, well knew the said pretences to be false." Now the premium for the year 1883 to 1884 was paid by the defendant in due time, but an informal receipt was given, and the company thereupon treated the policy as lapsed. But that is not the question; they only treated it as lapsed upon the money not being given to them by the defendant. *Non constat*, if the money had been ultimately given to them they would have continued to treat the policy as lapsed. I think that they could not in law have done so. Now, the conversation was in respect of the renewal of the policy from 1884 to 1885. It is said by my brother Huddleston that the calling and asking for the premium of that year was a pretence that the policy had continued to live during 1883 to 1884. I will assume that that may be considered to be implied, though it is a strong thing to do. If, then, it is to be so implied, the policy was alive, and the defendant is not to be indicted for that. He could only be indicted on the ground that the policy had really lapsed, and, therefore, as it does not appear that it had lapsed, I do not think he can be indicted for that statement. The case goes on, "Vellam replied that he was unable to pay then, as he had not the money; but that he hoped to be able to obtain the money before the 15th April. On the 21st April the defendant again called on Vellam for the premium." Now, this is the day on which the false representation is alleged to have been made, and that is, in my opinion, another reason why what happened on the 7th April cannot be brought in. It is said that "on the 21st April the defendant again called on Vellam for the premium. Vellam then paid the defendant the sum of 3l. 2s. 8d. on account. It was in respect of the obtaining of this sum that the defendant was indicted." So, not only does the indictment lay the offence on the 21st April, but it is fixed on that day by this statement. How, then, can we consider what happened on the 7th April? The offence is not a compound of what happened on the 7th and 21st, but of what he is assumed to have said by his conduct on the 21st. Now, what is said? On the 21st April Vellam knew that the policy had lapsed; but from the conduct of the company, as stated in the case, "the company were in the habit of allowing lapsed policies to be revived on the payment

of overdue premiums." Therefore, though legally lapsed, according to the practice of the company, it had not necessarily lapsed, because it was the practice of the company, under certain circumstances, to continue policies; so that, though it might be an incorrect term to use to say that a policy was alive, it was however, not necessarily a false statement in fact. Now, what did the defendant actually say? He said that the payment on the 21st April "would be effectual." Suppose it had stopped there. Both parties knew that the policy had lapsed, but they both knew of the habit of the company. The real representation was that it "would be effectual." Now, what did Vellam understand? "Vellam also understood that the defendant was to apply to the company to let the policy go on." Can anything be more explicit than that? Is it a representation that the policy had lapsed when the defendant received the money for the very purpose of applying to the company to let the policy go on? The representation alleged is that the policy had actually gone, and was irrevocable, and yet that the defendant represented it as still existing, and is that allegation proved by these facts? What is the meaning of the words "will apply," do they not amount to an assurance that the policy is not alive, but that he will endeavour to make it alive. "The time for the policy has expired; I will apply to the company, and I have no doubt the company will renew," in effect says the defendant. It seems to me that the evidence wholly fails, whether you take what happened on the 7th and 21st together or separately, to make up a false pretence as charged in the indictment. I am of opinion, therefore, that the offence here alleged in the indictment is not sustained, and that, though the defendant may have embezzled the money, he is not guilty of the false pretence with which he is charged. Suppose that the defendant did say that "he had power to receive the payment of the 21st April 1884 as a practically effectual payment of the annual premium on the policy," he only meant it in the sense in which the company generally renew their policies, as found in the case; and I do not see anything in the case to show that that would be false, because in all probability it would be true. I am, therefore, of opinion that the direction of the learned recorder to the jury was wrong, and that the conviction should not be affirmed.

COLERIDGE, C.J.—This is a curious example of how the same state of facts may produce absolutely different results upon educated minds. From the commencement of the case I have had no doubt in my mind, and it seems to me to be a clear case of false pretences. I am perfectly content to take what my brother Grove has said is necessary to constitute the offence of obtaining goods or money by false pretence to be requisite, and I agree with him that there must be a representation of some fact which is not only untrue, but which is false to the knowledge of the person making it, and that it must be on such representation that the goods or money are obtained. I do not gather that I shall be stating what is unfair if I state this, that, whatever the true legal effects of the circumstances down to the 21st April 1884 may be, the person who parted with his money on that day was unaware of those facts. I will not discuss what was the legal effect of the circumstances previous to that date, and whether the company could, or could not, treat

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the policy as gone, because the proper receipt was never given. Vellam knew, from the terms and conditions on the back of the policy, that if the premiums were in arrear for a certain time the policy would become void. He therefore knew that unless he did what he ought to do, and which he knew he had not done, the company might treat the policy as gone. So far as the policy of 1883 was concerned, he believed that he had paid the premium, and that the company had got it. The facts were otherwise, and it is said that the company had no right to treat the policy as gone. It may be so, but the defendant did not know it; he knew that he had not given the receipt he ought to have given. Now, the facts show that the money was obtained by reason of the statement made on the 21st. When the premium was applied for, Vellam believed—a belief induced by the statements of the defendant—that, unless the company chose to treat the policy as lapsed, it was still a good and valid policy. The company had treated the policy as lapsed, but that he did not know and the defendant did. It is admitted that, supposing the policy was not in existence, that may be a false pretence, because it was the obtaining a payment in respect of a policy that Vellam believed had continued and was continuing in existence. To my mind, the evidence is as cogent as it can be, that, had the defendant told the truth, it cannot be supposed that Vellam would have parted with his money. On the 7th April Vellam could not pay the premium, and the days of grace expired on the 15th. Nothing seems to have taken place, but on the 21st the defendant calls again. It is true that on the 21st there is not a repetition in terms of the representation which was made on the 7th; but the representation which was made on the 21st must be taken, in my judgment, as connected with the representation which was made on the 7th, because, without considering the representation which was made on the 7th, the representation made on the 21st would have had no effect. That being so, on the 21st Vellam pays the defendant this money, and the defendant tells him that it “would be effectual.” What is the meaning of “effectual” under the circumstances? Surely the meaning is that, “You have a policy which was valid up to the 15th. This, however, is the 21st; but, according to the ordinary course and practice of the office in which the policy is, if you pay me this money your policy will go on.” It is as if a man comes to me and says, “You pay me so much money,” and I say, “If I do, will that discharge my debt?” and he says, “Yes, it will.” The defendant also told Vellam that he must communicate with the office, and that, if he did, the policy would be effectual. It appears to me that the conduct on the 7th, being used, as it must be, to explain the conduct on the 21st, there was conduct on the 21st sufficient to effect the representation that, the policy being still in existence, the payment on that day would be effectual to keep it alive. Now, that policy had for a year been treated by the company as lapsed. That fact was concealed by the defendant from Vellam, and, supposing that upon that representation the money was obtained, it appears to me that all the elements of a false pretence are perfectly made out. It is said that the learned Recorder misdirected the jury because he told them that “If the defendant represented to Vellam that he had power to receive the payment

of the 21st April 1884 as a practically effectual payment of the annual premium on the policy, and that he thereby induced Vellam to pay the 3l. 2s. 8d., such representation, if false to the knowledge of the defendant, would be a false pretence within the terms of the indictment.” He did so represent; and can anyone question that the facts which were unknown to Vellam were known to the defendant, and that, if they had been known to Vellam, the money would undoubtedly never have been paid? I am of opinion that there was no misdirection. I agree that it is very likely another form of indictment would have been a surer and better mode of procedure, for it seems as if the money had been embezzled. The result, however, is that, as two of my learned brothers think with me that the conviction should be affirmed, though two of them think that it should not, the conviction must be affirmed.

MATHEW, J. formed one of the majority of the court, but was absent when the judgments were delivered.

*Conviction affirmed.*

Solicitors for the defendant, *Merediths and Co.*, agents for *A. H. Ruston*, Chatteris, Cambridge-shire.

## Supreme Court of Judicature.

### COURT OF APPEAL.

CORRIGENDUM.—At p. 526, first column, line 21 from the top, after “suing” insert “but.”

Monday, Oct. 27, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

SMITH v. LAND AND HOUSE PROPERTY CORPORATION. (a)

*Vendor and purchaser—Contract—Misrepresentation—Independent inquiry—Specific performance—Rescission of contract.*

The plaintiffs advertised for sale by auction an hotel, stated in the particulars to be held by a “most desirable tenant.” The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (400l.), rates, and taxes. The defendants, however, relying on the statements in the particulars, authorised the secretary to attend the sale and to bid up to 5000l. The property was bought in at the sale, and the secretary purchased it by private contract for 4700l. It appeared subsequently that the quarter’s rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant’s failure was the best he had had. The plaintiffs brought an action for specific performance, relying (in answer to the defence, and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries.

*Held* (affirming the decision of Denman, J., 49

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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*L. T. Rep. N. S. 532*), that the defendants were entitled to rescission of the contract.

*Observations on Redgrave v. Hurd* (45 *L. T. Rep. N. S.* 485; 20 *Ch. Div.* 1).

THE plaintiffs claimed specific performance of an agreement by the defendants to purchase a freehold hotel at Walton-on-the-Naze. The defendants by their defence and counter-claim claimed rescission of the contract, one of the grounds being a misdescription in the particulars of sale.

The plaintiffs, who were mortgagees in possession of the property in question, advertised it for sale by auction, the following being the material part of the particulars:

Good investment. Particulars and conditions of sale of the freehold Marine Family Hotel, situate at Walton-on-the-Naze, and now held by a very desirable tenant, Mr. Frederick Fleck, for an unexpired term of twenty-eight years, at a rent of 400*l.* per annum, which will be sold by auction by Messrs. Humbert and Sons.

The auction was to take place on the 4th Aug. 1882. The particulars also stated:

The whole property is let to Mr. Frederick Fleck (a most desirable tenant), at a rental of 400*l.* per annum (clear of rates, taxes, insurance, &c.), for an unexpired term of twenty-seven and a half years, thus offering a first-class investment.

The defendants having seen the above announcement had a board meeting on the 25th July 1882, and determined to send down their secretary, Mr. McLewin, to see the property and report thereon; the note in the minute-book was in these terms: "Secretary to view the same and fully report to next committee." On the 1st Aug. there was another meeting of the defendants' board when the secretary's report was read, which was as follows:

On Saturday I visited Walton-on-the-Naze with a view of inspecting the Marine Hotel. The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving hotel. Mr. Fleck, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes wide open, could have been induced to take the hotel at present rental. The only thing that I can see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a sort of casino. The town itself seems to be in the very last stage of decay from beginning to end; the old pier, wrecked on the 18th Jan. 1881, has never been repaired. The landlip, which occurred on above occasion has never been made good.

Notwithstanding this report the defendants (relying on the statement in the particulars that the property was let to a very desirable tenant) instructed the secretary to attend the auction on the 4th Aug., and to bid for the property up to 5000*l.* The secretary accordingly attended the auction, when the property was bought in; but on the same day the secretary entered into a private contract with the mortgagees to purchase for 4700*l.* Ultimately, the defendants having refused to complete the purchase, the plaintiffs, on the 7th Oct. 1882, brought their action claiming specific performance.

The defendants, by their statement of defence, alleged that they had entered into the contract on the faith of the allegations in the particulars of sale, but that previous to the date fixed for completion they had discovered that Fleck was not a desirable tenant, and that his rent was in arrear, as the plaintiffs knew, and that he was insolvent

at the time of and long previous to the date of the property being offered for sale, and had shortly afterwards filed his petition for liquidation. There was a further defence, which is immaterial for the present report, and by way of counter-claim the defendants claimed a return of their deposit, rescission of the contract, and damages.

By their reply and defence to the counter-claim the plaintiffs denied that the defendants had entered into the contract on the faith of the representation that Fleck was a desirable tenant. They also relied on the fact that previously to the sale the defendants had sent down their secretary Mr. McLewin to make inquiries, and further that Mr. McLewin had, before signing the contract, stated to Mr. Humbert, one of the firm of the plaintiffs' auctioneers, that he did not attach any importance to the tenancy of Mr. Fleck.

The lease to Fleck, which had been adopted by the mortgagees, was for a term of thirty years from Lady-day 1880, and with respect to his actual condition it appeared that the quarter's rent due on the 25th March previous to the sale had not been paid down to the 1st May following; that a distress for rent having been threatened by the mortgagees, who had adopted the lease, Fleck applied for time, but that the mortgagees declined to allow the rent to remain over Whitsuntide.

Accordingly, early in May Fleck paid 30*l.* on account of the quarter then due, and on the 13th June a further sum of 40*l.*, leaving 30*l.* still due, which it appeared was paid some time before the sale, but the subsequent Midsummer rent was never paid, and a few days after the sale Fleck filed his petition for liquidation. It further appeared, however, that the takings of the hotel business had in the year 1882 been as good as in the previous years, and that the month of Fleck's failure was the best he had ever had.

Mr. Humbert, the senior member of the firm of Humbert and Sons, the plaintiffs agents, deposed that he had prepared the particulars, but that he attached very little importance to the statement as to Fleck being a desirable tenant.

The material evidence is set out in the report of the case in the court below.

Denman, J. held that the statement in the particulars could not to be treated as *simplex commendatio*, and found that the defendants had relied on it. His Lordship accordingly gave judgment for the defendant on both the claim and the counter-claim: (49 *L. T. Rep. N. S.* 532.)

The plaintiffs appealed.

*W. W. Karelake*, Q.C. and *Asquith* (*B. S. Wright* with them) for the appellants.—The statement in the particulars was warranted by the circumstances existing at the time it was made, for the trade at the house was increasing, and the tenant had paid his rent, though he was backward in paying the last quarter's rent. There was no warranty of the man's solvency, or guarantee that he would pay the rent in future, and there was no recklessness in making the statement. The statement was a mere *simplex commendatio*, or flourishing description, and that is not sufficient to disentitle the plaintiffs to specific performance. The description of an imperfectly watered piece of land as uncommonly rich water meadow, was held not to be such a misrepresentation as would avoid the sale:

*Scott v. Hanson*, 1 Sim. 13; affirmed 1 R. & M. 128.

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SMITH v. LAND AND HOUSE PROPERTY CORPORATION.

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A man may be a very good tenant although he does not pay his rent punctually. In the case of farms the payment of rent is constantly deferred. [Fry, L.J.—I agree that a man may be a very good tenant although he is unpunctual.] At the most the statement was vague and indefinite, and ought to have put the purchasers on inquiry :

*Trower v. Newcombe*, 3 Mer. 704.

But no reliance was placed on the representation. The defendants had the means of inquiry, and acted on the report of their secretary, and in such a case the purchasers must perform the contract :

*Clapham v. Shillito*, 7 Beav. 146.

A description of a house as substantial and convenient, and having five bedrooms, was held to be no misdescription, although the house was out of repair, the walls in some cases only half a brick thick, and some of the bedrooms were very small inner rooms, without fire-places :

*Johnson v. Smart*, 2 L. T. Rep. N. S. 307, 783 ; 2 Gif. 151.

They distinguished

*Redgrave v. Hurd*, 45 L. T. Rep. N. S. 485 ; 20 Ch. Div. 1.

*Davey, Q.C.* and *W. A. Raikes*, for the defendants, were not called upon.

BAGGALLAY, L.J.—On the 4th Aug. 1882 certain property was offered for sale by auction, the property being described in the particulars of sale. There was no actual sale, but a contract to purchase the property was afterwards entered into by the defendants, which they declined to complete on the ground that there was a material misrepresentation in the particulars of sale. In the action for specific performance brought against them they rely on this alleged misrepresentation for the rescission of the contract. The representation complained of is that the property is "held by a very desirable tenant," or, as he was subsequently called, "a most desirable tenant." The defendants say that representation was false, inasmuch as Fleck, the tenant, was not a desirable tenant at all, for that at Lady-day he did not pay the rent then due, notwithstanding threats of a distress ; that it was not till May that he paid anything on account even ; that in June he paid something more, but that the balance of the Lady-day rent was not paid till after June. It appears also that at the date of the auction, which was six weeks after the Midsummer rent had become due, that rent was still unpaid. It is said that the words complained of are really the language of the auctioneer ; but I warn vendors not to allow untrue descriptions to be given of property which they offer for sale, and that they cannot be released from liability because auctioneers employed by them have given a description which the property will not bear. Indeed, I do not suppose for a moment that auctioneers claim the right to misdescribe property offered for sale by them. I think that Denman, J. was of opinion that a representation was made which was untrue, and that those who made it knew that Fleck was not a desirable tenant, as he had failed to pay the rent. I desire to add nothing to what I said in *Redgrave v. Hurd* as to the Court of Appeal differing from the opinion of the judge who has actually seen the witnesses. Not only is there no ground, in my opinion, for dissenting from the view taken in this case by Denman J., but I dissent in that view. Did the statement in the

particulars materially influence the purchasers ? It appears to me that the evidence is all on one side, and conclusively establishes that it did. The plaintiffs say that the defendants relied on the report made by their secretary, and could not have been induced to buy by the statement in the particulars. But, in my opinion, although everything in the report might be true, it did not follow that the tenant was not able to pay the rent of the hotel out of other money of his own. There is nothing in the report inconsistent with the statement of the vendors that Mr. Fleck was a most desirable tenant (which he would not be if he could not pay his rent), and that was enough to induce the defendants to buy. In the cases referred to of *Johnson v. Smart* and *Scott v. Hanson* it was held that there had been no misrepresentation, the question being, not whether the representation had had a material effect, but whether it was false. In *Trower v. Newman* the statement made was true. It appears to me that there is no reason to differ from Denman J. as to the facts of this case, and that it comes within the decision in *Redgrave v. Hurd*.

BOWEN, L.J.—The defendants say that the misdescription in the particulars of the tenant disentitles the plaintiffs to have specific performance of the contract. In order to support their case they must show, first, that there was a misrepresentation ; and, secondly, that the contract was entered into on the faith of that misrepresentation. It must be a misrepresentation of a specific fact. Was the representation untrue ? In considering whether it was a misrepresentation of fact it was urged that it was only a representation of what was the state of mind of the party making it. It is often assumed that a statement of a man's opinion does not involve a statement of fact. If all the facts are not known to both sides, the expressed opinion of one of the parties on those facts may be not only an opinion, but a statement of fact. Of course it does not follow that every statement of opinion is a statement of fact, because the facts may be known to both sides. But in certain cases, where a man ventures an opinion as to things within his own knowledge, an assertion by him that he has knowledge warranting that opinion is implied. A landlord knows the relations between himself and his tenant, and a purchaser does not know them, and an opinion stated by the landlord about the tenant involves an assertion of fact. Was this a mere opinion or an assertion in relation to a matter as to which only the landlord knew anything ? I agree that it does not amount to a guarantee of payment of the rent, or a warranty that the tenant will pay it ; but it is a statement which amounts to an assertion by the landlord that nothing has occurred to make the tenant an unsatisfactory tenant. That is a statement of fact. Can a tenant out of whom rent has to be squeezed be described as a desirable or satisfactory tenant ? I think not. I am therefore of opinion that Denman, J. drew the proper inference of fact when he found that there was actually a misrepresentation of a specific fact. But there is another question. Did this statement induce the purchaser to buy ? This is a pure inference of fact. There are many valuable hints in reported cases as to how inferences are to be arrived at ; but after all it is not a question of law but of fact whether a man believes what is said to him.



Were the defendants induced to buy by this statement? It was inserted in the particulars to make intending purchasers believe that what was offered for sale was a first-class investment. I cannot agree with what Jessel, M.R. is reported to have said in *Redgrave v. Hurd*, that if there is a material representation calculated to induce a man to enter into a contract "it is an inference of law that he was induced by the representation to enter into it," and possibly these are not the exact words used by the learned judge.<sup>(a)</sup> But in this case not only might the statement have influenced the defendants, but it is proved that it actually did. It is no answer to say that the defendants need not have been misled if they had been careful. That is laid down by *Redgrave v. Hurd*. In my opinion the appeal ought to be dismissed.

FRY, L.J.—I concur. The statement in the particulars amounted to an assertion that the vendors had no knowledge of any facts inconsistent with that of Fleck being a most desirable tenant. In my opinion Denman, J. has rightly found that the vendors had such knowledge. Then, did the defendants purchase on the faith of that representation? The learned judge found that they did. I might have arrived at the opposite conclusion if I had been in his place, but I have not heard the evidence actually given. There was evidence before him to justify his conclusion, and I cannot be a party to upsetting his decision.

*Appeal dismissed.*

Solicitors for the appellants, *Taylor, Son, and Humbert.*

Solicitors for the defendants, *Smythe and Brettell.*

Monday, Oct. 27, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

Re MORDY AND COWMAN. (b)

*Vendor and purchaser—Conditions of sale—Sale of two lots—Restrictive covenant between purchasers—Withdrawal of one lot from sale.*

Two lots of land were put up for sale under conditions which, after reciting that the vendor was possessed of adjoining property not included in the sale, provided that each purchaser should, in his conveyance, enter into a covenant with the vendor and the purchaser of the other lot not to use any building on his lot as a public-house, and to the conditions was annexed a form of covenant to this effect. No provision was made for the case of a lot remaining unsold. Lot 2 was purchased at the sale, and the purchaser signed a contract embodying the conditions. Lot 1 remained unsold.

Held (affirming the decision of Chitty, J.), that the purchaser was bound to enter into the restrictive covenant with the vendor.

By the conditions of sale by auction of property at Workington, which was advertised for sale in two lots, the vendor reserved the right to put all the property up in one lot, or such other lots as he might think fit.

(a) The words occur in the Law Reports (20 Ch. Div. 21), but not in the LAW TIMES Reports. In the latter, instead of the words in inverted commas cited by Bowen, L.J., the words are "that is a conclusion at which you arrive by inference."

(b) Reported by FRANK EVANS, Esq., Barrister-at-Law.

Condition 12 was as follows:

As the vendor is owner of certain shops, &c. . . . adjoining to and in the neighbourhood of the property comprised in the present sale, and not included in the sale, each purchaser shall, in the deed of conveyance to him of the lot purchased by him, at his own cost enter into a covenant with the vendor and the other purchaser restrictive of the user of such lot, in the form hereinafter set out; and the vendor on his part will (if required by either purchaser, but at the cost of such purchaser) enter into a similar covenant with the purchasers restrictive of the user of the said shops [not comprised in the sale]. If both lots are purchased by the same purchaser, this condition shall be binding upon him and the vendor subject to the necessary modifications entailed by the alteration in the circumstances of the case. Such covenants shall be in the following form, namely:—"The said (A. B., covenantor) doth hereby for himself, his heirs, executors, administrators, and assigns covenant with the said (C. D., covenantee, being the purchaser of Lot 1 or 2), his heirs and assigns, that no building or buildings . . . now standing or hereafter to be erected on the [here describe the piece of ground sold or retained by the vendor] or any part thereof, shall be used or permitted to be used or dealt with by the said (A. B., covenantor), his heirs, executors, administrators, or assigns, or his or their lessees, tenants, undertenants, servants, agents, or occupiers, or any other person or persons whomsoever, as a hotel, tavern, &c.

Lot 1 was offered for sale, but was not sold.

Lot 2 was purchased by Mr. W. B. Cowman, who declined to enter into any covenant at all restrictive of the user of buildings on the land purchased by him, on the ground that the condition as to the purchaser of lot 1 could not be complied with. The vendor offered to enter into a similar covenant with regard to lot 1, but this offer was declined by Mr. Cowman. The vendor accordingly took out a summons under the Vendor and Purchaser Act 1874 for a declaration that Cowman purchased in conformity with condition 12, and that the form of covenant therein referred to was properly inserted in the draft conveyance. In the draft conveyance the covenant was by Cowman, his heirs, executors, administrators, and assigns, with the vendor, his heirs and assigns.

Chitty, J. made an order in chambers in conformity with the summons, and Cowman moved in court to discharge the order.

J. Parkin for Cowman.—The purchaser of lot 2 is bound only to enter into the covenant set forth in the condition. But that contemplates both lots being sold, and does not provide for the case of one lot not being sold. If, therefore, the covenant is entered into it must be with a person who is not in existence, for there is no purchaser of lot 1. We are not bound to enter into a covenant with a person not in existence:

*Williams v. Briscoe*, 48 L. T. Rep. N. S. 198; 22 Ch. Div. 441.

And Cowman is not bound to enter into a covenant with the vendor alone, as proposed, for that is not the form of covenant referred to in the condition.

Ince, Q.C. and C. Plummer for the vendor.—The object of the covenant is to obtain something for the benefit of the vendor, and the condition means that there is also to be a covenant with the purchaser of lot 1, if that lot is sold, and in that case the purchaser of lot 1 will covenant with this purchaser. The vendor is willing to enter into that covenant. It is true the vendor's covenant might not be disclosed to the future purchaser of lot 1, but to cancel it would be a misdemeanour.

CHITTY, J.—The conditions show in plain terms



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that there are more lots than one; indeed, that is shown by the form of covenant, and there is, as far as I can see, nothing to show that lot 1 will necessarily be put up for sale before lot 2, although that would be so in the ordinary course. When lot 2 is sold it is unknown whether there will be a purchaser who will answer the description of purchaser of the other lot. The recital clearly shows that the covenant to be entered into is for the benefit of the vendor, and no doubt it would be also beneficial to each purchaser. The words "the other purchaser" must, I think, be read as meaning "other purchaser if such there be." The reasonable construction of the condition as a whole appears to me to be this, that the parties must have contemplated—although they have not in terms shown that they contemplated it—that one of the lots might not be sold. And, if that were so, the fair way of reading the condition would be as I have said. That appears to me to be a fair and necessary implication, arising from the nature of the sale, the sale being in lots, and it having been uncertain when one lot was sold whether the other would be sold or not. I must therefore refuse the motion, with costs.

Cowman appealed.

*Davey, Q.C.* and *J. Parkin* repeated the arguments on behalf of the purchaser in the court below.

*Ince, Q.C.* and *C. Plummer*, for the vendor, were not called upon, but renewed the offer that the vendor should enter into the same restrictive covenant with regard to lot 1 that the purchaser of that lot would have entered into in case it had been sold. He also undertook to indorse notice of the covenant on his title deeds.

*BAGGALLAY, L.J.*—Speaking for myself only, I am by no means sure that the vendor is bound to give the covenant he has offered to give. In my view, this appeal should be simply dismissed with costs; but I think, with reference to all the circumstances, that the real justice of the case requires the vendor to enter into some covenant of that kind. As I read the contract, particularly having reference to the twelfth condition, there were two covenants. The purchaser of lot 2 purchased with a perfect knowledge of what the conditions were, and possibly—although that does not quite appear—may have been aware that lot 1 was withdrawn before he purchased, but the condition by which he, by the terms of the contract, is bound, amounts to this: That he is to give—that is my view of the case, at any rate—two covenants. He is bound to enter into a covenant with the purchaser of lot 1 and also to enter into a covenant with the vendor. He is bound to enter into a covenant with both these persons to the like effect, namely, that the piece of land he has purchased shall not be used for the purpose of an hotel, restaurant, or any other similar purpose. Then he is entitled strictly to have a covenant given to him by the purchaser of lot 1 that that lot shall not be used in the like manner, and a covenant by his vendor that he, the vendor, will not allow the other property, which was not included in the sale, to be used in the like manner. That is all he is strictly entitled to. It so happens that from the circumstances of the case effect cannot be given to the second covenant which he is bound to enter

into. He is not called upon to enter into a covenant with the purchaser of lot 1, and therefore it is said there is no reason for entering into the covenant which he bound himself to enter into with the vendor according to the terms of the contract itself. No doubt the court has not the same power of dealing with this matter coming before it under the provisions of the Vendors and Purchasers Act 1874 as it would have had if either party were insisting on specific performance of the contract. Neither party could obtain specific performance without doing that which was just and equitable, and, had this been an attempt on the part of the vendor to obtain specific performance of the contract, I think the court would have imposed on him the giving of that covenant which Mr. Ince has expressed his willingness to give, and which, as I gather, was so offered to be given in the court below. I think that the justice of the case will be met by ordering that, on the vendor undertaking to enter into the covenant with respect to lot 1, the appeal shall be dismissed with costs.

*BOWEN, L.J.*—I am of the same opinion. At this auction two lots were intended to be put up. Lot 2 was sold, lot 1 having been withdrawn before it was sold, under these conditions of sale—amongst others the twelfth condition, with the interpretation of which we are at present concerned. On the settling of the conveyance the purchaser of lot 2 declined to give a covenant in the restrictive form set out in the conditions of sale, upon the ground that lot 1 having been withdrawn, and lot 2 alone sold, it was impossible that a restrictive covenant could be given in the form which was contained in the conditions of sale, and therefore that he was not bound to give any. He admits, and has admitted throughout, that if both lots had been sold he would have been compelled to give this restrictive covenant to the purchaser of lot 1 and to the vendor, but as lot 1 has not been sold, and as there is no purchaser of lot 1, he says he is emancipated from the necessity of giving a covenant, not merely to the purchaser of lot 1, who does not exist, but also to his own vendor. It seems to me that this raises a pure question of construction, and on the question of construction I think the judgment of the court below is clearly right. [His Lordship read the twelfth condition, and continued:] What does that mean? The purchaser of each lot is to enter into a covenant with the vendor and the other purchaser restrictive of the user of the land. It is capable of two interpretations. You may say that there was to be one covenant with the vendor and the other purchaser—a joint covenant—but you may say, if you take these words alone, there are to be two separate covenants, one with the vendor and one with the other purchaser. Which of those two views is correct? It is not open to argument. It is quite clear, when you look at the form of the covenant, that there were to be two distinct covenants—although they are bracketed together in the one word "covenant" in the earlier part of the article—one with the vendor and one with the purchaser of the other lot. What the purchaser of this lot wishes to do is to refuse to give one because there is nobody to whom he can give the other. We may search in vain through the conditions to discover, and it has never been discovered, that there is any implied condition

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whatever that, if there were no purchaser of the first lot, nevertheless the covenant was not to be entered into between the purchaser of lot 2 and the vendor. Because the man cannot do two things, he is nevertheless bound to do one. But Mr. Davey, with great force, argued that that could not be the true construction of the covenant, because, he said, it was an essential part of this transaction that the purchaser of lot 2 should, as he was going to give a covenant to the purchaser of lot 1, also be entitled to a covenant from the purchaser of lot 1. To my mind it is quite true that the purchaser of lot 2 is entitled to protection from the vendor in respect of lot 1 and all future purchasers of lot 1. He is entitled to that protection, and he has got it; but it does not follow from that that there is any implied condition whatever that he is not to give the covenant to the vendor unless both lots are sold, or that the true construction of this article is that, unless the form can be complied with as to both covenants, the form should not be complied with as to one. I think it is a perfectly clear case myself, and I am glad to think that that view is taken by the members of this court who are more familiar with these transactions than I am.

Fry, L.J.—I am entirely of the same opinion. It appears to me we are free in this case from any considerations as to whether in the present circumstances the purchaser might or might not have had a defence to an action for specific performance. The purchaser and the vendor alike insist on the performance of the contract. The simple question is, in what form is the contract to be carried into execution? According to the view I take, that contract contained two independent, distinct, and separate stipulations. The one was a stipulation for a covenant with the vendor in respect of the houses retained by him. The other was for a covenant by the purchaser with the purchaser of the other lot. Now the purchaser in effect says, "Because I cannot get a covenant with the purchaser of the other lot, I will not give a covenant to the vendor in respect of my lot." In my judgment he has no right to say that. In my opinion, the stipulations are independent, and being independent, the failure of the one does not prevent the operation of the other. I think, however, that it is only reasonable that notice of the covenant entered into by the vendor should be indorsed on his title deeds; otherwise, in the case of a fraudulent vendor, he might sell without notice of the covenant.

*Appeal dismissed with costs.*

Solicitors for the appellant, Wood and Wootton, for T. Milburn, Workington.

Solicitors for the vendor, Speechly, Mumford, and Landon, for W. Paisley, Workington.

Nov. 6 and 8, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

SAYERS v. COLLYER. (a)

*Covenant—Building estate—Mutual restrictive covenants—Alteration of character of property—Breach of covenant—Injunction—Lord Cairns' Act (21 & 22 Vict. c. 27)—Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49), s. 5.*

A building estate was laid out in lots, which were sold to different purchasers, each of whom covenanted with the vendors, and with the owners of the other lots, not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot to restrain him from using his house as a beer-shop with an "off" licence. The defendant had, to the knowledge of the plaintiff, so used his house for three years before the action was commenced, and the plaintiff had for some time bought beer from his shop. There was evidence that several other houses built on others of the lots had been for some time used as shops, and that many of the houses adjoining the plaintiff's house were occupied, not by a single tenant, but each by two families at weekly rents.

Pearson, J. held, that the character of the property had become so changed that the original purpose for which the covenant had been entered into had failed, and that it would under the circumstances be inequitable to enforce the specific performance of the covenant: (48 L. T. Rep. N. S. 939; 24 Ch. Div. 180.)

Held, on appeal, that the plaintiff had by acquiescence disintitiled himself to enforce the covenant.

Duke of Bedford v. Trustees of British Museum (2 M. & K. 552) distinguished.

Semble, that notwithstanding the repeal of Lord Cairns' Act by the Statute Law Revision and Civil Procedure Act 1883, the jurisdiction thereby given is preserved by sect. 5 of the latter Act.

The defendant's predecessor, during his ownership of plot No. 445, built upon it a house, which the defendant himself, upon his purchasing the plot, was the first person to occupy.

This house was, from the first, built to all appearance as a public-house, and not as a private residence. It was in fact bought as such by the defendant, who at once, in May 1879, proceeded to take out an off-licence, and from that time forward continued to sell beer accordingly.

It was not disputed that the defendant was aware throughout of the existence of the above-mentioned restrictions upon the mode of user of the house; nor, on the other hand, was it disputed that the plaintiff was throughout also aware that beer was being sold by the defendant. It appeared, indeed, that, although the plaintiff Sayers, according to his own statement, very early remonstrated with the defendant's managers against the sale of beer, he nevertheless took no active steps to stop such sale, but was in fact contented for about nine months to purchase his own beer from the defendant, and made no real objection to the defendant's conduct until the beginning of 1882.

His explanation of this delay was, that soon after

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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his purchase of plot 440 he mortgaged it and parted with the deeds; and that until the mortgage was paid off, and the deeds returned to him, he had no accurate knowledge of his rights.

The present action was commenced on the 2nd March 1882, the British Land Company being made co-plaintiffs with Sayers, and the claim being for an injunction, damages, and costs.

Besides relying on the acquiescence of Sayers, the defendant also urged that the character of the neighbourhood had altered, and that it could no longer be considered as purely or essentially residential, there being evidence that several other houses, built on other of the lots (one of them immediately opposite the plaintiff's house) had for some time been used as shops, and that at the beginning of the year 1874 the British Land Company purchased a considerable quantity of land at Leytonstone, in Essex, and, after selling part of it by auction in March, proceeded to divide the remainder into building plots, or lots, and dispose of the same by private sales to different persons; the conveyances being in each case taken subject, by reference, to certain stipulations appearing on the margin of a lithographed plan of the entire property, and affecting the different plots in such manner as was deemed necessary, the plots being for this purpose formed into a number of blocks or groups, according to their relative situations.

One of these blocks, comprising plots Nos. 424 to 445 inclusive, was in this manner rendered subject, upon the sale of any part thereof, to the following stipulation, among others, viz.:

Trades, &c., prohibited. No building shall be erected or used as a shop . . . nor shall any trade or manufacture be carried on or made upon any lot.

This stipulation is one of those referred to in the conveyance of April 1878, mentioned below.

After one or two mesne assurances plot No. 440 became vested in the plaintiff Sayers, and plot No. 445, about 98 feet distant from No. 440, became vested, in April 1879, in the defendant, whose immediate predecessor had bought it in April 1878, direct from the company, the conveyance upon this sale containing the following clause, viz.:

And whereas the premises were sold to the purchaser subject to the stipulations specified in the 2nd schedule which refer to the said lithographed plan, now, therefore, the vendors (as to so much of the land to which the said stipulations relate as remains vested in them) for themselves and their assigns, and the purchaser (as to the land hereby conveyed) for himself, his heirs, executors, administrators, and assigns, do respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of any other land to which the benefit of the said stipulations is attached, and their, his, or her respective heirs or assigns, that the covenants respectively, and their respective heirs and assigns, will henceforth observe, perform, and comply with the said stipulations so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed, and that nothing shall ever be erected, fixed, placed, or done upon the land as and to which they respectively covenant in breach, or violation, or contrary to the fair meaning of the said stipulation, but this covenant is not to be held personally binding upon either the vendors, or the purchaser, or any other person, except in respect of breaches committed or continued during their, his, or her joint or sole seisin of or title to the land upon or in respect of which such breaches shall have been committed.

Many of the houses adjoining the plaintiff's

house were occupied, not each by a single tenant, but each by two families at weekly rents.

Pearson, J., at the trial, held that the character of the property had become so changed that the original purposes of the covenant had failed, and that it would therefore be inequitable to enforce specific performance of the covenant: (48 L. T. Rep. N. S. 939; 24 Ch. Div. 180.)

The plaintiffs appealed.

Everitt, Q.C. and E. Ford, for the appellants, cited, in addition to the authorities cited in the court below:

*Doherty v. Allman*, 39 L. T. Rep. N. S. 129; 3 App. Cas. 709.

*Cozens-Hardy*, Q.C. and *Farwell*, for the defendant, were not called upon.

BAGGALLAY, L.J., after stating the facts of the case, continued:—A number of cases have been cited in the course of the argument, but they are of very little importance for the decision of this case, except as enunciating the principles on which the court ought to act, for each case must be determined according to its peculiar circumstances. The authorities establish the principle that there may be such an amount of acquiescence as will bar the right of a covenantee to enforce his covenants. I mean acquiescence as distinguished from delay, for a much shorter period is sufficient to bar the enforcement of rights in the case of acquiescence than in a case of mere delay. The question, then, here is whether, in the circumstances of the present case, there has been such an amount of acquiescence as is sufficient to preclude the plaintiff from enforcing his covenant. In my opinion, the evidence does show such an amount of acquiescence as to bar the plaintiff from enforcing his rights. The sale of beer by the defendant began in 1879, only a few doors from the house where the plaintiff lived, and went on till the commencement of the action, and during some part of that period the plaintiff himself bought beer at the defendant's house. We can hardly imagine a stronger case of acquiescence than this. It was not a public-house in the ordinary sense of the words. The defendant sold beer to be drunk off the premises; people bought it and took it away to their own houses. Pearson, J. appears to have held that the case fell under the doctrine of *Duke of Bedford v. Trustees of the British Museum* (2 My. & K. 552), the character of the neighbourhood having been changed. But I do not take quite the same view of the case. Within certain limits, no doubt, that authority has an application to the present case, but I do not decide it upon that ground; I prefer to base my decision on the ground of acquiescence on the part of the plaintiff. Pearson, J. also thought that in consequence of the change of condition of the neighbourhood he ought not to grant the injunction, but that the court had a discretion under Lord Cairns' Act to grant damages instead of an injunction, and being of opinion that the plaintiff had sustained no substantial damage, he dismissed the action altogether. Various comments have been addressed to us on Lord Cairns' Act, and it has been contended that it is not applicable to cases where the damages are nominal only. I cannot accede to that view. If it were so held, the result would follow that, if a plaintiff had sustained damage to the extent of 20l., the Act would apply, but if he had sustained only a farthing

damages it would not apply, and the plaintiff would be entitled to an injunction. This is surely inconsistent with the purposes of the Act. Our attention was called to the fact that Lord Cairns' Act had been repealed since the former hearing of this case, being included in the schedule to the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c. 49), but that Act contains words preserving the jurisdiction of the court notwithstanding the repeal. By sect. 5 it is enacted that "any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired," "by or under any enactment repealed by this Act," shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce a restrictive covenant had two remedies: he might come into a court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a court of common law to obtain damages, and Lord Cairns' Act gave the courts of equity the power of giving a plaintiff damages by way of alternative relief; but since the Judicature Acts each division of the court has ample power, apart from Lord Cairns' Act, to give either an injunction or damages. However, the ground of my decision is, that there has been such an amount of acquiescence in the present case as to bar the plaintiff from enforcing his covenant. The appeal will therefore be dismissed.

BOWEN, L.J.—I agree that the true ground for deciding this case is not the mere fact of an alteration in the proprietary character of the neighbourhood. The case of *Duke of Bedford v. Trustees of the British Museum* (2 My. & K. 852) must not be misunderstood or misapplied. It is not an authority that contractual obligations disappear as circumstances change, but that a person who is entitled to the benefit of a restrictive covenant may by his conduct or omission put himself in such an altered relation to the person bound by it as makes it manifestly unjust to insist on its enforcement. It was decided, I take it, on equitable grounds. In such a case there is an equity against the plaintiff which bars his relief. In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient, because there is no evidence that such alteration was caused by the plaintiff; but the true ground of our decision is, that the plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way he has behaved towards the defendant. Pearson, J. dealt with the case under Lord Cairns' Act. He held that it was a case in which he ought to refuse an injunction, but that he had a right under that Act to grant damages instead, and, as he assessed the damages at one farthing, he dismissed the action altogether. The counsel for the appellant complained bitterly of this treatment of the case by the learned judge; they said that the court elected to treat the case as one of damages, and then gave no damages at all, and they contended that the Act did not apply to such a case as that. But it is obvious that the Act applies with double force to cases where only nominal damages could be given. Otherwise this absurd result would

follow, that if a plaintiff is entitled to substantial damages the court could refuse him an injunction; but if he had no real cause of complaint, and the damages could not be assessed even by a peppercorn, he would have a right to an injunction. In other words, as his damages decreased to zero his right to an injunction would correspondingly increase. That is so absurd a proposition that I cannot believe that it was intended by the Legislature. I think, therefore, that Pearson, J. was right in treating the case as coming under Lord Cairns' Act. I doubted at first whether he ought not to have given nominal damages and no costs. But my doubt has been removed by the consideration that the plaintiff would not be entitled to 40s. damages for breach of covenant, or to a certificate for costs, unless he had suffered tangible damages, or unless he was justified in bringing his action to ask for a declaration of title or to try a right. But here the plaintiff has suffered no material damage, and he has no right to bring an action and ask for a declaration of title against the present defendant. If he had not behaved to the defendant as he did, there would have been no reason why he should not have had his right declared by the court. But the acquiescence which disentitles him from an injunction also precludes him from obtaining a declaration of title, and makes it a frivolous action. I think, therefore, Pearson, J. was right in dismissing the action.

FAR, L.J.—I agree in what has been said on the first question. I agree that the rule in *Duke of Bedford v. Trustees of the British Museum* (2 My. & K. 552) is not applicable to this case. It applies where an alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his right becomes unreasonable. But I do not think it applies to cases where the change which has taken place was beyond the control of the plaintiff. Therefore I think, although we have not heard the respondent on the point, that the learned judge was not right in applying the principle of that case to the present. But I agree that the action must be dismissed on the ground of the acquiescence of the plaintiff. Acquiescence may either be an entire bar to all relief, or it may be a ground for inducing the court to act under the powers of Lord Cairns' Act. Although I do not differ from what has been said by Baggallay, L.J., I am inclined to prefer the other ground, and think that this is a case in which the plaintiff's acquiescence would have induced me to give damages instead of an injunction. It was argued that Lord Cairns' Act is not applicable to cases where nominal damages only could be given, but only to cases where the damages are substantial. It would be astounding if, as Bowen, L.J. said, the effect of the Act were to be that the right to an injunction increased as the right to damages decreased, and that the right to an injunction became absolute when the damages were zero. In my opinion, the Act applies to cases where the damages are merely nominal, and I am clearly of opinion that acquiescence is one of those circumstances which the court may well take into consideration in deciding whether it should give damages or an injunction, and that an amount of acquiescence less than what would be a bar to all remedy may operate on the discretion of the court, and induce it to give damages instead of an injunction. Therefore,

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without differing from the other Lords Justices, I prefer to rest my decision on that ground.

*Appeal dismissed with costs.*

Solicitors for the plaintiff, *Clapham and Fitch.*

Solicitors for the defendant, *Stokes, Saunders, and Stokes.*

Dec. 5, 6, and 8, 1884.

(Before BOWEN and FRY, L.JJ.)

EDEN v. THE WEARDALE IRON AND COAL COMPANY. (a)

*Practice—Third party—Notice by defendant of claim to indemnity—Right of third party to counter-claim against plaintiff—Judicature Act 1873, s. 100—R. S. C. 1883, Order XVI., rr. 48-53.*

*Where the defendant has served a third-party notice, the court cannot allow the third party to counter-claim against the plaintiff.*

*Quære, whether there is jurisdiction to enable a third party to counter-claim against the defendant who has given him notice.*

*Although by sect. 100 of the Judicature Act 1873, "defendant shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings," the term "defendant" does not include a third party.*

*Semble (per Fry, L.J.) that the section meant to include the persons and classes represented by joining other persons as parties under part 5 of Order XVI., e.g., the residuary legatees in an administration action.*

*E. brought an action against the defendants for specific performance of an agreement to take a lease of coal under the lands of E., and also for an account of royalties in respect of the coals got by them since their taking possession under the agreement. The defendants denied that they were working the coals under any agreement with E., but alleged that they were working under an agreement with a lease from the Ecclesiastical Commissioners. They also by leave served a notice on the Ecclesiastical Commissioners of a claim to be indemnified by them, to the extent of any rent paid by the defendants to the commissioners, in respect of any payments or damages which they might be ordered to make or pay to the plaintiff. The commissioners obtained an order giving them leave to deliver a "counter-claim," the order not stating to whom the counter-claim was to be delivered. The commissioners then delivered to the plaintiff a defence in which they denied that the coals belonged to the plaintiff, or that the defendants were working the coals under any agreement with him. They at the same time delivered a counter-claim to the plaintiff, in which they alleged that the land under which the coal lay was partly freehold and partly copyhold held of a manor of which the commissioners were lords, and that the plaintiff had confused the boundaries between the freehold and copyhold, and they claimed to have the boundaries set out.*

*Held (reversing the decision of Bacon, V.C.), that the counter-claim must be struck out.*

*The plaintiff, Sir W. Eden, Bart., by his statement of claim, alleged that he was the owner at*

*the date of the agreement thereafter mentioned, and at the time of delivering his statement of claim, of certain freehold land at Middridge, in the county of Durham, and of the coal and fire clay thereunder, and that the defendants were the lessees under the Ecclesiastical Commissioners of coal under land immediately adjoining; that the defendants in 1880 contracted to take a lease of the coal under the plaintiff's land; that in 1881 the defendants commenced to work the coal and fire clay under the plaintiff's land in pursuance of the agreement, but declined to accept a lease from him in consequence of a claim, made subsequently to the agreement by the Ecclesiastical Commissioners, to be entitled to the coal under the plaintiff's land. And the plaintiff claimed specific performance of the agreement, and an account of royalties. The defendants thereupon served notice on the Ecclesiastical Commissioners, under rule 48 of Order XVI. that, in the event of the plaintiff establishing his claim to any payment or damages, the defendants claimed to be indemnified by the Ecclesiastical Commissioners against liability to such payment or damages to the extent of the rents received by the commissioners from the defendants in respect of coal worked out of the land in accordance with their undertaking under a letter of the 21st April 1883.*

*On the 24th June 1884 the defendants served a summons on the plaintiff and the Ecclesiastical Commissioners for directions for the trial of the question of liability as to indemnity between the applicants and the commissioners.*

*On the 30th June Bacon, V.C. made an order at chambers "that the Ecclesiastical Commissioners be at liberty, on or before the 21st July 1884, to deliver a counter-claim in the said action, and that the question of indemnity be tried in the action."*

*On the 30th July an order was made in chambers that the Ecclesiastical Commissioners should be at liberty, on or before the 5th Aug., to deliver, with their counter-claim, a statement of defence in the action as to such portion of the plaintiff's statement of claim and of the defendants' statement of defence, as they did not admit.*

*The Ecclesiastical Commissioners thereupon delivered a defence and counter-claim, by which they denied that the plaintiff was the owner of any of the coal or fire clay mentioned in his claim, and alleged that the commissioners had been owners thereof since 1856. They also alleged that the land under which the coal lay was partly copyhold, forming part of a manor of which the commissioners were lords, and partly freehold, and that the defendants were working the coal under agreement with the commissioners, and not under an agreement with the plaintiff. They also alleged that the plaintiff had confused the boundaries; and by way of counter-claim the commissioners asked that the boundaries of the copyhold portion of the land might be ascertained and set out.*

*On the 31st Oct. 1884 the plaintiff moved before Bacon, V.C. for an order striking out the counter-claim.*

*Sir Arthur T. Watson for the plaintiff.—The court has no power to allow a third party, who has been brought in for the purpose of indemnifying the defendant, to counter-claim against the defendant. If there is such a power*

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it ought not, on the ground of inconvenience, to be exercised in a case like this, where a new action altogether is raised. There is no objection to the defence of the commissioners, for it raises the same question as is raised by the defendants, as to who is the owner of the coal; but the counter-claim raises a question foreign to the action, viz., whether the surface is freehold or copyhold. The defendants have delivered their notice under rule 48 of Order XVI., having obtained leave *ex parte* to do so. The commissioners entered an appearance under rule 49, and obtained directions under rule 52, and the order gave the third party leave to deliver a counter-claim. That means not a counter-claim against the plaintiff, but a counter-claim against those who seek relief against the third parties, viz., the defendants. There cannot be a counter-claim against a person who does not claim anything, and the plaintiff claims nothing against the commissioners. Rule 49 only applies where "a person not a party to the action . . . desires to dispute the plaintiff's claim in the action as against the defendant . . . or his own liability to the defendant," and what the judge may order to be tried under rule 52 is the question as to the liability of the third party to make the contribution claimed. Nothing is said as to directing the trial of a question between the plaintiff and the third party. Even as against the defendant who has given notice, the third party cannot deliver a counter-claim:

*Street v. Gover*, 36 L. T. Rep. N. S. 766; 2 Q. B. Div. 498.

If a defendant cannot be counter-claimed against, *à fortiori* a plaintiff cannot. As to the second point, the case comes clearly within rule 15 of Order XXI., which enables the court to exclude a counter-claim the question raised by which ought to be the subject of an independent action. The claim as to setting out boundaries is eminently one which ought to be tried in a separate action. If the defendants show the plaintiff has no title, there will be an end of the action as against them. But it will be most inconvenient to try the question of boundaries in this action, and the trial of that question will delay the trial of the much simpler question originally raised, as to whether the plaintiff is entitled to specific performance.

*Elton*, for the Ecclesiastical Commissioners, was not called upon.

BACON, V.C.—I do not think there is any ground whatever for what Sir Arthur Watson asks me to do. The object of these orders, and the object generally of the practice, is to bring into one suit all the questions that can properly arise out of the claims of the several parties. The plaintiff says, "I sold to the first defendant a house and he will not pay me." The defendant says, "I bought the house, not from you, but from somebody else, and I have paid him." That is the simple way of putting it. Then the man who has paid for the house is called upon to account to the plaintiff, or through the defendant to the plaintiff, for what he has received. He says, "It is not your house at all, you must make out your title and fight it;" and thereupon the question arises. I think the counter-claim does, within the terms of the rule, bring the question between the parties in a proper state for decision; and if any objection can be taken, it must be taken at the hearing, but not by way of mutilating

the proceedings which the Ecclesiastical Commissioners have thought it right to institute under the notice to them as third parties. The application must be refused, with costs.

The plaintiff appealed.

Sir A. T. Watson, for the appellant, was stopped by the Court.

*Elton* for the Ecclesiastical Commissioners.—The third parties are, in effect, defendants to this action, and have the same right of counter-claiming, subject to the leave of the court being obtained, as an ordinary defendant. If there is inconvenience in trying the counter-claim in the same action, the court may, of course, exclude it: (Order XIX., r. 3). The third party has, under sub-sect. 3 of sect. 24 of the Judicature Act 1873, the same rights in respect of his defence as if he had been sued in the ordinary way as a defendant, and this includes the right to counter-claim. The third party is served with notice of proceedings, and is therefore within the definition of a defendant in sect. 101 of the same Act. He also referred to

Order XVI., rr. 48-53;

Order XXI., r. 15;

*Street v. Gover*, 36 L. T. Rep. N. S. 766; 2 Q. B. Div. 498;

*Witham v. Vane*, 41 L. T. Rep. N. S. 729.

Sir A. T. Watson replied.

*Cur. adv. vult.*

Dec. 8.—BOWEN, L.J.—This is a case in which the Weardale Iron and Coal Company were sued by the plaintiff and have brought in the Ecclesiastical Commissioners as third parties. At chambers two orders were made, which are couched in rather vague language, giving the third parties leave to counter-claim, but not saying whether they might counter-claim against the plaintiff or the defendants or both. The Ecclesiastical Commissioners say, however, that they are entitled to counter-claim against the original claimant, the plaintiff, and they have accordingly delivered a counter-claim as against him. The plaintiff has moved to strike out the counter-claim, and we have to decide whether the rules entitle the court to allow such a counter-claim to be delivered. I am of opinion that there is no such power in the court. I should be very sorry to do anything militating against the provisions in the Judicature Act 1873, s. 24, sub-sect. 7, that as far as possible all matters in controversy between the parties may be finally determined, and all multiplicity of proceedings concerning any of such matters avoided. But, after all, we must consider whether a machinery has been provided for allowing such a question as that raised by these third parties to be decided in the way suggested. By sub-sect. 3 of sect. 24 of the Judicature Act 1873 the courts have power to grant to "any defendant," in respect of any right claimed by him, all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the courts might have granted in a suit instituted by the same defendant against the same plaintiff, and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party or not, who shall have been duly served with notice, as might have been granted against him if he had been a defendant to a cause by the same defendant for the like

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purpose; and that every person served with any such notice shall thenceforth be deemed a party to such cause, with the same rights in respect of his defence against such claims as if he had been duly sued in the ordinary way by such defendant. The counsel for the Ecclesiastical Commissioners has prayed in aid the definition of a defendant in sect. 100 of the Judicature Act 1873, which provides that "defendant" shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend, any proceedings," and he asks us to hold that the word "defendant" in the Act is to be extended so as to include a third party in a section dealing with procedure by a defendant. I am by no means certain that a third party is a person who can be said to be served with any process, or with notice of, or entitled to attend, any proceedings. But, even if you can apply that definition to some of the rules, it is clear that, under subsect. 3 of sect. 24, a third party is not a defendant for all purposes, and that the Ecclesiastical Commissioners do not better their case by referring to that section. But a portion of the Rules of 1883 is devoted to this subject of third parties, and on the construction to be placed on it this question must depend. I am of opinion that a third party cannot, under rule 53 of Order XVI., have leave given to him to deliver a counter-claim to the plaintiff. There are two ways of working the third-party procedure. The defendant giving the notice may apply to the court, under rule 52, for directions, and on the hearing of that application the court may, "if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice," to be tried. So far as that rule alone is concerned, the question to be tried must be either one between the third party and the defendant who brings him in, or a question common to all three parties which is to be decided once for all. Here it cannot be said that a direction under rule 52 includes the counter-claim by the third parties against the plaintiff. Then, if we turn to rule 53, the other method of working the procedure is shown, that is, by giving the third party liberty only to defend the action. It is clear that under that rule a third party cannot have a counter-claim against the plaintiff; therefore the counter-claim cannot be delivered under either of the two rules. It is very important to settle the practice as to the third-party procedure, and if the application had been to deliver a counter-claim, not against the plaintiff, but against the defendant, I should have considered it doubtful whether the court could have given leave to do so, as there is language of the judges in some of the reported cases which seems to be against the legality of that course; but, when it is attempted to deliver a counter-claim against the plaintiff, that case falls clearly outside the third-party rules, and, although general convenience ought perhaps not to influence us in construing an Act of Parliament, I am bound to say that it would clearly be most inconvenient to allow a counter-claim like this. A plaintiff who brings his action against a defendant and desires a speedy determination would find himself embroiled in quite another controversy with a person who had been

brought in, not by him, but by the defendant. I think, therefore, that the appeal must succeed, and that the counter-claim must be struck out. In passing, I wish to add that the orders in chambers are not in such precise terms as they might have been, and that, in my opinion, what has been done is due to the language of the orders being so vague.

FRY, L.J.—I am of the same opinion. The question is, whether or not third parties can counter-claim against the plaintiff. The primary, if not the sole object of the third-party procedure is to determine two questions: (1) As to the right as between the plaintiff and the party who brings the third party in; and (2) that which arises between the defendant and the third party, whether the third party is liable to contribute or give an indemnity in respect of the liability of the defendant. I think the procedure is confined to these two questions, and that, if it were extended, great inconvenience would be caused to litigants. Rule 49 provides that if a third party "desires to dispute the plaintiff's claim in the action as against the defendant, on whose behalf the notice has been given, or his own liability to the defendant," he must enter an appearance, in default of which he admits the validity of the judgment and his own liability to contribute or indemnify. Those are the two questions I have referred to. It is contended by Mr. Elton that the definition of a defendant in sect. 100 gives to a third party all the rights of a defendant, including the right to counter-claim. Now, in the first place, the third party is not "served with any writ of summons or process." Is he a person "served with notice of, or entitled to attend, any proceedings?" These words seem to apply to the case provided for by rule 40 of Order XVI., by which certain persons are served in an administration action with notice of judgment, and are entitled to attend proceedings, though not originally parties to the action. If one refers to rule 48 of the same order, it seems that the third party is served with a particular notice of the defendant's claim to contribution or indemnity over against himself, and that does not seem to me to be notice of a proceeding. I agree, therefore, that the appeal must be allowed.

Solicitors for the appellant, *Shum, Crossman, and Co.*, for *Trotter, Bruce, and Trotter*, Bishop Auckland.

Solicitors for the Ecclesiastical Commissioners, *White, Barrett, and Co.*

Friday, Nov. 14, 1884.

(Before BOWEN and FRY, L.JJ.)

BORNEMANN v. WILSON. (a)

*Practice—Costs—Bankruptcy of party to an action—Trustee in bankruptcy—Liability for costs.*

*Where a party to an action becomes bankrupt, and the trustee in the bankruptcy elects to go on with the action, and thus approbates what has been done, he must take the action as he finds it, and he thereby renders himself liable to the opposite party for the costs which have been already incurred therein.*

THIS was an appeal from an order of Bacon, V.C. On the 1st Aug. 1884 the plaintiff, Friedrich



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Bornemann, commenced an action against the defendants, William Wilson and others, the writ claiming an account of all receipts and payments by the defendants on account of the plaintiff; an account of all dealings and transactions by the defendants as agents for the plaintiff; for a receiver of all silk and other goods belonging to the plaintiff in possession of the defendants; and for an injunction to restrain the defendants from parting with such goods.

On the 7th Aug. 1884, on the motion of the plaintiff, an injunction was granted by Bacon, V.C., and a receiver was appointed.

On the same day the defendants, by special leave of the Court of Appeal, served the plaintiff with notice of appeal from this order.

On the 4th Sept. 1884 a receiving order in bankruptcy was made against the defendants. They were afterwards adjudicated bankrupt, and on the 7th Oct. 1884 a trustee of their estate was appointed.

On the 18th Oct. 1884, on the *ex parte* application of the plaintiff, an order was made that the action and the proceedings therein should be carried on and prosecuted by the plaintiff against the trustee as defendant, in like manner as the same might have been carried on and prosecuted against the original defendants if they had not become bankrupt. A copy of this order was sent to the trustee's solicitors. The trustee did not move to discharge this order.

On the 31st Oct. 1884 the trustee's solicitors wrote to the plaintiff's solicitor, acknowledging the receipt of the copy of the order of the 18th Oct. 1884, and adding that "it is not the intention of our client to proceed with the appeal, or to take any proceedings thereon."

After this the trustee's solicitors entered an appearance for him in the action, and gave notice that they should require a statement of claim to be delivered by the plaintiff.

The appeal from the order of Bacon, V.C. of the 7th Aug. 1884 now came on for hearing.

It being stated that the trustee did not intend to prosecute the appeal, the question was raised as to his liability to pay the costs of the appeal.

*Millar, Q.C.* and *J. R. Brooke*, for the plaintiff, asked that the appeal might be dismissed with costs in the ordinary way, leaving the trustee personally liable to pay such costs. They contended that the trustee, by requiring the delivery of a statement of claim, had adopted the action as it stood, and was therefore responsible for costs already incurred.

*Herbert Reed*, for the trustee, argued that the trustee never had any intention of prosecuting the appeal, and ought not to be made personally responsible for the costs. He referred to

*Barter and Co. v. Dubois and Co.*, 44 L. T. Rep. N. S. 596; 7 Q. B. Div. 413;

*Watson v. Holliday*, 46 L. T. Rep. N. S. 878; 20 Ch. Div. 780.

*BOWEN, L.J.*—This appeal must be dismissed with costs, to be paid by the trustee. Without discussing the question of the exact position of a trustee in bankruptcy who finds himself made party to an action in which proceedings have been taken before the bankruptcy, it is clear that, if he elects to go on with the action, and thus approbates what has been done, he must take the

action as he finds it. He cannot approbate and reprobate; he cannot blow hot and cold—take part of an action and leave the rest. Here, before the bankruptcy, the bankrupt had given notice of appeal, and the trustee, having (by appearing and calling for a statement of claim) adopted the defence, must be taken also to have adopted the notice of appeal.

*FRY, L.J.*—I am entirely of the same opinion. When the trustee adopted the defence to the action, he adopted the action exactly as it then stood. He cannot take one part of the proceedings and leave the rest.

*Appeal dismissed with costs.*

Solicitor for the plaintiff, *A. G. Ditton*.

Solicitors for the trustee, *Hindson, Müller, and Vernon*.

[*Cf. Warner v. Armstrong*, 4 Sim. 140, and *Lewis v. Armstrong*, 3 My. & K. 69.]

Feb. 26, 28, March 1, 3, and 24, 1884.

(Before *COTTON, BOWEN, and FRY, L.JJ.*)

*CROPPER v. SMITH. (a)*

*Letters patent — Assignment — Action against original grantee—Denial of validity—Estoppel—Particulars of objection—15 & 16 Vict. c. 83, s. 41.*

*In 1873 letters patent for improvements in lace machines were granted to H. In 1877 H. went into liquidation, and the patent was sold by the trustee to the plaintiffs. H. afterwards entered into partnership with S.*

*This action was brought against S. and H. to restrain them from infringing the patent.*

*By an order made when the action came on for trial it was postponed, with liberty to S. and H. to deliver specified objections, when S. and H. denied infringement, and S. objected to the validity of the patent on the ground of want of novelty and insufficiency of the specification.*

*The cross-examination of the plaintiffs' witnesses showed want of novelty in one of the subsidiary combinations in the machine.*

*Pearson, J. held that the defendants had not claimed this subsidiary combination as his invention; that the patent was valid, and granted an injunction against both defendants and an inquiry as to damages.*

*The defendants appealed.*

*Held, that, on the construction of the specification, H. had claimed the subsidiary combination as his invention, and that the patent was invalid, and that, there being nothing to prevent S. from insisting on this objection, his appeal must succeed.*

*Held, also, that H. was not estopped from disputing the validity of the patent, either on the ground that the letters patent were of record; or by deed, by reason of the specification being under his seal; or by matter in pais on the ground of the statements in his petition to the Crown, there being nothing to show that the plaintiffs bought on the faith of those statements.*

*Held, also, that H. not having delivered objections to the validity of the patent evidence to show that it was invalid for want of novelty could not be read on his behalf.*

*Held, also, by Cotton and Fry, L.JJ. (dissentiente*

(a) Reported by *W. O. Biss, Esq., Barrister-at-Law*.

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*Bowen, L.J.*), that *H. never having asked for leave to amend his particulars of objection, but having to the last argued the case on the ground that no such amendment was necessary, leave ought not to be now given, but that his appeal must be dismissed.*

In 1873 letters patent were granted to one Hancock for improvements in lace machines. By the specification he claimed, according to the decision of the Court of Appeal, not only the general combination which constituted his improved machine, but also two subsidiary combinations which formed parts of it.

In Jan. 1877 Hancock went into liquidation, and in April the trustees in liquidation sold the letters patent to the plaintiffs.

In Nov. 1880 Hancock took out another patent for improvements in lace machines, and in Feb. 1881 entered into partnership with the defendant Smith.

In May 1881 the present action was commenced against Smith and Hancock to restrain them from infringing the plaintiffs' patent.

On the 17th May 1882 the action was standing for trial, but, on the application of the defendants, the following order was made:

"Upon motion made by counsel for the defendants on the 17th May 1882 for leave to sever in their defences, and this action standing this day in the paper for trial, in presence of counsel for the plaintiffs and defendants, and the defendants by their counsel asking for leave to deliver particulars of their objections to the validity of the plaintiffs' letters patent, this court doth order that the defendants be treated as having severed in their defence. And this court doth order that this action do stand over, with liberty to apply to restore the same."

The Court then gave leave to the plaintiffs to discontinue the action on certain terms, and then provided that if the plaintiffs should not within a month give notice to the defendants of discontinuance, "the defendants be at liberty to deliver to the plaintiffs the particulars of objection specified in the schedule hereto, but without prejudice to any question at the trial of this action as to the defendants or either of them being estopped from objecting to the validity of the plaintiffs' letters patent."

The particulars of objection were as follows:

Take notice that at the trial of this action the defendants will deny that they have infringed the letters patent in the statement of claim mentioned, and the defendant Smith will rely on their objections to the validity of the said letters patent on the ground of want of novelty and insufficiency of the specification, and that the matters claimed, or some of them, were not good subject-matter, and will further contend that the invention, as described and claimed in the specification of the said patent, or material parts thereof, were, prior to the date of the said patent, publicly used at the times and places, and in the manner more particularly herein-after set forth, that is to say, &c.

The plaintiffs did not discontinue the action, and the above objections were delivered.

At the trial it was shown by the cross-examination of the plaintiffs' witnesses that the second of the subsidiary combinations was a well-known old combination, though it had never before been applied to lace machines.

On the 5th March 1883 Pearson, J. held that the specification was sufficient, and also, upon its construction, that the patentee only intended to

claim the entire combination, and that by the third claim he was merely intending to give a more full description of a part of his machine, and not to claim that subsidiary combination as his invention. His Lordship accordingly held that it was a good patent, and gave judgment against the defendants for an injunction and a reference as to damages, considering it clearly established that, if the patent was good, the machine which the defendants were using was an infringement of it.

The defendants appealed, and the appeal was heard on the 26th and 28th Feb. and the 1st and 3rd March 1884.

The case, as far as it relates to the validity of the patent, does not call for a report, as the only question was whether, on the construction of the particular specification, the patentee was to be taken to claim the subsidiary combinations as separate inventions in respect of which he was entitled to a monopoly, it not being disputed that if he had done so the letters patent were invalid.

*Aston, Q.C.* and *Goodeve*, for the appellant, contended that the second and third claims were distinct substantive claims, and that, as the combination in the third claim was old, the patent was bad.

*Davey, Q.C.*, *Barber, Q.C.*, *Chadwyck Healey*, and *Cann*, for the plaintiffs, argued that the patent was good. With regard to Hancock, they contended that Hancock, having given no particulars of objection, no evidence of the invalidity of the patent was admissible on his behalf: (15 & 16 Vict. c. 83, s. 41.) The evidence of the want of novelty of the third subordinate combination could therefore not be read on his behalf, and his appeal must fail. He was estopped from denying the invalidity of the patent: (1.) by the letters patent which are of record (Com. Dig. vol. 4, 189). (2.) The specification being under seal, there was also estoppel by deed. There might be estoppel by deed-poll (*Shepp. Touchstone*, p. 53); and there was estoppel in the present case:

*Bowman v. Taylor*, 1 Web. Pat. Cas. 293;

Co. Litt. 352, a;

*Oldham v. Langmead*, 3 T. R. 439, n.;

*Chambers v. Crickley*, 33 Beav. 374.

(3.) There was estoppel by matters *in pais*, for Hancock could not dispute the allegations in his petition to the Crown by which he obtained the letters patent:

2 Smith L. C. 8th edit. 379;

*Carr v. London and North-Western Railway Company*, 31 L. T. Rep. N. S. 785; L. Rep. 10 C. P. 307;

*Crossley v. Dixon*, 10 H. of L. Cas. 293.

*Aston, Q.C.* in reply.—[*COTTON, L.J.*—We only require to hear you on the points whether Hancock is at liberty to say that his representation to the Crown that his invention was novel was a misrepresentation, and, whether, not having delivered objections to the validity of the patent, he can avail himself of evidence to show its invalidity.] Hancock only said to the Crown that he believed the invention to be a new and useful invention. He did not know at the time that the use, for other purposes, of the combination for which the three claims is made, took it out of the category of inventions. There does not appear to be any case as to the position

of a patentee who has become bankrupt; but there are analogous cases. In *Walker v. Mottram* (45 L. T. Rep. N. S. 659; 19 Ch. Div. 355.) the goodwill of a business was sold in bankruptcy, and the effect of assignment in bankruptcy was held to be different from that of assignment by the bankrupt himself. He is not subject to the same equities as if he were the assignee. There is nothing to show that the plaintiffs bought on the faith of anything he said in his petitions. Purchasers do not buy a patent on the faith of any such statement. Hancock denies infringement. Now, "infringement" does not mean making something described in letters patent, but violation of a patent right. Then infringement having been denied by the notice, any act which infringed any right secured by the patent was also denied, and objections to the validity of the patent were therefore included, and it was unnecessary for Hancock to state specifically that the patent was bad. If the court, in favour of Smith, holds the patent void, how can it, in the same action, grant relief against Hancock under a patent which it decides to be invalid? The evidence on which the patent is held invalid came from the plaintiffs' own witnesses. There is no reason, therefore, why the court should not treat it as available to Hancock.

At the conclusion of the argument judgment was given as to the validity of the patent. The Court was of opinion that on the construction of the specification the patentee had claimed the second subsidiary combinations as his inventions, and that as it was not novel the patent was void, but judgment was reserved with reference to the question as to which of the defendants was at liberty to dispute the validity of the patent.

March 24, 1884.—CORROX, L.J.—In this case we determined on a former day that, as against any one of the defendants who is now entitled to take the objection, that the patent now vested in the plaintiffs was bad on the ground that one of the subordinate combinations which we considered to be claimed by the patentee in his specification as part of his invention was not novel, but we reserved for consideration the question which of the defendants were entitled to take that objection. As regards the defendant Smith, there is no reason why he should not take it, and his appeal therefore succeeds. But as regards the defendant Hancock the case stands in a peculiar position. Hancock was the original patentee; he went into liquidation, and the plaintiffs bought the patent from his trustee in liquidation. Several grounds were taken against Hancock being entitled to rely on the objection which we held to be fatal to the validity of the patent, the first, which divides itself into three subdivisions, being that the patentee was estopped from denying the validity of his own patent. Mr. Barber put it that there were three valid grounds, namely, estoppel of record, estoppel by deed, and estoppel *in pais*. The estoppel on the record was of course alleged to arise from the letters patent which were recorded. But besides the objection that estoppel is only as between parties and privies, there is nothing in the patent which is inconsistent with Hancock alleging, if he is otherwise in a position to do so, that the specification was not a good one; and that the patent was invalid on the ground of want of

novelty. Estoppel arises only from something by which the man who is estopped is prevented from alleging and proving the truth, he being bound by that which estops him to admit that certain allegations are true. As regards the estoppel on the record, therefore, in my opinion there is no ground for the argument. Then we come to estoppel by deed, namely, by the specification which was by deed-poll; but, in my opinion, there is nothing in the specification which prevents Hancock from alleging the truth, and from proving the truth, for all that the specification professed to do was to fully declare the nature of the invention, and how it was to be carried into effect. It may be that he would be estopped by the specification from taking certain objections. On that we give no opinion, but, in my opinion, there is nothing in the specification inconsistent with his now showing that one of the subordinate combinations which he claimed as part of his invention fails for want of novelty. Then it was urged that he was estopped by the petition which he presented to the Crown, because there he represented that this invention was a new invention, and that this representation must apply to the whole of the invention for which he claims protection in the specification. That would, in my opinion, so far as it is necessary to give an opinion on the point, be good as an estoppel *in pais* as against anyone who is proved to have acted in reliance on the statements in the petition; but here there is no evidence at all that the plaintiffs relied on any statement made by Hancock in his petition. The plaintiffs gave a very small sum for this patent, and as a rule people do not rely on any statement made by the patentee, but they buy the patent, forming their own opinion as to its worth, taking their chance (unless it had been established) of their being able to establish its validity if the question comes before a court of law. In my opinion, therefore, the objections raised by the plaintiffs on the ground of estoppel fail. But there is another more serious objection to be considered, viz., that by the Act of 15 & 16 Vict. c. 83, s. 41, it is enacted that the defendant in any action for the infringement of letters patent shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas, and that at the trial of such action no evidence shall be allowed to be given in support of any objections impeaching the validity of the letters patent which shall not be contained in the particulars so delivered. Now the objection which we have held to prevail is one which, in my opinion, could not be decided without evidence. We required evidence to show whether the subordinate combination which we held not to be novel had been used, if not in these machines in other machines, so that there could be no sufficient invention in applying it to lace machines. It was said on behalf of Hancock that the evidence on that subject was evidence given by the plaintiffs. It was not. It is true that it was evidence elicited on cross-examination of the plaintiffs' witnesses, but it was evidence which did not go to the credit of those witnesses; it was evidence brought in by the defendants, although it was obtained by the cross-examination of the plaintiffs' witnesses, and it was admissible only as being relevant to an issue which was to be decided by the court. At the time when that evidence was put in, the two defendants, although they

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had severed in their defence, appeared by the same counsel, and if it had only been Hancock who had sought to introduce this evidence, then in my opinion (since he has not delivered objections, as I shall presently show that he has not) it ought not to have been admitted by the court. It is evidence without which we could not have decided this case, and evidence of which Hancock cannot avail himself. In my opinion, therefore, subject to what I shall now consider, Hancock cannot avail himself of the invalidity of the patent. I have now to consider the order which was made when the case came on in the first instance for trial. [His Lordship read the order of 17th May 1882.] The particulars of objections are these: "Take notice that at the trial of this action the defendants will deny that they have infringed the letters patent in the statement of claim mentioned." Mr. Aston contended that this in itself was notice that both the defendants intended to rely on objections to the validity of the patent. In my opinion that was a sort of *tabula in naufragio* attempted to be seized, because it is well known that a contention that there has been no infringement is entirely distinct from an objection that the patent is bad. It is true that a judgment given on the footing of there having been an infringement assumes that either by the confession of the defendants from their not having raised the objection or otherwise, or from the decision of the court, the patent is to be treated as good, but a notice denying infringement means, "Even assuming your patent is one which you have a right to the assistance of a court of law to enforce, I have not done anything which is an infringement of the privilege granted to you." Then there is a break in the particulars. "And the defendant Smith will rely on their objections to the validity of the said letters patent, on the ground of want of novelty and insufficiency of the specification." We therefore have it distinctly stated that both the defendants intend to rely on there having been no infringement; but the language is then changed, and it is, "The defendant Smith will rely on their objection to the validity of the said letters patent." The word "their" is remarkable, and possibly may show that at one time they both intended to ask for leave to put in objections to the validity of the letters patent, but for some reason satisfactory to Hancock he determined not to ask for it. That being so, in my opinion he is not entitled, as matters now stand, to rely on this objection which has proved fatal to the plaintiffs' title. Ought then any relief to be granted to him by giving him liberty to amend or otherwise? In my opinion it ought not. The deliberately taking the order in this form shows, in my opinion, an intention on his part not to raise any objection to the validity of the patent. He may have thought that if his co-defendant Smith could raise the objections the court would give him the benefit of them. In my opinion we cannot. We must treat that evidence on which we are enabled to find that there was a want of novelty which was a fatal objection, as not his evidence, but evidence which he was not entitled to put in, and, as he has done this deliberately, and has not even at the last moment asked for liberty to amend, but relied on the argument with which I have already dealt, that raising the

question of no infringement raised the question of want of novelty, it would, in my opinion, be wrong to give him liberty to amend, even on the terms of his paying all the costs up to the present time. In my opinion, therefore, the judgment against Hancock in the court below ought not to be disturbed, and his appeal must fail, although the appeal of Smith must be sustained, and the judgment of the court below as against him must be reversed.

BOWEN, L.J.—I am so unfortunate in this case as to be at variance with the rest of the court as to the judgment which should be given, and I need hardly say that I feel very great diffidence in expressing my own views as against the views of those whose opinion I respect more than I do my own; but at the same time, as I am one of the judges of the court, I must state my own honest opinion about the matter. So far as the estoppel is concerned the whole of the court is at one. I think it is quite clear that there is no estoppel here. There is no estoppel of record between Hancock, the original patentee, and the person who has bought from his trustee in liquidation, and there is no estoppel by deed, because the people who claim against Hancock are not parties or privies to the deed or to the record. Nor is there estoppel *in pais* or by matter of conduct, for the best of all reasons. It is true that in his petition to the Crown, Hancock stated that his invention was new; but what sensible being in this world who buys a patent buys it on the strength of the assertion made by the patentee that the invention is new? We know that a person who buys a patent generally takes it for what it is worth, and there is absolutely no evidence in this case that the plaintiffs, who bought from the trustee in liquidation, and who gave a very small sum for the patent, relied in the least on the allegations made in the petition to the Crown by the patentee that the invention was novel. Then as to whether an action for an injunction is maintainable, whether the right of the liquidating debtor to manufacture his own invention passed to his trustee, is a curious question. I do not differ from the rest of the court on this point. It is not necessary, for the purposes of my judgment, for me to express any opinion on the subject. To my mind there is no estoppel, and Hancock was entitled to set up in the action the defence that his invention was not new when he took out his patent. Now, what judgment ought to be given? This is an action against Hancock and his partner for infringing a patent which the court decides to be invalid. The court refuses to restrain the partner from infringing a right which does not exist, and all the rest of the world are at liberty to manufacture freely this invention. We are now asked to shut out Hancock and to enjoin him for ever from infringing a right which does not exist, and to compel him to render an account of the profits to persons to whom they do not belong. Now, upon what ground do the plaintiffs' counsel ask us to take this line—a line which may entail endless consequences upon the unhappy Hancock, because I do not know how it will affect his articles of partnership? Upon the ground that in the notices of objection which were delivered in the action Hancock did not set up that his patent was void for want of novelty, but left his partner to fight that part of the case. They severed in their defences, but were repre-

sented by the same counsel, and they delivered on the same piece of paper notices of objections. The partner said that the patent was bad. Hancock, I suppose, for some reason or other, did not like to say that his own patent was bad for want of novelty. At all events he did not do it, and he left that part of the case to be fought by his partner. I cannot see what possible ground he could have for thinking that he would gain any advantage thereby, unless it was the simple advantage of escaping from the prejudice which a man creates against himself who says that his own patent is invalid. If we could analyse the case thoroughly we should probably find that his advisers imagined that there was an estoppel, and that this was a good objection in the mouth of that partner, but was not a good objection in the mouth of Hancock, and thought that for tactical purposes it was more prudent to let the fight be fought by the partner who could fight it than set it up on behalf of Hancock. What injury did that do to anyone? Smith had to fight the case. Hancock lay by and said nothing. Now it is true that under the 15 & 16 Vict. c. 83, s. 41, you must give notice of an objection to the validity of the patent if you wish to raise the objection; but there is a power even in that statute for a judge at chambers to amend, and to allow you at the last moment to cure any laches or error of judgment, and what a judge could do at chambers a judge could do in court. Moreover, every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think it is a well-established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which if not fraudulent or intended to overreach the court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy; and I do not regard such amendment as a matter of favour or of grace. Order XXVIII., r. 1, of the Rules of 1883, which follows previous legislation on the subject, says that: "All such amendments shall be made as are necessary for the purpose of determining the real questions in controversy between the parties." It seems to me that, as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. It was said by Mr. Barber in his very powerful speech to us, "You are taking away an advantage from the plaintiffs who have got judgment below by making an amendment at the last moment." In one sense we should be taking away an advantage from them, but only an advantage which they have obtained by a mistake of the other side, contrary to the true bearing of the law on the rights of the parties. The question seems to me to be this: Can you by the imposition of any terms place the other side in as good a position for the purpose of having the question of right deter-

mined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not if not intended to overreach. There is no rule that only slips or accidental errors are to be corrected. The rule says: "All such amendments shall be made as are necessary for the purpose of determining the real questions in controversy." I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine. Here I fail even to see that the respondents want costs to remedy any grievance, because they have been put to none. The case has been fought exactly in the same way as it would have been fought if Mr. Hancock had delivered particulars of objection, and therefore it seems to me that he ought to be allowed to amend. I reserve to myself the right to consider how a case should be dealt with where there has been not merely a mistake but an attempt to mislead. I do not see here any attempt to mislead. I do not see any moral iniquity in letting your partner fight a point about the validity of your own invention: It may be bad taste, but the court, according to my view, does not exist for the purpose of punishing bad taste. Then it is said he has not asked for leave to amend. He certainly did not ask leave in the court below. It was not necessary because the judge was deciding against him on another point. In this court, although he may not have asked leave in so many terms, I think the true effect of what has been done by Mr. Aston was to argue that it was not necessary for him to ask leave, but I think he has impliedly asked for leave, and is entitled to obtain it. I am perfectly sensible that the view of my learned brothers is more likely to be right than my own, but, in my opinion, the order ought to be that, Mr. Aston applying for leave to make any necessary amendment, the action against Hancock should be dismissed, Hancock paying the costs below, and no costs of this appeal being given.

Fry, L.J.—Immediately after the hearing of this appeal we determined that the injunction against the defendant Smith could not be maintained on the ground that the third claim in this specification was bad for want of novelty. The questions which we reserved for consideration were, whether the defendant Hancock, the original patentee, was in the same position as the defendant Smith, or whether he was precluded from denying the invalidity of the patent either on the ground of estoppel or by reason of his not having delivered any notice of objection to the validity of the patent. The question of estoppel was argued on three grounds: first, estoppel by record from the effect of the letters patent; secondly, estoppel by deed from the effect of the specification under the hand and seal of the defendant Hancock; and thirdly, estoppel *in pais* by reason of the allegations contained in his petition to the Queen. That there would be an estoppel by record between the Crown and a grantee of its letters patent is, I think, probable, but I find neither reason nor authority for extending this

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estoppel so as to make it work between the grantee and all other Her Majesty's subjects. The plaintiffs claim as assigns of the grantee, not of the grantor, and consequently can have no benefit of an estoppel between grantor and grantee. As to estoppel by the specification it was argued that estoppel may arise between the maker of a deed-poll and all to whom it is addressed—in this case all men. But I am not able to find in the specification either an expressed or implied assertion of the validity of the third claim in the specification, the object and scope of the specification being merely to give the best description which the patentee can give of his invention. Lastly, as to estoppel by the petition. The petition must, I think, be taken to be an assertion of the discovery by the petitioner of a new invention capable of being made the subject-matter of a patent, and if it had been shown that the plaintiffs had purchased on the faith of this assertion by the defendant, it may well be that the defendant would have been estopped. But there is no evidence from which I can conclude that the plaintiffs did so purchase, and consequently this head of estoppel, in my opinion, fails like the other two. It remains to consider the effect of no notice of objections to the validity of the patent having been given by the defendant Hancock. Under the joint operation of the 41st section of the Patent Act (15 & 16 Vict. c. 83) and the order made at the trial of this cause, I am of opinion that no evidence could be adduced or received on behalf of Hancock to show the invalidity of the letters patent, and I am of opinion that this incapacity applies equally whether the evidence be tendered by way of examination in chief or cross-examination. It follows that Mr. Hancock cannot insist on the validity of the patent unless there be some ground of invalidity capable of being judicially determined by the court in the absence of evidence. It was contended that this was the case here, and that the court ought, without evidence, to hold that the subject-matter of the third claim was not a good subject-matter of a patent. We have already determined that claim to be bad on the ground of want of novelty. But I am of opinion that, if the combination of the floor plate with the vertical supports had been new in the history of machinery, it might have been a very important invention, and a good subject-matter of a patent, and consequently that we could not in the absence of all evidence have arrived at the conclusion that the third claim is bad. It is argued that, if the court concludes the patent to be bad as against Smith, it cannot, on the footing that the patent is good, grant relief against Hancock. But I see no force in this objection, because every issue of fact in litigation must be determined with reference to the evidence admissible for and against each litigant respectively and the admissions made by each litigant respectively, and as this evidence and these admissions vary, so the conclusions of the same issue may vary as against the separate parties, including co-defendants. In the present case the defendants have deliberately taken different courses: Smith has applied for and obtained leave to place himself in a position to give evidence to show the invalidity of the patent; Hancock has by the limited nature of his application precluded himself from tendering

such evidence. It is upon that evidence in behalf of Smith that I conclude in Smith's favour, and from the absence of all such evidence on behalf of Hancock that I conclude against Hancock. It is true that in the present case the two defendants appeared by the same counsel, and put in the evidence without so far as appears specifically indicating on whose behalf it was tendered. But, as they thought fit to pursue this course after having obtained leave to sever, and had put in different notices of objection, it appears to me to be the duty of the court to consider that evidence which was competent to both defendants as put in for both, and that which was competent to Smith alone as put in on his behalf alone. I now approach the remaining question, which is simply this, whether under the circumstances at this eleventh hour the court ought to give Hancock leave to amend the particulars of objections. I agree with the view taken by Cotton, L.J., and differ (though with diffidence and regret) from the view taken by my learned brother Bowen, L.J. In the first place, it seems to me that the leave to amend never was asked for. Mr. Aston, although almost invited to ask for leave, remained silent as regards any such application, and took a course of argument totally inconsistent with asking such leave, for he argued with pertinacity and ability that the notice of objections was sufficient to raise the point, and therefore, so far from asking for leave, he insisted that the point was open to him without leave. In the next place, it must be observed that, if the leave had been asked for, it would have been the duty of the court to inquire carefully whether it should be given or not, and that, to a great extent, would, in my judgment, have depended on what took place in the court below when the limited order was made which has resulted in the curious conclusion at which we have arrived. If it was evident that when the application was made in the court below, Hancock deliberately, whether from feelings of honour or from any other motive, confined himself to asking for leave to raise the question of infringement, I for one should have been very unwilling to have allowed him at the last moment to alter that course, and if it appeared that he was really endeavouring to fight under the shield of his partner to gain a benefit which he did not think he ought to gain in his own name, then I for one should have been very unwilling to grant him any leave of amendment at this late hour. But what I rely on is this, that no application ever was made for leave to amend, that the defendant's counsel took the opposite course, and insisted that the leave obtained was sufficient, and therefore we never have been placed in a position to determine whether if the leave had been asked for we ought to have granted it. I do not think that it is the duty of the court to force upon a party who, although almost invited to apply, does not apply for leave to amend, an amendment for which he does not ask. On that ground I agree that the decision in the cases of Smith and of Hancock must be different. I think, therefore, that the view which my learned brother Cotton, L.J. has expressed with regard to the costs is the just one; that is to say, the defendant Smith must have his costs both in the court below and in this court, and Hancock must pay the costs in the court below and the costs of the appeal. How the costs

will be apportioned by the taxing master I do not presume to suggest.

*Barber, Q.C.*—The question remains, how the damages which have been paid are to be dealt with. They were assessed by the official referee at about 700*l.*, and payment was obtained by execution against the partnership property.

*Goodeve.*—I ask that the damages should be returned. How can damages be given for a void patent?

*COTTON, L.J.*—As against Hancock the plaintiffs are entitled to damages, and we cannot order them to be refunded. If they have been paid out of the partnership estate, that is a matter of account between Smith and Hancock. We make no order as to them, but nothing that we say is to prejudice any application by Smith for an order as between him and Hancock, or any such application as he may be advised to make as to the damages. We do not, however, encourage any such application.

*BOWEN and FRY, L.JJ.* concurred.

Solicitors for the appellants, *Marsland, Hewitt, and Everett*, agents for *Everall and Turner*, Nottingham.

Solicitor for the respondents, *F. Needham*, agent for *Cann and Son*, Nottingham.

Saturday, June 21, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re SCOTT. (a)

*Lunacy—Alleged insanity—Order for inquiry before judge of High Court—Lunacy Regulation Act 1862 (25 & 26 Vict. c. 86), s. 4—8 & 9 Vict. c. 109, s. 19.*

*It is not necessary that a writ of summons shall be issued previous to the trial of an issue directed by an order in lunacy under sect. 4 of the Lunacy Regulation Act 1862.*

On the 4th Feb. 1884, upon the petition of a brother of the alleged lunatic, an order was made in lunacy that a master in lunacy should inquire before a jury concerning the alleged lunacy of Mr. George Gilbert Scott.

On the 29th March an order was made by Bowen, L.J., which, after reciting that it had been represented to him that the aforesaid inquiry should be made under an issue to be tried in the High Court of Justice by one of the judges in the Queen's Bench Division of the said court, continued as follows: "Now I do order that all future proceedings under the said order of the 4th Feb. 1884, so far as it directs the inquiry to be held by one of the masters in lunacy, be stayed. And I do order that the inquiry concerning the alleged lunacy of the said G. G. Scott shall be had and made before a good jury; and do, pursuant to the provisions of the Lunacy Regulation Act 1862, order and direct that such inquiry be made under an issue to be tried in Her Majesty's High Court of Justice in the Queen's Bench Division of the said court; and that the question on such issue shall be whether the said G. G. Scott is a person of unsound mind and incapable of managing himself or his affairs."

An inquiry was accordingly held in Lincoln's-inn before Denman, J. and a jury. It lasted several days, and was concluded on the 9th April, when a verdict was returned that Mr. Scott was of unsound mind and incapable of managing himself or his affairs.

An application was now made to the Lords Justices, sitting in lunacy, on behalf of Mr. Scott, for a declaration that the inquiry before Denman, J. and the certificate of the finding of the jury were irregular and void, and that the petition might be dismissed.

*Sir Hardinge Giffard, Q.C.* and *Bucknill (E. Beaumont with them)* in support of the application.—The proceedings before Denman, J. under the order of the 27th March 1884 were altogether void, and a mere nullity, as no writ of summons had been issued pursuant to the requirements of 8 & 9 Vict. c. 109, s. 19, which are incorporated into and made part of sect. 4 of the Lunacy Regulation Act 1862, under which the inquiry before Denman, J. purported to have been made. That section expressly directs the issue of a writ of summons. Without the issue of a writ as directed by the statute, the provisions of which must be strictly adhered to, Denman, J. had no authority to entertain any question, to hold this inquiry, or even to administer an oath. Under the old practice the Court of Chancery could direct an issue to be tried by a common law court, without the issue of a writ at common law. But then there a suit had been commenced, and here no action is pending in any court. This appears to be the first case in which such an issue has been directed, and it is important that the practice should be correctly ascertained. By sect. 7 of the Lunacy Regulation Act 1862 the alleged lunatic is deprived of his right of traversing the inquisition, and must apply to the Lord Chancellor for a new trial, which he has a discretion to grant or refuse. That shows that it was intended to assimilate the practice to that of an issue in an ordinary action. This is a proceeding under a statute, which makes certain proceedings obligatory, and, as those directions have not been complied with, the whole inquiry was a nullity.

*Murphy, Q.C.* and *Swinfen Eady*, for the respondents, were not called on.

*BAGGALLAY, L.J.*—The question raised in this case is, whether the provisions of the Lunacy Regulation Act 1862, s. 4, have been complied with in the case of an inquiry under that section as to the state of mind of Mr. Gilbert Scott. Reliance was mainly placed upon the words used in that section, "and, subject thereto, such issue and the trial thereof shall be regulated by the Act of 8 & 9 Vict. c. 109, intitled An Act to amend the law concerning games and wagers," by sect. 19 of which Act proceedings under feigned issues were abolished, and it was enacted that "in every case where any court of law or equity may desire to have any question of fact decided by a jury it shall be lawful for such court to direct a writ of summons to be sued out by such person or persons as such court shall think ought to be plaintiff or plaintiffs against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the schedule to this Act annexed." That is to say, that in any case in which a court of law or equity directed an issue, it was to direct who



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were to be plaintiffs and who defendants in the proceedings, and what was to be the form of issue which was to be made. But the Lords Justices sitting in lunacy are not a court either of law or equity; nevertheless, they may wish to have the question whether a person is or is not of unsound mind inquired into before a jury. This we can do in either of two ways, either before the master, with or without a jury, or before a judge of the High Court with a jury. The simple question that arises for decision in these cases of alleged lunacy is soundness or unsoundness of mind, and there is no occasion to decide who is to be plaintiff or defendant. Before the Act of 1862 the inquiry was always before one of the masters in lunacy, either with or without a jury, but it was thought necessary to make an alteration. It is singular that this provision has never been acted on until the present year, so that the necessity for the alteration does not seem so clear as it was then thought. In the present case, however, Bowen, L.J. thought it desirable to direct an inquiry before a judge of the High Court under the 4th section. Having regard to the language of that section I am of opinion that it is no longer necessary that a writ of summons should be issued for the purpose of showing what the issue to be tried is, or who is to be plaintiff or defendant. Then it was by the same section provided that the provisions of the Lunacy Regulation Act 1853, that is, the 38th and subsequent sections, should apply to any issue to be directed and the trial thereof, and "subject thereto such issue and the trial thereof" should be regulated by 8 & 9 Vict. c. 109; that is to say, a certain mode of procedure having been adopted which brought the matter down to the time of trial, it was then taken up under 8 & 9 Vict. c. 109. It appears to me, therefore, that this application is wholly without foundation, and that no writ of summons is necessary, as the issue is defined, and everything for which a writ is required is already provided for by sect. 4. What possible advantage, then, could follow from the issue of a writ? It would be a mere additional form without any benefit to anyone. Under the 7th section of the Act an application can be made to the Lord Chancellor or Lords Justices sitting in lunacy for a new trial if the alleged lunatic desires it, but the present application must be refused.

CORROX, L.J.—I am of the same opinion. Undoubtedly a question of very great importance is raised by this application, namely, whether the whole foundation of the present proceedings is a nullity. It has been contended that the proceedings before Denman, J. were altogether a nullity because no writ had been issued; but the question is whether sect. 4 of the Act of 1862 does not of itself give jurisdiction to the judge to try the issue. If we take the first part of the section I hardly think there can be any doubt about it. Construing sect. 4 fairly and reasonably, I am of opinion that when it says that the Lord Chancellor may by his order direct an issue to be tried before a judge, that gives the judge, acting under the order, jurisdiction and authority to try the issue, and to do everything necessary to try the question, and for that purpose to swear the jury and witnesses; and, in my opinion, if that stood alone, the judge would have all powers necessary to make that effectual

which the statute has authorised to be done. Then the section, after referring to the provisions of the Lunacy Regulation Act 1853, goes on to say that, subject thereto, such issue and the trial thereof shall be regulated by the 8 & 9 Vict. c. 109, and those are the words which have caused the difficulty. It is said that it imports into the section all the provisions of sect. 19 of the 8 & 9 Vict. c. 109, and renders it necessary to issue a writ of summons as a commencement of the proceedings. In my opinion that is an erroneous contention. It arises from an erroneous view of the nature of the proceedings in lunacy. They are not taken adversely between litigants, but under special authority from the Crown given to the Lord Chancellor and the other persons designated under the sign manual to act for the care and custody of lunatics. It is not intended that these powers, which are only given to enable the Crown to ascertain whether the alleged lunatic is insane, should be exercised by the Lord Chancellor or Lords Justices as judges of the Court of Appeal deciding between adverse litigants. If it had been intended that a writ should be issued there would have been a direction to that effect in the section, but there is nothing of the kind. It was said that there is no right of traverse reserved to the lunatic when the issue is tried before a judge of the High Court, but a special application must be made to the Lord Chancellor for a new trial and it is urged that this shows that it is intended to assimilate the practice to that in an ordinary action. In my opinion there is no such intention implied. When there was an ordinary inquiry directed before the master, the alleged lunatic was entitled as of right to a traverse. He was strictly no party to that inquiry, and therefore it was right that he should have power to traverse it. But in this case, where he is a party to the proceedings, there is no necessity for such right, it is sufficient protection to the alleged lunatic that the Lord Chancellor or Lords Justices acting in lunacy should have a discretion to grant a new trial. They have a full discretion to decide what they think best to be done under the circumstances of each case. I am of opinion that Denman, J. had full jurisdiction to try the question in this issue, and there is no ground for setting aside the proceedings.

LINDLEY, L.J.—I cannot see any difficulty in this case. The question turns upon the construction of the 4th section of the Lunacy Regulation Act 1862. What is the Lord Chancellor empowered to do? He is to make an order directing an issue to be tried by a judge of the High Court. The issue is stated by the court in the order. In the 8 & 9 Vict. c. 109, the enactment is that a writ shall issue; here it is that the Lord Chancellor shall direct an issue. Then the section in question says that the issue and the trial thereof shall be regulated by the 8 & 9 Vict. c. 109. That does not refer to the machinery for arriving at the issue, but for the trial of the issue when you have got it. I agree that this application fails.

Solicitors for the applicant, *Hall, Knight, and Co.*

Solicitors for the respondent, *Parker, Garrett, and Parker.*

July 12 and 14, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re ROBINSON. (a)

*Lunacy—Judicial separation—Permanent alimony—Allowance out of lunatic's estate—Assignment—20 & 21 Vict. c. 85, s. 25.*

*Alimony is not property within the meaning of sect. 25 of 20 & 21 Vict. c. 85.*

*A decree was pronounced for a judicial separation, and an order made for the payment of 60*l.* a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in Lunacy and in Chancery, certain dividends to which he was entitled in a Chancery suit were ordered to be carried to an account in lunacy, and out of them the sum of 60*l.* a year was directed to be paid to the wife in respect of her alimony, until further order. She afterwards mortgaged the annuity to secure the repayment of a certain sum.*

*Held, that the court would not order the payment of the annuity to the mortgagee, as whether it was considered as alimony or as an allowance made to the wife by the court in lunacy, she could not alienate it.*

On the 19th July 1861, on the petition of Matilda A. Robinson, a decree for judicial separation between her and her husband, H. F. Robinson, was pronounced by the Divorce Court.

On the 19th Nov. 1861 a further order was made that H. F. Robinson should pay M. A. Robinson permanent alimony at the rate of 60*l.* per annum, payable monthly.

In 1865 the husband was found lunatic by inquisition, and in June of that year the Lords Justices sitting in lunacy made an order that the interest from time to time to accrue due on 6357*l.* 15*s.* 2*d.* Bank Three per Cent. Annuities then standing in an administration action of *Peillon v. Brooking* to the account of "the legacy for the benefit of H. F. Robinson and his wife and children" should until further order as and when the same should become payable be carried over to the credit of the lunatic, and that out of such interest should be paid to M. A. Robinson on her sole receipt the annual sum of 60*l.* in respect of the alimony.

On the 18th May 1880, the above-mentioned sum of Bank Annuities being then represented by 5210*l.* 3*s.* 10*d.* of Metropolitan Consolidated Stock, an order was made in Chancery and Lunacy that the interest on the same, after making certain payments which reduced it to 4970*l.* 3*s.* 5*d.*, be carried over to the credit of "the matter of Henry F. Robinson, a person of unsound mind," and that out of such interest, when so carried over, there should be paid until further order to M. A. Robinson on her sole receipt the annual sum of 60*l.*, by equal half-yearly instalments of 30*l.*, less income tax, in respect of her said alimony, on the days therein mentioned.

By an indenture dated the 30th Nov. 1883, M. A. Robinson, in consideration of 200*l.*, assigned the annuity of 60*l.*, payable to her by virtue of the above-mentioned order, to her nephew, E. W. Robinson.

By an indenture dated the 14th Dec. 1883 E. W. Robinson mortgaged the said annuity, together

with other property, to William Rutley to secure the repayment of 750*l.* and interest.

E. W. Robinson and William Rutley now presented a petition in lunacy in the Chancery suit, praying that, in lieu of the direction given in the order of the 18th May 1880, it might be ordered that out of the interest to be from time to time carried over to the credit of the matter in lunacy the annual sum of 60*l.* during the joint lives of Henry F. Robinson and Matilda Robinson might be paid to W. Rutley until further order.

The petition was adjourned into court.

*Oswald* for the petitioners.—This alimony was payable on Mrs. Robinson's sole receipt, and she had full power to assign it. There are no cases which show that alimony is not the separate property of the wife, or that she cannot alienate it. *Ex parte Bremner* (15 L. T. Rep. N. S. 297; L. Rep. 1 P. & D. 254) is an authority to the contrary. It is within sect. 25 of the Divorce Act 1857 (20 & 21 Vict. c. 85), by which it is enacted that in every case of a judicial separation the wife shall, from the date of the sentence, be considered *a feme sole* with respect to property of every description which she may acquire, or which may come to her.

*Malleson* for the committee.—Alimony is inalienable. It is an allowance given by the Divorce Court from time to time, and may be varied or entirely withdrawn. Though that has not been expressly decided, yet there are dicta to that effect:

*Vandergucht v. De Blaquiére*, 8 Sim. 315; 5 My. & Cr. 229;

*Stones v. Cooke*, 7 Sim. 22; 8 Sim. 321, n.;

*Ex parte Linehan*, 1 J. & Lat. 29;

*Hyde v. Price*, 3 Ves. 437;

*Prescott v. Prescott*, 20 L. T. Rep. N. S. 331;

2 Bright's Husband and Wife, 361.

Therefore it does not come within sect. 25 of the Divorce Act. Besides, this order was made in lunacy. The allowance was for the maintenance of the wife, and will not be continued for the benefit of a stranger. It is entirely in the discretion of the court:

*Re Weld*, 46 L. T. Rep. N. S. 397; 20 Ch. Div. 451.

*Oswald* in reply.

BAGGALLAY, L.J.—The circumstances of this case are somewhat singular. Henry F. Robinson was found to be of unsound mind in 1865, but before that time a suit had been instituted in the Divorce Court, and on the 19th July 1861 a decree for judicial separation was pronounced. In Nov. 1861 an order was made by the same court for payment of an annual sum of 60*l.* by way of permanent alimony to Mrs. Robinson from the date of the order for separation. This order was acted upon till Mr. Robinson became of unsound mind; but subsequently an order was made in the matter of the lunacy, and in an administration suit pending in Chancery, that the dividends on a sum of about 4970*l.* 3*s.* 5*d.* Metropolitan Consolidated Stock should be carried over to the lunatic's account in the lunacy, and that an annuity of 60*l.* should be paid out of the dividends to Mrs. Robinson on her sole receipt till further order, in respect of her alimony. It appears that on the 30th Nov. 1883 an assignment was executed by Mrs. Robinson, by which she purported to assign her

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annuity of 60*l.* to the petitioner Eugene Robinson in consideration of 200*l.*, and that he afterwards mortgaged it to Rutley with other property for 750*l.*, and the present petition is presented by Eugene Robinson and Rutley asking for payment of the annuity of 60*l.* to Rutley instead of Mrs. Robinson. This petition has been opposed on two grounds: first, that there was not sufficient consideration for the assignment; and secondly, on the ground of the inalienable character of alimony. I prefer, however, to deal with the case on a short point without deciding either of those questions. When a man is found to be of unsound mind the court is in the habit of making allowances for the wife and children and other near relatives of the lunatic for their personal benefit. When Mr. Robinson was first found to be a lunatic it was within the ordinary jurisdiction and practice of the court to consider what sum would be proper to allow his wife out of his income, and as an order had been made for paying a certain sum to her in respect of her alimony, the court considered that was a proper allowance to make her. Perhaps it is too strong a word to use, to say that it was given out of charity, but it was an allowance made out of the lunatic's income for the personal maintenance of his wife. But now the reason for that payment no longer exists; it is no longer to be applied for the maintenance of his wife, but is to be applied to other purposes. I think therefore the payment ought no longer to be sanctioned. In the Ecclesiastical Court it is the practice to vary or stop the payment of alimony according to the position or conduct of the wife, and if it were necessary to give an opinion on the question I should be inclined to decide that alimony was not alienable. But I do not think it necessary to decide that question in the present case, because, having regard to the practice of the court in lunacy, we should not be justified in continuing the allowance when it was not to be applied to the maintenance of the wife, but to be paid to other persons. The petition must therefore be dismissed.

COTTON, L.J.—This is a petition by the assignee of an allowance for alimony, made by an order in lunacy, to have the allowance paid to him out of the lunatic's property. To my mind this turns on the question whether alimony is alienable or not. It is said that the wife became entitled to deal with it as if she were a *feme sole*, under the 25th section of the Divorce Act 1857, as being property acquired by her after the decree. I do not think it is within the section referred to; but I do not decide this case on that ground, because the very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such as the half-pay officers of the army and navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the court thinks right to be paid for her maintenance from time to time, and the court may alter it or take it away whenever it pleases. It is not in the

nature of property, but only money paid by the order of the court from time to time to provide for the maintenance of the wife. Therefore it was not assignable by the wife. How far she might dispose of the arrears or of her savings is a different matter; here the question is whether she can deprive herself of the benefit of it by anticipation. Therefore, treating it as merely a question of alimony, I am of opinion that this lady had no power to assign her annuity. I do not disagree with what Baggallay, L.J. has said on the question of allowance made by the court in lunacy for the maintenance of the wife and children of the lunatic; but I think the only question here is whether the order in lunacy put the assignee in a better position; and I am of opinion that the order in lunacy was only a mode of providing for carrying out the order for alimony, and that it did not put the assignee in any better position than if no such order had been made. As the alimony is not itself alienable by anticipation, I do not think the assignee can get any advantage from the order in lunacy, and that this petition must fail.

LINDLEY, L.J.—I am of the same opinion. The question whether alimony is assignable has never been distinctly decided; but the nature of alimony has often been discussed, and there are cases which, in my opinion, tend to show that it is not alienable. For instance, the Ecclesiastical Courts could not enforce arrears of alimony beyond one year. Then also in *Vandergucht v. De Blaquiere* (8 Sim. 315; 5 Myl. & Cr. 229) it is plain that both the judges thought that alimony could not be dealt with as if it was the separate property of the wife. To the same effect is *Stones v. Cooke* (7 Sim. 23; s.c. 8 Sim. 321, n.); and *Prescott v. Prescott* (20 L. T. Rep. N. S. 331) shows that a claim to alimony is not provable in the husband's bankruptcy. All these cases tend to show that alimony is not assignable, and is only an allowance made by the Ecclesiastical Court, and revocable by the same court. I am also of opinion that alimony is not property within the meaning of the 25th section of the Divorce Act which makes a wife a *feme sole* with respect to property which she may acquire after the sentence of judicial separation. It is not property in its proper sense; it is like an allowance made by a husband to his wife or a father to his child. In addition to this we have this circumstance—that this is a petition asking the court sitting in lunacy to change the order for payment of an allowance to a wife, and to make it payable to her assignee. I entirely agree with Baggallay, L.J. that the court is under no obligation to do any such thing. The assignee is certainly not in a better position by reason of the order in lunacy than if there had been no such order. I agree that the petition must be dismissed.

Solicitors: G. J. and P. Vanderdorp; Wadeson and Malleon.

Monday, Dec. 8, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF OVER DARWEN v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER. (a)  
ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Highway—County—Borough—Expense of maintenance of road—County in which road is situate—Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), ss. 13, 38—Highway Acts 1862 and 1864 (25 & 26 Vict. c. 61), s. 2, and (27 & 28 Vict. c. 101), s. 3.*

*By the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13: "For the purposes of this Act, and subject to its provisions, any road which has within the period between the 31st day of December 1870 and the date of the passing of this Act" (16th Aug. 1878) "ceased to be a turnpike road . . . shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate . . ."*

*By sect. 38: "In this Act 'county' has the same meaning as it has in the Highway Acts 1861 and 1864 (with an exception not here material).*

*By the Highway Act 1862 (25 & 26 Vict. c. 61), s. 2: "The word 'county' in this Act shall not include a county of a city or a county of a town, but where a county as hereinbefore defined is divided into ridings or other divisions having a separate court of quarter sessions of the peace, it shall mean each such division or riding, and not the entire county; and for the purposes of this Act all liberties and franchises . . . except boroughs as hereinafter defined shall be considered as forming part of that county by which they are surrounded . . ."*

*By the Highway Act 1864 (27 & 28 Vict. c. 101), s. 3: "County shall include any division of a county that has a separate county treasurer."*

*The borough of Over Darwen in Lancashire is a highway area within the meaning of the Act of 1878, having no separate court of quarter sessions, and the townships or parts of townships comprised within its boundary are assessed and contribute to a separate rate raised and charged upon the hundred of Blackburn.*

*A road which ceased to be a turnpike road in 1877 passing through the borough, the highway authority sued the county authority to recover payment of one-half of the expenses incurred by the highway authority for the year ending 25th March 1883 in the maintenance of so much of the road as was situate within the borough.*

*Held, on a special case stated in the action, that the word "county" in 41 & 42 Vict. c. 77, s. 13, is used in a geographical sense, and therefore the county of Lancaster was the county in which the road was situate, and the defendants, the county authority, were liable.*

*Judgment of Day and Smith, JJ. affirmed.*

*This was an appeal by the defendants from the judgment of Day and Smith, JJ. (reported 51*

*L. T. Rep. N. S. 630), where the material parts of the special case are set out.*

*Gorst, Q.C. (Blair with him), in support of the appeal, used the same arguments as in the court below.*

*R. Henn Collins, Q.C. and W. H. Cross, for the plaintiffs, were not called upon.*

BRETT, M.R.—The 2nd section of the Highway Act 1862 (25 & 26 Vict. c. 61) deals with the definition of the word "county," and the question to be determined is whether the provisions of that section are applicable to the phrase "the county in which such road is situate" in the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 13. It seems to me that the word "county" in the Act of 1878 must have its ordinary meaning. If this is so, as it is admitted that the road and the highway area are in the county of Lancaster according to the ordinary meaning of the expression, it follows that the judgment of the Divisional Court ought to be supported. These Acts of Parliament deal with two different matters, geography and jurisdiction. The power of justices to make orders is a matter of jurisdiction, and the description of counties and other divisions of the country is a matter of geography. England is divided geographically into counties, and there is no part of the country that is not within a county. There are the well-known counties of England, the names of which are familiar, and there are also counties of cities and counties of towns. When one speaks of a physical thing like a road being situate in a particular place one is referring to the place where it is situate on the map which divides England into counties. I am therefore of opinion that the phrase, "the county in which such road is situate" in the Act of 1878 is descriptive, and is not altered by the definition clause in the earlier Act, and that the judgment of the court below is right, and ought to be affirmed.

COTTON, L.J.—The point to be settled by this appeal arises on the 13th section of the Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), and we have to decide how we are to deal with the provisions of that section, having regard to the definition clause contained in sect. 38. The question is whether the main road referred to in the special case is situate in the county of Lancaster within the meaning of sect. 13. There is this difficulty, that by the definition clause in sect. 38, the word "county" is to have the same meaning as in the Highway Acts of 1862 and 1864. In drawing that section the draftsman appears to have been more cautious, for in dealing with the exception there provided for the words "locally situate" are used. Now, the definition clause in the Act of 1862 (25 & 26 Vict. c. 61, s. 2) provides that liberties and franchises "except boroughs" are to be considered as forming part of the county by which they are surrounded, and it is contended that by this exception boroughs are excluded from the county for all purposes. In my opinion this view is erroneous. I think the interpretation clause is not to be construed so as to give an interpretation inconsistent with the context. I think the words "for the purposes of this Act" may be meant to provide that certain powers which the county authority may possess are not to be exercised by

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them in boroughs, so as to interfere with the local authority. In my opinion it is a wrong construction to say that, because the road in question is in the borough, it is not situate in the county within the meaning of sect. 13. I am of opinion that it is a main road physically situated in the county of Lancaster, and I therefore agree that the judgment is right.

LINDLEY, L.J.—I am of the same opinion. We are asked to construe sect. 13 of the Act of 1878, not in its plain sense according to the meaning of the words, but in a sense which has to be got at by a puzzle. I think the road is a main road situate in the county of Lancaster, and that the decision of the court below is right.

*Judgment affirmed.*

Solicitors for plaintiffs, *Pritchard, Englefield, and Co. for C. Costeker, Over Darwen.*

Solicitors for defendants, *Ridsdale and Son, for Wilson and Hulton, Preston.*

Friday, Oct. 31, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

JOSEPH v. LYONS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Bill of sale—Assignment of after-acquired property. A bill of sale, duly registered, purported to assign to plaintiff the stock-in-trade then on the grantor's premises, and that which should during the continuance of the security be brought on the premises.*

*Goods brought on the premises after the execution of the bill of sale were pledged by the grantor with defendant, a pawnbroker, who received them in the course of business without knowledge of the bill of sale.*

*In an action to recover the goods or their value:*

*Held (reversing the judgment of Huddleston, B.), that the bill of sale did not pass the legal property in the goods to plaintiff, but only gave him an equitable interest in them, and therefore he was not entitled to recover.*

APPEAL by the defendant from the judgment of Huddleston, B., in favour of the plaintiff for 171l., to be reduced to 1s. on return of the goods claimed.

The action was brought for the conversion and detention of certain jewellery to which the plaintiff claimed to be entitled under a duly registered bill of sale, dated the 3rd Feb. 1881, and made by way of security for the payment of money due from the grantor, Manning, to the plaintiff, by which Manning assigned to the plaintiff the goodwill of, and his interest in, the business of a gold and silversmith, which he carried on in Worcester, and also all the stock-in-trade in or about or belonging to the premises, and also all the stock-in-trade which should or might, at any time during the continuance of the security, be brought into the premises, or be appropriated to the use thereof, either in addition to or in substitution for the stock-in-trade then being thereon or belonging thereto. The bill of sale further provided that Manning should not, while in possession, remove the chattels from the premises without the consent of the plaintiff. There was also a declaration in the bill of sale

that all future property thereinbefore assigned should be subject to the security thereby made, and the powers, covenants, and provisions thereinbefore contained, although the same, or any part thereof, might not be capable of passing at law by the assignment thereinbefore contained.

The defendant was a pawnbroker in Birmingham. The goods, the subject of the action, had been brought on the premises after the date of the bill of sale, and were pledged by Manning with the defendant, and received in pawn by the defendant in the ordinary course of his business and without knowledge of the existence of the bill of sale.

*Jelf, Q.C. (W. H. Clay with him), for the defendant, in support of the appeal.*—The plaintiff cannot recover in this action. The effect of the decisions is, that an assignment of after-acquired property is invalid at law, and although such a transaction may for certain purposes be valid in equity, it cannot confer more than an equitable title:

*Lunn v. Thornton*, 1 C. B. 379;

*Holroyd v. Marshall*, 7 L. T. Rep. N. S. 172; 10

H. of L. Cas. 191; 33 L. J. 198, Ch.;

*Clements v. Matthews*, 11 Q. B. Div. 808;

*Brown v. Bateman*, 15 L. T. Rep. N. S. 658; L. Rep.

2 C. P. 272.

[BRETT, M.R. referred to *Reeves v. Barlow*, 50 L. T. Rep. N. S. 782; 12 Q. B. Div. 436.] It follows that the defendant has acquired a legal title by the pledge from Manning, and is entitled to succeed.

*A. T. Lawrence and Darling for the plaintiff.*—The bill of sale amounted to a contract by the grantor that when any additional goods came on the premises they should be the property of the grantee. This gives the property in the goods to the plaintiff. It may be that before the Judicature Acts the defendant would have had the legal title as against the plaintiff; but by the Act of 1873 (36 & 37 Vict. c. 66), s. 25 (11), in cases of variance or conflict between law and equity, the rules of equity are to prevail. Therefore such an assignment as this is valid for all purposes, both at law and in equity:

*Lasarus v. Andrada*, 43 L. T. Rep. N. S. 30; 5 C. P. Div. 318.

It was the duty of the defendant to make inquiries before he took the goods in pawn, and if he had done so he would have discovered the existence of the bill of sale, for it was duly registered. He ought, therefore, to be considered as having had constructive notice of it. They also referred to

*Collyer v. Isaacs*, 45 L. T. Rep. N. S. 567; 19 Ch. Div. 342;

*Cooper v. Willomatt*, 1 C. B. 672.

*Jelf, Q.C.* was not called upon to reply.

BRETT, M.R.—In this case an action of trover or detinue is brought to recover certain jewels or their value. The plaintiff's interest is under a bill of sale, and the grantor of the bill of sale is a person of the name of Manning. The goods came to the defendant in this way, that Manning pledged them to him in the ordinary way in which goods are commonly pledged with pawnbrokers. There is no pretence here for saying that the pawnbroker knew anything of the existence of the bill of sale. The defendant declined to deliver up the goods to the plaintiff unless the advance which he had made to Manning was paid,

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and therefore, if the plaintiff were entitled to the possession of the goods, there would be a conversion; but the question to be decided is, whether the plaintiff can maintain this action. The grantor of the bill of sale, Manning, carried on business as a jeweller at Worcester. The business was Manning's, and there was an existing stock-in-trade. The bill of sale passed the legal property in those goods which constituted the stock-in-trade to the plaintiff, but the business remained the business of Manning, who was to sell the goods to customers and account to the plaintiff for the proceeds. The bill of sale assumed to assign, not only the existing stock-in-trade, but also any other goods which might afterwards come on to the premises. The goods which were pawned to the defendant, and which form the subject of the present action, were not in stock when the bill of sale was given. It was argued for the plaintiff that the bill of sale gave him the legal property in the after-acquired goods when they came on the premises, and it was argued on the other side that only an equitable interest in those goods passed to him. An ingenious argument was put forward on behalf of the plaintiff by Mr. Lawrence and Mr. Darling; they contended that the bill of sale was equivalent in law to a contract by Manning that, when any goods in addition to the existing stock-in-trade came on to the premises, they should be the legal property of the plaintiff, and therefore that the plaintiff was entitled to the legal property in the goods now in question. But we must consider what the law is. A bill of sale such as the present is a legal document, assuming at the date of its execution to pass the property in after-acquired goods; but the law has said that this cannot be done, though in equity the bill of sale gives an equitable interest in the goods to the assignee. What then is to be taken to be the intent of the parties to such an instrument? I think it must mean what has been declared to be the effect of documents in similar terms, namely, that there shall be no legal title in the assignee to the after-acquired property, but only an equitable title. In equity the document is considered equivalent to a contract that when goods are afterwards acquired there shall be an equitable property in such goods in the grantee. What Jessel, M.R. said on this subject is perfectly plain, and means the same as what I desire to state. He said "That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment:" (*Collyer v. Isaacs*, 19 Ch. Div. at p. 351.) By that he meant a complete assignment in equity. Then, if the plaintiff's interest was only equitable, in whom was the legal title to the goods? It was in Manning, and he took the property to the defendant and pledged it, thereby conferring a legal right on the defendant. Therefore the right of the defendant to the goods is legal, while the plaintiff has only an equitable interest, and it follows that the plaintiff cannot maintain an action of trover

or detainee. Then it is said that this was not a *bond fide* transaction, because the defendant could have inquired as to the bill of sale. That strikes me as a very far-fetched doctrine, for, in my opinion, in such a transaction as receiving goods in pawn in the course of business, a man is not bound to inquire for bills of sale unless something is brought to his attention which makes it incumbent on an honest man to inquire, and that was not the case here. For these reasons I differ from Huddleston B., and am of opinion that in this action the plaintiff is not entitled to recover, and therefore the judgment which has been given in his favour ought to be reversed.

COTTON, L.J.—The plaintiff sues to recover a quantity of jewellery, which the defendant holds as a pledge from a person named Manning. The plaintiff claims under a bill of sale, which purports to pass to him both the stock-in-trade which was on Manning's premises at the time of its execution, and also any after-acquired goods which might subsequently be brought upon the premises. The only question is as to the latter goods, that is, the after-acquired stock-in-trade. Did the plaintiff by the bill of sale acquire the property at law in these goods? In the case of *Holroyd v. Marshall* (10 H. of L. Cas. 191) the House of Lords decided that such an instrument gave a right in equity to an assignment of the after-acquired property, and, therefore, since equity treats what ought to be done as done, there was an assignment which was good in equity. But it has been laid down at law that such an assignment is null and void, because at law an assignment of goods not existing at the date of the assignment, or of goods which are not then the property of the assignor, can have no effect. *Lunn v. Thornton* (1 C. B. 379) is also like the present case. Then it is said that the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25 (11) has altered the law as to this question, but I am of opinion that the intention is that all courts shall recognise equitable rights. The words of sub-sect. 11 are: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." That clause cannot be read alone without looking at the previous part of the same section, and, looking at the whole section together, I think the Act was not intended to alter the law as it stood, and that its effect is only to cause rights which previously were only recognised in courts of equity to be recognised and given effect to in all courts, but not to say that a conveyance which would be void at common law is not void since the Act came into operation. What I said in *Clements v. Matthews* (11 Q. B. Div. at p. 814) is to this effect. The conclusion at which I have arrived, therefore, is that, with regard to the chattels acquired after the execution of the bill of sale, the plaintiff had only an equitable title, and the legal title remained in Manning, subject to the plaintiff's equity, and therefore the defendant acquired a legal title to the goods when Manning pledged them to him, for equity does not deprive a man of his legal title unless he had notice of an existing equity affecting the property. There is nothing here to show that such was the case. It is said that the defendant ought to have inquired whether there was a bill of sale, but I

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cannot accede to that contention. If he had known something which would make it reasonable to inquire as to the title to the goods there might have been something in the point; but there was nothing which ought to have made him inquire, unless it can be said that every pawnbroker ought to assume that goods offered to him in pledge are subject to a bill of sale; but this is an absurdity, and would make it impossible to carry on business. I think the doctrine of constructive notice has already gone quite far enough, and ought not to be further extended. Huddleston, B., in giving judgment for the plaintiff, relied on the case of *Lazarus v. Andrade* (*ubi sup.*) where the title of the bill of sale holder was preferred to that of the execution creditor. In that case I think Lopes, J. did, in substance, refer to the Judicature Act as giving legal effect to an assignment of after-acquired property. If that is the meaning of what he said, I must say that I think it is not the right view. I agree, therefore, that the defendant is entitled to succeed, and the appeal ought to be allowed.

LINDLEY, L.J.—I agree that the defendant is entitled to judgment. The plaintiff would succeed if he could show that he had a legal title, but I cannot see how any such title is made out, for the bill of sale provides that the future property should be subject to its provisions, although it might not be capable of passing at law by the assignment. That shows the plaintiff knew he was not to get the legal title. It shows that the instrument did transfer the legal title in the existing stock-in-trade, but not in the after-acquired goods. This is plain from the decisions in *Lunn v. Thornton* (1 C. B. 379) and *Holroyd v. Marshall* (10 H. of L. Cas. 191.) It is said that the Judicature Act gives a different effect to the bill of sale, but I do not think that is the intention of the Act. I cannot see on what principle a plaintiff with an equitable title is to succeed against a defendant with a legal title in an action to determine the right to the possession of goods. There is no foundation for the contention that there was constructive notice of the existence of the bill of sale. I am therefore of opinion that there ought to be judgment for the defendant.

*Judgment reversed.*

Solicitors for plaintiff, C. C. Ellis Munday and Co., for William Lambert, Great Malvern.

Solicitor for defendant, David William Pearse, for R. Jeffery Parr, Birmingham.

Friday, Nov. 28, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

BOOTH v. SMITH. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Rentcharge—Action for arrears—Release of part of property charged—Liability of purchaser of part not released—Apportionment—22 & 23 Vict. c. 35, s. 10.*

*The devisee in fee of property subject to an annuity in favour of the plaintiff conveyed part of such property to the defendant, and afterwards conveyed the remainder to another purchaser. The plaintiff by deed released the last-men-*

*tioned part of the property from the annuity, but did not release the part conveyed to the defendant.*

*In an action to recover arrears of the annuity :*

*Held, that the arrears could be recovered by action, and that the effect of 22 & 23 Vict. c. 35, s. 10, was neither to release the defendant altogether, nor to entitle the plaintiff to recover the whole arrears from the defendant, but to apportion the annuity so that the plaintiff could recover a part of the arrears proportionate to the defendant's share of the property originally charged.*

*Judgment of Stephen, J. reversed.*

THIS was an action to recover 100*l.*, being five years' arrears of an annuity.

Frederick Griffiths devised certain premises at Epping to his son William Griffiths in fee, subject to an annuity of 20*l.* to his daughter, the plaintiff, for her life. William Griffiths sold a portion of the property so charged to the defendant for 80*l.*, and afterwards sold the remainder of the property to a person named Wright for 350*l.* The plaintiff by deed released the portion of the property conveyed to Wright from the annuity, but did not release the portion conveyed to the defendant.

A demurrer to the statement of claim having been overruled by Day and Smith, JJ. (whose judgment is reported 51 L. T. Rep. N. S. 395), the case was tried without a jury before Stephen, J., who gave judgment for the defendant.

The plaintiff appealed.

William Barber, Q.C. and John Cutler, for the plaintiff, referred to the Act to further amend the Law of Property and relieve Trustees (22 & 23 Vict. c. 35), s. 10: (a)

Sheppard's Touchstones, by Preston, p. 345;

Thomas v. Sylvestar, 29 L. T. Rep. N. S. 290; L. Rep. 8 Q. B. 368.

J. G. Witt (Gilbert Metcalfe with him) argued in support of the judgment.

BRETT, M.R.—The plaintiff in this case was entitled to an annuity, which was in the form of a rentcharge of 20*l.* a year charged upon certain property. The owner of the property in question has parted with the whole of it, but he parted with it at different times and to different persons. He sold a part of the land to the defendant Smith, and he sold the other part of it to a person named Wright. The owner of the land released Wright from the rentcharge as regards the land sold to him, and the annuitant, the plaintiff in this action, joined in that release. The annuitant, however, was not a party to any release to Smith the defendant, and the question now to be decided is, whether the annuitant can successfully sue Smith for the whole or any part of the arrears of the rentcharge. It was argued that the form of the action was wrong, although at the same time the defendant does not want it changed into a claim to have a receiver appointed; but I am of opinion that this kind of rentcharge, since real actions have been abolished, can be

(a) By which "The release from a rentcharge of part of the hereditaments charged therewith shall not extinguish the whole rentcharge, but shall operate only to bar the right to recover any part of the rentcharge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



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Re THE MIDDLESBROUGH, &amp;c., BUILDING SOCIETY.

[CHAN. DIV.]

recovered by an action of debt. The question then arises as to the effect of 22 & 23 Vict. c. 35, s. 10. In the present case the owner gets rid of the whole of the land, and as to part of the land the annuitant agrees to release it from the rentcharge, while as to the other part she does not agree to release it. It is contended for the plaintiff that the whole of the rentcharge is payable out of the unreleased part of the land, or if this is not so, that a proportionate part is so payable, while on behalf of the defendant it is argued that no part of the arrears can be recovered. If we take the case where a part of the land is released from the rentcharge and sold, and the owner remains owner of the rest of the land, then he would not be a person "interested in the hereditaments remaining unreleased, and not concurring in or confirming the release," and therefore would not come within the saving clause at the end of the section, and would be bound to pay the whole of the annuity in respect of the unreleased part of the land. Here the defendant has this in his favour, that he has not concurred in or confirmed the release within the meaning of the section, and therefore his rights are reserved by the words of the proviso. I think that means real substantial rights, and not merely the mode of enforcing rights. Among the rights which would be preserved would be a right to contribution, and here I think the right reserved to the defendant would be the right only to be liable to pay the part of the rentcharge represented by his part of the land. I therefore think that the defendant is only bound to pay so much of the rentcharge as bears the same proportion to the whole as his portion of the land bears to the whole of the land originally charged. This can be calculated from the price which the land fetched, which would show that the defendant was liable to pay about one-fifth of the rentcharge, which would be 4l. a year. The judgment therefore will stand for a portion of the arrears of the rentcharge at the rate of 4l. a year, unless a valuation is insisted on by either of the parties, which will be at their own risk.

COTTON, L.J.—This is an action by an annuitant to recover arrears of the annuity, and the defendant is the purchaser of a part of the land on which the annuity is charged. The other part of the land, which was sold to a different purchaser, has been released from the annuity, but the defendant's portion has not. Now, the old law as to the effect of a release of part of the land is gone altogether. It was found exceedingly inconvenient, and a complete change has been made by the passing of 22 & 23 Vict. c. 35, s. 10. It is curious that no case is to be found on that section arising under circumstances like the present. By the proviso "the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release," are preserved. The defendant in the present case did not concur in the release, and the learned judge before whom the case was tried held that his rights were the same as if no Act of Parliament had been passed, and that he was entirely discharged from liability. I am of opinion that this is a wrong interpretation of the statute, and that the proviso preserves to persons not concurring in or confirming the release such rights as they had which are consistent with the other portion

of the section. The right to contribution depended on this, that each party was not to bear more than his proportion of the charge, and here the right of the owner of the unreleased part of the land is that he is not to bear more than the proportion of the liability which corresponds to his portion of the land originally charged. I am of opinion, therefore, that the reasonable interpretation of the section is to look to the right which was the foundation of an action for contribution, and that the defendant is liable for a part of the arrears proportionate to his share of the land.

LINDLEY, L.J.—I am of the same opinion. The section in question is somewhat obscurely worded, but to ascertain what its object was it is necessary to look to the whole of the section. It was clearly intended to put an end to the old law as to the effect of the release of part of the property. The statute does not say, nor was it desired to say, that in all cases the annuity should be apportioned, nor was it intended to release the whole land without considering what the consequences would be. I am of opinion that the only sensible interpretation is, that the rentcharge should be apportioned, because otherwise either the whole of the land would be released, which is against the words of the Act, or circuity of action would be produced. I am of opinion, therefore, that the judgment appealed from ought to be reversed, and that, subject to the right of either party to have a valuation at their own risk, the plaintiff is entitled to judgment for one-fifth of the arrears.

*Appeal allowed.*

Solicitors for plaintiff, *Tippetts and Son*, for *Crompton Chambers*, Hastings.

Solicitors for defendant, *Tamplin, Taylor, and Joseph*.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Saturday, Nov. 8, 1884.

(Before KAY, J.)

Re THE MIDDLESBROUGH, &c. BUILDING SOCIETY. (a)  
*Building society—Advanced member—Reasonable rule—Fines—Compound interest—6 & 7 Will. 4, c. 32, ss. 1, 2.*

*By the rules of a benefit building society the members could borrow from the society the amount of their shares, to be repaid by monthly instalments comprising principal and simple interest at 5 per cent., and to be secured by a mortgage to the society. A fine was imposed on mortgagors "neglecting to make their monthly payments of principal, interest, fines, and other payments, . . . at the rate of 5 per cent. per month on the total amount in arrear."*

*Held, that the meaning of the rule was, that fines, if unpaid, were to be added to the previous months' fines remaining unpaid, as well as to the instalments of principal and interest in arrear, and that the monthly fine was to be calculated upon the total amount of the principal, interest, past fines, and other payments added together; and that neither the rule nor the amount of the fine imposed was unreasonable.*

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

CHAN. DIV.]

Re THE MIDDLESBROUGH, &amp;c., BUILDING SOCIETY.

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THIS was a summons taken out in the winding-up of the Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society, by Walter Seal, an advanced member of the society, asking that the official liquidators of the society might be ordered to reconvey to him certain freehold property, and to deliver to him all securities deposited by him with the society to secure moneys advanced by the society to him, the said advances having been fully repaid.

The questions raised were as to the reasonableness and construction of one of the rules of the society.

The society was enrolled under the statute 6 & 7 Will. 4, c. 32, in 1865, and was ordered to be wound-up under the Companies Acts 1862 and 1867, by an order made on the 24th Aug. 1881.

The society was carried on under rules duly certified and approved in conformity with 6 & 7 Will. 4, c. 32.

The scheme of the society was to raise by the monthly subscriptions of the members, in shares not exceeding the value of 10*l.* per share, a fund to enable each member of the society to receive out of its funds the amount or value of his or her share or shares therein, to build or purchase a house, or real or leasehold estate, the advance to be secured by a mortgage to the society until the amount or value of the shares should have been fully repaid to the society, with the interest thereon, and all fines or other payments incurred in respect thereof.

The rules provided that when a member had executed a mortgage for the amount of any shares he had received, he should pay the subscriptions on such shares by monthly instalments, at a rate mentioned in a table to the rules, until the whole amount of such shares should be liquidated. He was also to pay the interest in monthly instalments according to the same table. The interest was to be at the rate of 5 per cent. per annum upon the amount advanced.

It was also provided that

The fines incurred by all present or future mortgagors, by neglecting to make their monthly payments of principal, interest, fines and other payments, will be at the rate of 5 per cent. per month on the total amount in arrear.

Seal being the owner of 100 shares of 10*l.* each in the society, received an advance of 1000*l.* out of its funds, and by an indenture dated the 12th Jan. 1869 he mortgaged to the trustees of the society certain freehold property to secure the repayment thereof. And he covenanted that he would make the several payments and observe and perform the rules and regulations prescribed in the articles of the society both in respect of the said shares; and of all other shares which he then held, or might thereafter hold.

By an indenture dated the 1st May 1871 Seal further charged the above property with the repayment of a further sum of 400*l.* advanced to him in respect of forty further shares in the society. A similar covenant was entered into by him in this deed.

Seal duly paid his monthly instalments amounting to 11*l.* 13*s.* 4*d.* per month until Oct. 1881, when the instalment for that month was not paid. He was charged a fine at 5 per cent (11*s.* 8*d.*) on this. The instalment was again in arrear in November, when he was charged a fine at 5 per

cent. (11*s.* 10*d.*) on the amount of the two instalments, together with the former fine, viz., 23*l.* 18*s.* 4*d.* The December instalment was also in arrear, and he was again charged a fine at 5 per cent (11*s.* 9*d.*) on the total amount of the three instalments and two former fines, viz., 36*l.* 15*s.* 6*d.* After this he paid the remaining instalments, but refused to pay these arrears and fines, and was consequently each month charged a fine at 5 per cent. on the total amount of the arrears plus the former fines. He subsequently paid the three months instalments in arrear, but contended that he was not obliged to pay the fines, and refused to do so, and finally this summons was taken out. When the summons was before the chief clerk, he, to save further fines, directed that the amount in dispute should be paid to the official liquidator, who should hold it subject to further order. This was done.

*Byrne* for the summons.—The rule may mean that a mortgagor in arrear in his payments is to pay interest at 5 per cent. per month, but it does not mean that he is to pay a fine at that rate on former fines; that would be compound interest at an enormous rate. By sect. 1 of 6 & 7 Will. 4, c. 32, the rules must be proper and wholesome rules, and not repugnant to the general laws of the realm. A rule which had the effect of making a mortgagor pay compound interest at this rate would not be proper or reasonable, and the court would grant relief against it:

*Parker v. Butcher*, L. Rep. 3 Eq. 763.

*Graham Hastings*, Q.C. and *Seward Brice* for the liquidators.—The rule means that fines are to be paid on the total amount made up of principal, interest, and former fines. There is no reason why fines should not be reckoned as principal, and made chargeable with interest, if it is so provided by the rules, as we say it is:

*Provident Permanent Building Society v. Greenhill*, 38 L. T. Rep. N. S. 140; 9 Ch. Div. 122;

*Clarkson v. Henderson*, 43 L. T. Rep. N. S. 20; 14 Ch. Div. 348;

*Ex parte Voisey*; *Re Knight*, 47 L. T. Rep. N. S. 362; 21 Ch. Div. 442.

It was decided in *Parker v. Butcher* that 60 per cent. is not an unreasonable rate of interest in such a case as this. These rules have been duly certified under the Act, and unless they are contrary to the scheme of the Act they are valid and binding:

*Re Guardian Permanent Benefit Building Society*, 48 L. T. Rep. N. S. 134; 23 Ch. Div. 440; before the House of Lords, sub nom. *Murray v. Scott*, 51 L. T. Rep. N. S. 462; 9 App. Cas. 519.

They are, we submit, not contrary to the Act, which contemplated payments which would have been contrary to the usury laws then in force.

*Byrne* replied.

KAY, J.—In this case the applicant is an advanced member of a building society. His mortgage contains a covenant that he shall pay principal, interest, and fines, according to the rules of the society. Now, the effect of the rules and his mortgage taken together is this: The mortgage being for a sum of 1000*l.*, he would under the rules calculate what instalments he would have to pay under the mortgage for, I think, twenty years, at all events a certain number of years, and the instalments are calculated so as to include a certain proportion of simple interest for the

whole period at the rate of 5 per cent; so that, as far as principal and interest go, by paying these instalments he pays simple interest merely on the loan he receives. But the rules provide that he shall, if his monthly instalments be in arrear, pay fines, and these fines are to be at the rate of 5 per cent per month "on the total amount in arrear." What "total amount in arrear" means is to my mind quite clear, reading the rest of the sentence: "The fines incurred by all present or future mortgagors, by neglecting to make their monthly payments of principal, interest, fines, and other payments, will be at the rate of 5 per cent. per month on the total amount in arrear." Therefore the total amount in arrear includes the monthly instalments of principal, interest, fines, and other payments. The consequence is, that if a mortgagor make default in payment of a monthly instalment, and that monthly instalment included fines, he will have to pay next month another fine of 5 per cent. upon the total amount so unpaid. Of course the fines increase if the payment is left for a series of months; that is, it makes the fines compound interest at the rate of 5 per cent per month, that is, 60 per cent per annum. It is said, first of all, that the rule does not mean this. Now I think that the rule is very clearly expressed. He has to pay fines on the total amount in arrear, and that total amount, as I pointed out, in the same sentence includes principal, interest, fines, and other payments. Then it is said, if it means this, the fines are unreasonable, and reference has been made to the Act of Parliament to show this. The 1st section provided for the establishment of societies for the erection or purchase of dwelling houses, and that the members of each society should from time to time assemble together, and make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such society so assembled together should seem meet, so as such rules should not be repugnant to the express provisions of this Act or to the general laws of the realm, and impose and inflict such reasonable fines, penalties, and forfeitures upon the several members of any such society who should offend against any such rules as the members should think fit. And the 2nd section provided that the laws then in force relating to usury should not apply to any bonuses or interest paid by any of the members to the society. On the face of the Act of Parliament it is clear that it was intended that the contracts of the society by way of mortgage should not be subject to the usury laws, even when they existed, and now that they are abolished there is still less reason for saying that a provision offending against them would be unreasonable. Now the question is whether this is in fact an unreasonable provision by way of fines. It certainly is a very large payment to make, but anyone who is a borrowing member can easily prevent his becoming liable to pay the fines by keeping his instalments properly paid up. If compound interest has been imposed, that is within the Act of Parliament. It was intended by this Act of Parliament that interest or fines might be imposed upon an advanced member in such a manner as that the usury laws could not help him, and I find the authorities bear this out. In the case of *Clarkson v. Henderson Hall*, V.C. held that a covenant in a mortgage

by reversioners that interest in arrear should be capitalised and bear interest at the same rate as the original debt was good and valid, and must be acted upon; and in the case of *The Provident Permanent Building Society v. Greenhill*, in 1878, fines were allowed to be reckoned as principal in a foreclosure suit, and interest calculated upon those fines. Then there is *Ex parte Voisey*, which came before the Court of Appeal. A member of a building society borrowed a sum of money to be repaid by a series of instalments of 71l. 17s. 6d., which included interest at 7 per cent. on the amount of the loan. The instalments were payable at the monthly meetings of the society, and if he neglected to pay them he became liable to pay fines at 5 per cent. per month on the total amount in arrear and unpaid at each meeting. Now that is exactly the case here. It is clear that, if he was in arrear with his monthly repayments, something for principal, something for interest, and also something for fines, the fines would be added to the total amount due at the end of each month in respect of principal, interest, fines, and other payments, and interest would be charged on the whole at the rate of 5 per cent. per month. The case of *Ex parte Voisey* went to the Court of Appeal, not upon this point, but on a question on which it must have had the point under its notice. The point was this: The mortgage conferred a power of distress for the better securing the payments which by the rules of the society ought to be made by the mortgagor. It was agreed that the mortgagor should be treated as tenant of the property, he paying his instalments to the society in lieu of rent, and, in default of the instalments being paid, a distress was levied in accordance with the provision. Bankruptcy occurring, the question arose whether the provision under which the distress could be made was valid, or the charge an exorbitant charge which could not be enforced, and the Court of Appeal held that it could be enforced. The Court of Appeal has decided that such a provision is not unreasonable, and is enforceable if the mortgagor becomes bankrupt. Not only therefore does it appear that the rule is a usual one, and one which the person, or revising barrister, certifying the rules is accustomed to allow and certify, but that the effect of it is that the borrower pays simple interest on the mortgage debt and compound interest by way of fines (in case his instalments get into arrear), which is certainly not contrary to any of the provisions of the statute, and the matter having been brought to the Court of Appeal as to whether a similar amount could be recovered against the trustee in bankruptcy of a mortgagor under an attornment clause, they held it could. It seems to me that it has been practically decided, and I must decide, that the meaning of the rule is that the fine must be included and added to the arrear of the previous months' fines, as well as to the arrear of principal and interest; and secondly, I hold that the rule is not so unreasonable that I should say that the amount should not be paid. I declare that neither the rule, nor the amount of the fine imposed, is unreasonable.

Solicitors for the applicant, *Botterell and Roche*, agents for *R. H. Young*, West Hartlepool.

Solicitors for the liquidators, *Jackson and Evans*, agents for *Jackson and Jackson*, Middlesbrough.

Nov. 4, 5, and 11, 1884.

(Before KAY, J.)

SCOTT v. MATTHEW BROWN AND CO. LIMITED. (a)

*Landlord and tenant—Forcible entry on land—Damages—5 Rich. 2, stat. 1, c. 8—Re-entry for breach of covenant and nonpayment of rent—Absence of notice of breach—Conveyancing Act 1881, s. 14, sub-sects. 1, 2, 8.*

*Where a person has gained possession of property, but has no title to it, being in fact a trespasser, the rightful owner is entitled to use force in ejecting him, so long as he does him no personal injury.*

*Lessors had not before re-entering upon premises for nonpayment of rent and breach of covenant served upon the tenant the notice required by sect. 14, sub-sect. 1, of the Conveyancing Act 1881, specifying the breach of covenant complained of. Held, that, by reason of sub-sect. 8 of the section, its provisions did not affect the law relating to re-entry for nonpayment of rent; and under sub-sect. 2 the court had a discretion to refuse relief against re-entry for breach of covenant on the ground of want of notice, and the circumstances of this case were such that the court would refuse such relief.*

THIS was an action by a former tenant of the defendant company and his wife for damages for an alleged wrongful entry and distress by the defendants upon the demised premises, and for assaults committed upon the plaintiffs while being forcibly ejected from the premises.

The plaintiff Scott executed a counterpart lease, dated the 22nd Nov. 1881, whereby the defendant company demised the Cavendish Hotel, Barrow-in-Furness, to Scott as tenant.

A rent of 75*l.*, payable quarterly in advance, was reserved by the lease, and Scott covenanted that he would during the continuance of the demise personally inhabit with his family the said messuage or house, and make the same his usual place of residence, and would not desert or shut up the same, and would use his best endeavours at all times to increase and extend the custom and business of such public-house; also that he would not sell upon the premises any excisable liquors other than such as should have been purchased from the defendant company; and also that he would pay the rent. There was also a power for the lessors to re-enter on nonpayment of rent for seven days, or on breach of covenant.

On the 10th Nov. 1879 Scott executed a bill of sale over all the furniture and chattels then in the Cavendish Hotel, or which should during the continuance of that security be brought there, for securing the repayment to the defendant company of present and future debts owing by Scott to them. And it was provided that, if default should be made in payment, the defendant company might enter and seize the chattels, and either remove them, or remain in the hotel for the purpose of selling them.

Scott remained in possession of the hotel until the 5th Sept. 1882, when, during a short temporary absence of his wife, he left the hotel and went to America, without giving notice of his intention to do so.

At this time 107*l.* 8*s.* 6*d.* was, according to the

defendant company, owing from Scott to the defendant company on the bill of sale, and the rent of the hotel was five quarters in arrear. Scott had also, it was alleged, sold liquor bought from other persons than the company, in breach of his covenant in the lease, and had committed a further breach of covenant by leaving the hotel and going to America.

Mrs. Scott, finding her husband gone, informed the defendant Ellis, who was then the company's agent. He, after leaving at the hotel a twenty-four hours' notice, on the 8th Sept., took possession on behalf of the company of the chattels in the hotel. On the same day the company under the proviso for re-entry in the lease took possession of the hotel, and determined the tenancy, for nonpayment of rent and breach of the covenants of the lease. On the 11th Sept. they levied a distress upon the premises, seizing goods appraised at 380*l.* 11*s.*

On the 14th Oct. 1882 the company granted a lease of the Cavendish Hotel to the defendant Ellis, and sold to him such of the chattels comprised in Scott's bill of sale as then remained in their hands. Up to this time the company had allowed Mrs. Scott to remain in possession of the hotel as manageress, and Ellis, after the lease to him, allowed her to continue in the same capacity, receiving a weekly salary, and paying the takings of the business to him.

In Nov. 1882 Scott returned, having been away about eight weeks shooting in America. He had never written home during that period, but he denied that he had intended to remain away permanently. He was informed of what had taken place during his absence, and a correspondence ensued between him and the company, in which he thanked the company for their kindness to his wife, and asked to be forgiven and to be allowed to return to live with his wife at the hotel, and in a letter to the chairman of the company, dated the 11th Dec. 1882, he wrote: "I will swear to you that I will not interfere with the business in any way whatever, unless you will allow me to look after the 'cellar.'" His application was not acceded to. On the 10th Jan. 1883 Scott returned to the hotel, and began to carry on business there again, and refused to give up possession to Ellis. On the 11th Jan. Ellis by a notice in writing dismissed Mrs. Scott from his service, and required her to leave the hotel, and on her refusing to do so he on the 13th Jan. sent bailiffs to eject her and her husband from the premises. The bailiffs after a struggle succeeded in doing so, but without doing any material injury to either the person or the clothes of either of them.

On the 17th Jan. 1883 Scott and his wife brought this action against the company and Ellis. The principal claims were for damages for the wrongful entry and distress; also for the wrongful entry and seizure under the bill of sale; also for the assaults committed on the plaintiffs in ejecting them; double the value of the goods seized and sold in distress; an account of what was due to the defendant company under the bill of sale; and on payment by Scott of the amount so found due (if any) redelivery of the goods seized.

The defendants put in a counter-claim, whereby the company asked for an account of what was due to them for principal, interest, and arrears of

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

rent under the bill of sale; and for damages for the breaches of the covenants in the lease.

Ellis also claimed damages for the wrongful acts of the plaintiffs above stated.

*Neville* for the plaintiffs.—The re-entry here was wrongful, as the defendant company did not serve the notice required by sect. 14, sub-sect. 1 of the Conveyancing Act of 1881. The entry was forcible, which is illegal, and the plaintiffs are at any rate entitled to damages for the violence used towards them in ejecting them :

5 Rich. 2, stat. 1, c. 8 ;

*Beddall v. Maitland*, 44 L. T. Rep. N. S. 249, 251 ;

17 Ch. Div. 174, 189 ;

*Edwick v. Hawkes*, 45 L. T. Rep. N. S. 168 ; 18 Ch. Div. 199.

We deny that there was anything due under the bill of sale at the time of the sale of the chattels and we contend that no proper demand was made before they were sold. Then a distress was levied after the defendant company had purported to determine the tenancy; but a distress is a clear affirmation of a tenancy (*Price v. Warwood*, 4 H. & N. 512), therefore either the re-entry or the distress must be bad. [KAY, J.—Under the statute 8 Anne, c. 14, a lessor may distrain for rent within six months after the determination of the lease.] Yes, but the tenant must be in possession of the demised premises :

*Taylorson v. Peters*, 7 Ad. & E. 110.

The distress was altogether bad, and, as the things seized have been sold, the plaintiffs are entitled to double the value of the goods as damages, under 2 Will. & M., sess. 1, c. 5. Our contention is, that we have been wrongfully evicted from the premises under circumstances likely to cause great injury to us, and it is a case for exemplary damages.

*Graham Hastings*, Q.C. and *G. B. Finch* for the defendants.—Sub-sect. 8 of sect. 14 of the Conveyancing Act of 1881 provides that the section shall not apply to cases of re-entry for nonpayment of rent. The circumstances under which it was provided that the lessors might re-enter and determine the lease have clearly arisen. As to the seizure and sale under the bill of sale, the company only did what they were empowered to do by the bill of sale, they served a notice demanding payment twenty-four hours before they seized. As to the distress, the entry was not affected by it, and it does not operate as a waiver of the forfeiture, but we must admit that it was bad :

*Grumwood v. Moss*, 27 L. T. Rep. N. S. 268 ; L. Rep. 7 C. P. 360.

However, the plaintiffs have not been injured by it, for the company lawfully exercised their right to seize and sell the goods under the bill of sale, and if they were wrongfully sold under the distress they were rightfully sold under the bill of sale. As to the eviction, the tenancy had long since determined by Scott's own admission, and he was a mere interloper, and we were entitled to use force to keep him out of our premises.

*Neville* replied. [KAY, J. referred to *Browne v. Dawson*, 12 Ad. & E. 624.]

KAY, J. stated the facts, observing that the circumstances under which Scott went to America were such as to justify the defendants in supposing that he would not return, and it was not clear from the evidence whether he would not in

fact have remained out there had he been able to obtain some employment. He also observed that under the circumstances the bailiffs did not appear to have used unnecessary violence in ejecting her and her husband from the hotel. He continued :—It is said that this forcible ejectment is a great wrong, and that this is a case where exemplary damages ought to be given, 100*l.* and 200*l.* being mentioned as sums which might fairly be awarded. In support of this contention reliance is placed on a case which came before this division of the court (*Beddall v. Maitland*) where the learned judge, referring to the statute 5 Rich. 2, stat. 1, c. 8, says : "The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser, but if a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance." But how far is that to be carried? Can a man come into my house when I am out, and then say that he claims to be there, and I cannot use force to turn him out? I cannot think that the law would admit of anyone taking up such a position as that. The law on the subject was, in my opinion, accurately stated in *Browne v. Dawson*. In that case a schoolmaster, who had been dismissed from his office for some breach of the rules under which he was appointed, gave up possession of the schoolroom to his employers, who took possession of it and locked it up. He, on the next day, returned and broke into the room, and remained there some days, after which his former employers forcibly ejected him. He brought an action against them for trespass, in which a verdict was given for the defendants on a plea which denied that the room was the room of the plaintiff. On a motion for a new trial Denman, C.J. said : "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him; he had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession." Every word of that, it seems to me, would apply to this case. It is clear to me that Scott had when he was ejected no title whatever to possession, and the defendant company and Ellis, acting as their agent, and who was lawfully in possession before, were entitled to use force in turning him out, so long as they did him no personal injury. There was, therefore, no wrong done to the plaintiffs by the ejectment, and I give no damages on that ground. The defendants are willing to submit to an account of the money due under the bill of sale, and to an inquiry as to the value of the goods seized, so I need say no more as to that than to direct an account and inquiry accordingly. Then as to the distress. The company are, it appears to me, in this dilemma, viz. : if the re-entry which they had previously made was good, Scott was not in possession, and no distress under the statute 8 Anne, c. 14, could lawfully be made; if, on the other hand, the distress was good, there had been no proper re-entry, and the tenancy was not deter-

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mined. However, their counsel have admitted that the distress was not good, and I think that the re-entry was proper and the distress invalid. The question, therefore, arises whether there ought to be an inquiry as to the damages caused by such distress. Such an inquiry would however be idle, as before the distress the company were lawfully in possession of the goods under their bill of sale, and all the other acts of the company were only done to fortify their title, so that no damage can I think reasonably be said to have been caused by the distress, and I decline to order any inquiry as to that. There are two more questions to be decided. It is said that the tenancy has never been properly terminated, as the notice required by sub-sect. 1 of sect. 14 of the Conveyancing Act 1881 to be served upon a lessee by a lessor before enforcing a right of re-entry or forfeiture for breaches of covenants in the lease has not in this case been served. But it would have been idle to have served any such notice in this case, as Scott had left the hotel, as it was supposed, never to return, and no one knew where he was. However, if the Act says that it must be served before re-entry can be made, any re-entry made without serving it would be wrong. But sub-sect. 8 of sect. 14 provides that that section shall not affect the law relating to re-entry or forfeiture or relief in case of nonpayment of rent, so that the old law is still in force as to that. Then sub-sect. 2 of the same section provides that the lessee may apply to the court for relief against the enforcing of a right of re-entry or forfeiture, "and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit." "The foregoing provisions of this section" are the provisions as to notice contained in sub-sect. 1; so that this, I think, gives the court a discretion to refuse relief on the ground of the absence of such notice where the circumstances are such that it would be right to refuse it. In this case there have clearly been breaches of covenant, partly in nonpayment of the rent by Scott, and partly in his absenting himself from the hotel, and it is clear that the service of any notice would have been a mere idle form, and it seems that when Scott returned he acquiesced in what had been done, and recognised that all possible kindness had been shown to his wife by the company. He ought not, therefore, in my opinion, to be allowed to come now and say that the re-entry was wrongful, and claim damages for it, and having a discretion to refuse him any relief on that ground, I accordingly do refuse it. Then as to the counter-claim, there must be an account of what is due under the bill of sale, but it will not be necessary to express that in taking such account an account is to be taken of the arrears of rent, as that would, I think, be done without being expressed. As to the breaches of covenant, it is said that Scott purchased liquor from persons other than the company, and he says that the company did not properly perform their duty of supplying him with good liquor, but there is no evidence of the breach to justify me in granting an inquiry as to that. Lastly, as to the damages which the counter-claim asks for Scott's improper entry and trespass, I am not satisfied that any

pecuniary damage has resulted from it, so that I will not grant any inquiry as to that either. On the whole I think it best to give such a judgment as will, so far as possible, put an end to this wretched litigation, and I dismiss with costs the whole of the plaintiff's action except so far as it asks for an account of what is due under the bill of sale, and an inquiry as to the value of the goods seized by the defendants, which account and inquiry will be taken, and the costs of which I reserve. I dismiss the counter-claim without costs, and I reserve further consideration.

Solicitors for the plaintiffs, *D. Warde*, agent for *J. H. Pinckney*, Barrow-in-Furness.

Solicitors for the defendants, *Gregory, Rowcliffes*, and *Co.*, agents for *Charnley, Finch*, and *Johnson*, Preston.

Friday, July 4, 1884.

(Before KAY, J.)

Re CHAPPLE; NEWTON v. CHAPMAN. (a)

Solicitor—*Executor and trustee*—*Professional charges*—*Direction as to, in will.*

*A testatrix, by her will, appointed C., who was her solicitor, and who prepared the will, one of her two executors and trustees, and stating that, it being her desire that C. should continue to act as her solicitor in the matters relating to her property and affairs, and should "make the usual professional charges," she expressly directed that he should, notwithstanding his acceptance of the office of trustee and executor, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of her will, or the management or administration of her trust estate, real or personal, as if he, not being himself a trustee or executor of the will, were employed by the trustee or executor; and that he should be entitled to retain out of her trust moneys, or be allowed to receive from his co-trustees (if any) out of the same moneys, the full amount of such charges, any rule of equity to the contrary notwithstanding; nevertheless without prejudice to the right or competency of C. to exercise the authority, control, judgment, and discretion of a trustee of her will.*

*Under this direction C. delivered certain bills of costs, which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor himself without the assistance of a solicitor.*

*Held, that all items which were not of a strictly professional character ought to be disallowed.*

*Re Ames* (25 Ch. Div. 72) distinguished.

A TESTATRIX by her will appointed her solicitor *Ralph Chapman* (who prepared the will) one of her two executors and trustees, and she gave him a legacy of 19l. 19s.

The will contained the following clause:

And it being my desire that the said *Ralph Chapman*, who is my solicitor, shall continue to act as such in the matters relating to my property and affairs, and shall

(a) Reported by *E. A. SCRATCHLEY*, Esq., Barrister-at-Law.

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make the usual professional charges, I expressly direct that he shall, notwithstanding his acceptance of the office of trustee and executor of this my will, and his acting in the execution thereof, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of my said will, or the management and administration of my trust estate, real or personal, as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor; and he shall be entitled to retain out of any trust moneys, or to be allowed and to receive from his co-trustee (if any) out of the same moneys the full amount of such charges, any rule of equity to the contrary notwithstanding; nevertheless without prejudice to the right or competency of the said Ralph Chapman to exercise the authority, control, judgment, and discretion of a trustee of my said will.

Under this direction Ralph Chapman delivered certain bills of costs which included charges for all business done by him, whether such business was strictly professional, or could have been transacted by a lay executor himself without the assistance of a solicitor.

The taxing master, in taxing these bills of costs, had (upon the authority of *Harbin v. Darby*, 28 Beav. 325) disallowed all items which were not of a strictly professional character.

*Farwell* for Ralph Chapman.—In this case the testatrix has gone far beyond the corresponding clause in the will in *Harbin v. Darby* (*ubi sup.*). There the testatrix merely declared that the solicitor-executor should be “at liberty to charge for his professional services.” Upon the true construction of the express directions of the testatrix in the present will, the solicitor is entitled to be allowed proper charges for all business done by him, whether such business was strictly professional, or could have been transacted by a lay executor himself without the assistance of a solicitor. Mr. Chapman has a right to charge as if an executor had appointed him solicitor, and had employed him to do all that has been done. Charges for non-professional services can be allowed:

*Re Ames*, 25 Ch. Div. 72.

In that case it was held that the taxing master had power, under the directions in the testator's will, to allow a trustee who was a solicitor the proper charges for business not strictly of a professional character transacted by him in relation to the trust estate. [KAY, J.—There the words were that the solicitor should be allowed the usual professional “or other proper and reasonable charges.” In this will the clause is equally comprehensive, inasmuch as it refers to “pecuniary emoluments and remuneration.” It is customary now to empower a solicitor-trustee to receive his usual professional costs and charges for all business transacted by him, “including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed, in person by a trustee not being a solicitor:”

Wolstenholme & Turner's Conv. Acts, 3rd edit., part 2, sect. 3, tit. Forms in Settlements, p. 236.

The taxing master ought to have considered each item of the bill of costs separately. He was wrong in drawing a hard and fast line.

*Grosvenor Woods* for the other trustee; and

J. B. Porter, for certain of the beneficiaries, were not called upon.

Vol. LI., N. S., 1317.

KAY, J.—I have listened with some surprise to the argument which has been addressed to me. A solicitor prepares a will for a client which gives him a legacy of 19l. 19s., and appoints him an executor and trustee, and he now comes to ask the court to construe a direction contained in that will as authorising him not only to make and be paid for professional charges in the usual way, but also to make and be paid for professional charges for everything which he does, either as a solicitor to the executors, or in his private capacity of executor. It would require very clear words to induce me to accede to such an application as that, and it seems to me that, when this gentleman drew that will, he was too high-minded to put into it anything which would entitle him to make such an extravagant charge. The clause in question begins by stating the desire of the testatrix that the solicitor should continue to act as such in the matters relating to her property and affairs, and should “make the usual professional charges,” and then she directs that he shall “be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed” in the execution of the trusts or powers of the will, or the management or administration of the estate, “as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor.” Now a trustee or executor would not employ, and ought not to employ, a solicitor to do things which he could properly do himself, and any person whose fortune it is to be a trustee or executor has many things to do which he cannot properly throw on his solicitor. Accordingly, to return to the language of the will, when it says that the solicitor shall be “entitled to retain out of my trust moneys, or to be allowed and to receive from his co-trustee (if any) out of the same moneys the full amount of such charges,” they must be charges for something in respect of which he has been properly employed. It is said, however, that there is authority on the point by which I am bound. I always struggle against being bound by authority, unless the principle upon which the authority proceeds commends itself to my judgment; but in the case cited (*Re Ames*, 25 Ch. Div. 72) the testator directed the solicitor-trustee to be allowed to make the usual professional charges “or other proper and reasonable charges,” which words do not occur here. In my opinion the line which the taxing master drew was perfectly right. Then it is said that the forms in ordinary use would authorise such charges as are here contended for, and reference has been made to a form given in the second part of Mr. Wolstenholme's book on the Conveyancing Acts (3rd ed., p. 236). That form, however, contains the words “including all business of whatever kind, not strictly professional, but which might have been performed, or would necessarily have been performed, in person by a trustee not being a solicitor.” And again there are no such words in this will. I must say, however, that the form to which I have just referred is, in my opinion, one which no solicitor ought to put in its entirety into a will drawn by himself, unless the testator has expressly instructed him to insert those very words. This application must, therefore, be dis-



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missed, and all persons who have been served must have their costs of it.

Solicitors: *Pritchard, Englefield, and Co.: E. Tilling; W. Stollard.*

### Judicial Committee of the Privy Council.

June 26, 27, and July 12, 1884.

(Present: The Right Hons. Lord WATSON, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir A. HOBHOUSE.)

CLARK v. CLARK. (a)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

*Vendor and purchaser—Trustee—Avoidance of sale.*

*J. C. carried on business in partnership with D. and by his will appointed B. and D. his executors and trustees and guardians of his infant children. B. proved the will, but D. did not, and he afterwards renounced by deed the office of trustee. D. purchased J. C.'s share of the partnership estate from B.*

*Held, that, in the absence of proof of misrepresentation or fraud, the sale could not be avoided merely on the ground that when entered upon the purchaser might, at his option, have become a trustee of the property purchased, he not having, in point of fact, done so.*

*Judgment of the court below reversed.*

THIS was an appeal from a judgment of the Supreme Court of Victoria (Stawell, C.J., Higinbotham and Holroyd, JJ.) reversing a decree of Molesworth, J. dismissing the bill in a suit in equity instituted by the respondents against the appellants to set aside a sale.

The facts appear fully in the judgment of their Lordships.

*Davey, Q.C. and J. D. Wood* appeared for the appellant.

*Macnaghten, Q.C. and Dundas Gardiner* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 12.—Their Lordships' judgment was delivered by

Sir A. HOBHOUSE.—In this case a bill was filed on the 15th Aug. 1881 to set aside a transaction which was entered into in the month of April 1866. The plaintiffs, the now respondents, are the two youngest children of John Clark, viz., John Guillian Clark, who attained twenty-one in Oct. 1869, and Jane, the wife of William Lawrence, who attained twenty-one in Jan. 1867. Mrs. Lawrence sues by her next friend George Clark Allan, and her husband is a defendant. The principal defendant, the now appellant, is David Clark the eldest son of John Clark. In 1864 John Clark had for some time been carrying on a tannery business in Melbourne. In July 1864 he took his two sons David and George into partnership, and in Jan. 1866, on the sudden and simultaneous death of John and George, (b) David became surviving partner. The

impeached transaction is the purchase of the partnership assets and of the site of the business by David. The partnership was regulated by a deed made in April 1865, of which the now material provisions were that the business should be carried on upon certain land belonging to John Clark, that so long as it was so carried on he should be entitled, in addition to his share in the profits, to receive out of the funds of the partnership by way of rent the sum of 150*l.* a year; that John's stock-in-trade should be taken by the partnership at the price of 5300*l.*, which should be considered as a loan and a first charge upon the partnership assets; that he should be entitled to receive out of the funds of the partnership, in addition to his share of the profits, interest at 7 per cent. on that sum, and that the net profits should be divided in the proportions of one-half to David and one-fourth to each of the others. By his will John Clark appointed David and a Mr. Balderson his executors and trustees and the guardians of his infant children, and he gave directions for the conversion of his real and personal estate and its equal division amongst his children. The surviving children were five in number, the three parties to this appeal, Ann Clark, and Agnes the wife of G. L. Allan. When the news of John and George's deaths arrived, which happened on the 16th March 1866, David had to consider his position, and he was advised by counsel on the 11th April 1866 to the effect that if he wished to continue the business he had better not prove the will, that it would not be judicious for him to continue the business for the benefit of himself and the family, and that arrangements should at once be made for winding-up the business. Counsel then suggested that David might make a fair arrangement with the representatives of John and George for the purchase of their shares, but that in such case it was essential that he himself should not be one of those representatives. In point of fact David never did prove his father's will. On the 1st May 1866 he renounced by deed the office of trustee and executor, and all trusts, powers, and authorities whatsoever by the will expressed to be made or given to himself and Balderson. There is no allegation in the bill, and no suggestion in the evidence, that he ever acted as executor or guardian, or was looked upon by the others of the family as filling either of those characters. On the 17th May 1866 Balderson alone proved John Clark's will. In August Ann Clark took out administration to George. On the 15th Oct. Balderson and Ann executed a deed whereby they agreed to sell to David their interest in the partnership assets and the land whereon the business was conducted for the sum of 5000*l.* By the same instrument David gave security for payment of the purchase money with interest to Balderson by ten instalments, the last of which fell due on the 4th May 1871. The stipulated payments were duly made by David to Balderson, and accounted for by Balderson to the beneficiaries. This is the transaction which the respondents have impeached, and it has been set aside by the decree of the Supreme Court now appealed from. It is impeached by the bill on the one ground of fraud and misrepresentation on the part of David, but that ground is not the only one on which

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

(b) They were drowned at sea on a voyage from England to Australia.

[Priv. Co.]

CLARK v. CLARK.

[Priv. Co.]

the court has rested its judgment. There are passages in this judgment from which it appears that the court considered that at least until his final renunciation David must be treated as being an executor, and that he was also guardian to the respondents. And it has also been contended that the sale may be considered as one by an executor to himself, and as proceeding upon misrepresentation made by David, the surviving partner, to David, the guardian of the infant legatees. If that were so, of course it could not stand when duly challenged by the beneficiaries. But David never was a guardian at all. And their Lordships cannot agree that a sale is to be avoided merely because when entered upon the purchaser may at his option become the trustee of the property purchased, though in point of fact he never does become such. A man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction, and whether David so acted is one of the questions to be decided. But that is a different thing altogether from the absolute disability attaching to one who would at the same moment be a vendor in trust for others and a purchaser on his own behalf. No such case as that existed, nor was any such charged by the bill. [His Lordship went through the facts of the case as proved, and continued:] The view taken of the transaction by their Lordships is this. It was one quite within the competence of Balderson as executor. It is not the less so because Balderson declined to clothe himself with the character of executor unless and until he could see a good chance of avoiding family quarrels and litigation. He need not have consulted the family, but as a prudent man he did so. David was not in any position of advantage except as surviving partner, which may have thrown upon him the obligation of giving full information. That Balderson, and Allan too, had free access to all available means of information is clear. It is equally clear that they were well advised, understood the bearings of the question, and struggled to enhance the price beyond what David would give. Nor can their Lordships find any trace of dishonesty or concealment on David's part from first to last. The cause was heard before Molesworth, J., who dismissed the bill without costs, except as against Balderson's executor, whose costs the plaintiffs were ordered to pay. It would seem that the prayer for the administration of John Clark's estate was treated as only incidental to the recovery of assets for that estate by setting aside the sale to David. The plaintiffs then appealed to the full court, who set aside the sale as against them, directed accounts and administration of the partnership estate and of the estates of John and George Clark, and ordered David to pay all the costs both of the original hearing and of the appeal. One of their reasons for making such a decree has already been disposed of. Having stated what is the case made and the case proved, their Lordships will advert briefly to the other reasons of the Supreme Court. The learned judges think that Balderson was placed in an unfair position by David's uncertainty whether or no he would renounce. But it is difficult to see how that circumstance placed Balderson at any disadvantage, and there is no evidence whatever to show that any

embarrassment did in fact arise from it. It was very natural that David should make his renunciation dependent on the acceptance of his proposal, the more so because Balderson declined to prove if the proposal was rejected, and their Lordships cannot appreciate the objections which have been raised to his so acting. But then, the learned judges ask, was the sale fair? The contract, they say, may have been fair enough between Balderson and David, supposing them to have been dealing as strangers at arms' length, but unfair towards the testator's estate, treating both parties as representatives of the estate, and bound to protect the interests of the beneficiaries. And then they go on to show the imperfect nature of the valuation and their reasons for thinking that more ought to have been coming to John Clark's estate from the partnership. Now, if the contract was fair as between Balderson and David, that is sufficient to maintain it, for it was within Balderson's competence, and David never held any fiduciary position. But their Lordships desire to add that, notwithstanding a very ingenious argument at the bar, they cannot find from any evidence before them reason to think that David gave any great under-value for the assets, even considered on the basis of a book valuation, while there is strong reason to think that the family got at least as much as they might have got by the only possible alternative, viz., winding-up and sale. It is possible and probable that David got a good bargain, which he turned to good account, especially as the course of trade turned strongly in his favour the next year; but it does not follow that the family got a bad bargain. Finally, the court say, the sale could have been successfully challenged on the ground of a misrepresentation of value of the testator's estate, made by both Balderson and David directly to the plaintiff Jane Lawrence, and indirectly to the plaintiff John Clark, as it would naturally be repeated to him by all his relatives who heard it, and was in effect repeated to him by Balderson when he received the securities on which he was told that his share, 1000*l.*, was invested. Upon this it is sufficient to observe that from the filing of the bill down to the argument at this bar there has not been any suggestion or insinuation on the part of the plaintiffs that Balderson made any misrepresentation or behaved otherwise than with honesty and with zeal for the family interest. Even if a more adverse view could be taken of the conduct of David or of Balderson, there would be much difficulty in giving relief to persons who have so long delayed to make their claims. The younger of the plaintiffs attained majority nearly twelve years before the bill was filed. He then received from Balderson what he knew was his share of the tannery business. The other plaintiff, who also duly received her share, was old enough to be present at the family discussions in 1866, and knew the whole story perfectly well. The only excuse given for action after such long delay is the discovery of the partnership deed. Supposing that suggestion to be well founded in fact, it is clear that the question how much would be coming to the estate of John Clark from the partnership must be determined by the state of the accounts in Jan. 1866, and not by the agreed amount at the date of the deed; and that the value of the land must be determined by the state

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of the market at the time of the sale and not by the agreed rent stated in the deed. But their Lordships cannot believe in the truth of the suggestion. Even if the deed had turned out to have a direct and strong bearing on the question of value instead of a remote and weak one, its production under such circumstances as appear in this case would not justify the bringing of a suit after so long a lapse of time, during which the important testimony of Balderson was lost. In the opinion of their Lordships this suit is one which ought not to have been brought. It was rightly dismissed by Molesworth, J. The full court ought to have dismissed the appeal with costs. Their Lordships will now humbly advise Her Majesty to make an order to that effect. The costs of this appeal must be paid by the respondent John Clark, and the next friend of the respondent Jane Lawrence.

Solicitors for the appellant, *Keen, Rogers, and Co.*

Solicitors for the respondents, *Fowler and Perks.*

## Supreme Court of Judicature.

### COURT OF APPEAL.

Thursday, Dec. 4, 1884.

(Before BOWEN and FRY, L.JJ.)

AGNEW v. USHER. (a)

*Practice*—Service of writ of summons out of the jurisdiction—Order XI., r. 1 (b) and (c)—Action to recover rent—Defendants domiciled or ordinarily resident in Scotland.

By Order XI., r. 1, service out of the jurisdiction of a writ of summons may be allowed "whenever (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or (c) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." The plaintiffs, who were the executors of the lessor, brought an action against the defendants, who were the assignees of the lessee, to recover one quarter's rent of premises in Liverpool, and obtained leave to serve the writ upon the defendants, who resided in Scotland. On motion to set aside the service it was held by the Queen's Bench Division (51 L. T. Rep. N. S. 576) that it was not an action affecting land within the meaning of sub-sect. (b) of rule 1 of Order XI., but was an action founded on a breach of contract within the jurisdiction, and which ought to have been performed within the jurisdiction within the meaning of sub-sect. (c), and, as the defendants were domiciled or ordinarily resident in Scotland, the service of the writ must be set aside. Held, on appeal, that, as the defendants had not executed the assignment of the lease, and there was no evidence that they had accepted it, the judgment of the court below must be affirmed.

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

*Quere, whether a claim for rent is "an obligation or liability affecting land."*

THIS action was brought by the executor of the lessor of certain premises in Liverpool against the mortgagees by assignment of the lease, to recover 170*l.*, one quarter's rent of the premises.

The lease was by deed, dated the 2nd Dec. 1881, for seven years from the 1st Jan. 1882, at a rent of 680*l.*, and contained a covenant by the lessee to pay a rent of 680*l.* per annum.

The lessee first deposited the lease as an equitable security for the sum borrowed from the defendants. His subsequent assignment to them was not executed by the defendants, and there was evidence that they had never accepted, but had repudiated it.

The defendants resided at Edinburgh.

Field, J. gave the plaintiffs leave to serve the writ of summons in the action out of the jurisdiction, under Order XI., r. 1 (a); but on appeal a divisional court of the Queen's Bench Division set aside the writ, holding that a claim for rent was not a liability affecting land within sub-sect. (b) of that rule, but came within sub-sect. (c): (51 L. T. Rep. N. S. 576.)

From this decision the plaintiffs appealed.

*J. G. Barnes* for the appellants.—The obligation to pay rent is a liability or obligation affecting land within the meaning of sub-sect. (b) of rule 1 of Order XI. "Affecting" means touching. The obligation arises by the privity of estate between the assignee and the landlord, even if the former does not expressly covenant to pay the rent.

*French*, for the defendants, was not called upon.

BOWEN, L.J.—In my opinion, the difficult point of law opened by the appellants does not arise, and we ought to dismiss the appeal on the ground that, on the facts, a case is not shown in which we could exercise a discretion by holding that it would be wise and expedient to let the writ issue. The plaintiffs are the executors of a man who demised the property to a person for seven years, by a deed which contained a covenant to pay rent which would run with the land and bind the assignees, and these defendants are sued as such assignees and therefore liable to fulfil the obligation to pay the rent. Whether such an action is an action to enforce an "obligation or liability affecting land" is a question of some difficulty, which, however, it is not necessary for us to decide. It may be that the argument of the plaintiffs' counsel is correct, but if so, it was for the plaintiffs to show that the defendants became assignees of the term. Whether the court will issue the writ or not depends on the case of the plaintiffs, not on that of the defendants. The deposit of the lease made the defendants mortgagees, but not assignees.

(a) Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever: (a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or (c) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland: (R. S. C. 1883, Order XI., r. 1.)

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If the deed had been executed by the defendants, they would have been liable for the rent, but otherwise it is a piece of waste paper as against them, for a man cannot vest property in another without the consent of the latter. The defendants swear that they never accepted the assignment, but repudiated it, and the plaintiffs have adduced no evidence to prove such acceptance. Therefore, there is no ground for saying that the defendants are assignees of the lease, and the case is not one in which the court ought to allow service out of the jurisdiction.

Fry, L.J.—I concur.

*Appeal dismissed with costs.*

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*, for *Harvey, Alsop, and Stevens*, Liverpool.

Solicitors for the defendants, *Wynne and Son*, for *Evans, Lockett, and Co.*, Liverpool.

Feb. 19, 20, and May 30, 1884.

(Before BRETT, M.R., LINDLEY and BOWEN, L.JJ.)

HOLLINS v. VERNEY. (a)

*Easement—Right of way—Prescription Act (2 & 3 Will. 4, c. 71), ss. 2, 4, 5, 6—User at long intervals —“Enjoyment for the full period of twenty years.”*

*The defendant claimed a right of way under the Prescription Act (2 & 3 Will. 4, c. 71), in respect of twenty years' user as of right. The user had been a user to cart timber along the way in question from a wood belonging to the defendant adjoining the way. The evidence showed that the timber had been cut in the wood in the years 1851-3, 1866-8, and again in the year before the action was commenced; and that in those years the timber cut was carted along the way in question as of right and without interruption, so that the defendant had in fact for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose.*

*Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of the Prescription Act, which Act did not apply to so discontinuous an easement as that claimed.*

*Judgment of the Queen's Bench Division (11 Q. B. Div. 715) affirmed.*

THIS was an appeal from a judgment of Lord Coleridge, C.J., Denman and Manisty, JJ. (reported 11 Q. B. Div. 715), whereby judgment was ordered to be entered for the plaintiff.

The defendant appealed.

The facts and arguments sufficiently appear from the judgment hereinafter set forth.

Sir F. Herschell, S.G. (*J. C. Lawrance, Q.C.* and *Graham* with him) for the defendant.

*Mellor, Q.C.* and *Garrett* for the plaintiff.

The following cases were cited in the course of the argument, or were referred to in the judgment:

*Richards v. Fry*, 7 Ad. & E. 698;

*Wright v. Williams*, 1 M. & W. 77;

*Ward v. Robins*, 15 M. & W. 237;

*Bright v. Walker*, 1 Cr. M. & E. 211;

*Tickle v. Brown*, 4 Ad. & E. 369;

*Earl de la Warr v. Miles*, 45 L. T. Rep. N. S. 424; 17 Ch. Div. 535;

*Monmouth Canal Company v. Harford*, 1 Cr. M. & E. 614;

*Eaton v. Swansea Waterworks*, 17 Q. B. 267;

*Battisill v. Reed*, 18 C. B. 696;

*Hartridge v. Warwick*, 3 Ex. 552;

*Flight v. Thomas*, 11 Ad. & E. 698;

*Carr v. Foster*, 3 Q. B. 581;

*Webb v. Bird*, 4 L. T. Rep. N. S. 445; 10 C. B. N. S. 268;

*Sturges v. Bridgman*, 41 L. T. Rep. N. S. 219; 11 Ch. Div. 853;

*Lowe v. Carpenter*, 6 Ex. 825;

*Lawson v. Langley*, 4 Ad. & E. 890;

*Hall v. Swift*, 4 Bing. N. C. 331;

*Bailey v. Appleyard*, 8 Ad. & E. 161;

*Parker v. Mitchell*, 11 Ad. & E. 798;

*Dare v. Heathcote*, 25 L. J. 245, Ex.;

*Hammer v. Chance*, 12 L. T. Rep. N. S. 163; 34 L. J. 413, Ch.

*Our. adv. vult.*

May 30.—The judgment of the court was read by

LINDLEY, L.J.—This was an appeal from the decision of the Divisional Court, reported in 11 Q. B. Div. 715. The action was for trespass on the plaintiff's land, and was commenced on the 16th June 1882. The defendant pleaded a right of way for carting timber and underwood from a wood of his own. It was conceded that the right of way claimed could not be established by immemorial prescription at common law, inasmuch as the right could be shown to have originated in modern times. Nor was any attempt made to establish the right of way as a way of necessity, or as a way created or reserved by any grant, actual or presumed. The contention was that the case was brought within the Prescription Act (2 & 3 Will. 4, c. 71), and that the evidence given at the trial in support of the right of way amounted to the proof required by that Act. Some of the evidence given at the trial went to show an actual user of the way every year for more than twenty-five years before action; and, if this evidence had been reliable, the right of way would clearly have been established. But this part of the evidence was very conflicting and unsatisfactory, and the learned judge who tried the case has reported that, if the jury meant to find a verdict for the defendant on this ground, such a verdict ought not to be allowed to stand. There was, however, other evidence showing that the timber on what was called the slope of the wood had been cut in the years 1851, 1852, and 1853, and again in the years 1866, 1867, and 1868, and again in the year before the action was commenced; and that in these years the timber cut was carted along the way in question as of right, and without interruption, so that the defendant had in fact for the last thirty years used the way whenever he wanted to do so, although that happened to be only twice before the dispute arose. The evidence on this point was satisfactory; and if the jury found for the defendant on the ground that this limited user was proved, the learned judge reports that he is not dissatisfied with it. He, however, gave no judgment for either party. Under these circumstances the plaintiff obtained a rule to show cause why the verdict should not be set aside, and a new trial had. The defendant, on the other hand, asked the court to give judgment for him upon a claim of right of way restricted to carting timber cut on

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law

the slope of the wood. The Divisional Court, after hearing both sides, set aside the verdict, and gave judgment for the plaintiff with nominal damages, and decided, in effect, that such a right as the defendant claimed cannot be established under the Prescription Act by such evidence of user as the defendant was compelled to rely upon. The question thus raised is one of very considerable importance, and in substance is whether a right of way can be established under the Prescription Act (2 & 3 Will. 4, c. 71), where on the one hand the right can only be proved to have been actually exercised for a period of over thirty years on what are substantially three occasions at intervals of two or three years; but where, on the other hand, the person claiming the right did not require to exercise it on any other occasion. The sections of the Prescription Act material for consideration, in order to determine the question thus raised, are: first, the preamble; secondly, sect. 2, relating to ways; thirdly, sect. 4, relating to the computation of the periods mentioned in sect. 2, and defining the meaning of interruption; fourthly, sect. 5, relating to pleadings; and fifthly, sect. 6, relating to presumptions. These various provisions must be read together, for they illustrate and explain each other. They show, first, that, in order to establish a right of way under the Act in question, it is necessary that the way shall have been actually enjoyed by some person claiming right thereto without interruption for the full period of twenty years; secondly, that this period is to be reckoned next before some suit or action wherein the right of way shall have been brought in question [see as to this *Richards v. Fry*; *Wright v. Williams*; *Ward v. Robins*, *ubi sup.*]; thirdly, that the expression "without interruption" means without such an interruption as is described in sect. 4; fourthly, that no presumption is to be made in favour of any claim upon proof of the exercise or enjoyment of the right of way claimed for any less period than the full period of twenty years mentioned in sects. 2 and 4. The meaning of "as of right," or "claiming as of right," will be found discussed in *Bright v. Walker*; *Tickle v. Brown*; and *Earl de la Warr v. Miles* (*ubi sup.*); and it has been decided that enjoyment by permission (*Monmouth Canal Company v. Harford* (*ubi sup.*), contentious user (*Eaton v. Swansea Waterworks* (*ubi sup.*), enjoyment as owner or occupier of the servient tenement (*Battishill v. Reed* and *Hartridge v. Warwick* (*ubi sup.*) are not enjoyments "as of right" within the statute. It is not, however, necessary to examine this point with any minuteness, as the right of way claimed in the present case may be taken as having been "claimed as of right" within the true meaning of sects. 2 and 5. It may also be taken that there has been no "interruption" of the right of way within the meaning of sects. 2 and 4. The words "without interruption" in sect. 2 mean, as already stated, without such an interruption as is mentioned in sect. 4. The words are not equivalent to "without cessation;" and, paradoxical as it may appear, it has been decided that an enjoyment for nineteen years and three-quarters is sufficient to establish a right to light under sect. 3, although the enjoyment may have been in fact obstructed for the last three months of the full period of twenty years for which the light must be actually enjoyed in order that a right to it may be ac-

quired under the statute. That was decided in 1840, in *Flight v. Thomas* (*ubi sup.*), both by the Exchequer Chamber and the House of Lords. The easement there in question was a continuous easement (light), and the non-enjoyment for part of the twenty years was due to actual obstruction and not to mere non-user. The case, however, shows that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation. Common sense, moreover, is enough to show that, in order to establish a right of way under sect. 2, it cannot be necessary to prove an actual continuous user of the way by day and by night for twenty years without any cessation whatever. Whatever fairly amounts to an actual enjoyment as of right of the way claimed for the full period of twenty years mentioned in sect. 2, is sufficient. But it is obvious, and it has often been pointed out, that in the case of a discontinuous easement like a right of way, it is extremely difficult, if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves this difficulty to be solved in each case as best it may; but some light is thrown on the subject by sects. 6 and 4. Sect. 6 prohibits the making of any presumption in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less periods than those mentioned in the other sections of the Act. This section is addressed to presumptions as distinguished from legitimate inferences from facts. It is addressed to judges rather than to juries. It assumes proof of actual enjoyment for a less period than twenty years, and forbids any presumption being made simply from such short enjoyment in favour of an actual enjoyment for a longer period than that proved; but sect. 6 does not forbid inferences from an enjoyment for a less period than twenty years and other circumstances, if there are any. Sects. 2 and 4 require proof of actual enjoyment for twenty years before action; sect. 6 says that proof of actual enjoyment for less than twenty years before action will not do; but this after all throws little or no light upon the continuity of user requisite to amount to proof of actual enjoyment for the period in question. This view of sect. 6 is the same as was taken by the court in *Carr v. Foster* (*ubi sup.*), which will be alluded to again presently. Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption. Upon this principle it has been held that easements, the enjoyment of which cannot be prevented, cannot be acquired. Thus, in *Webb v. Bird* (*ubi sup.*) it was held that the owner of a windmill cannot gain by

prescription a right to the free passage of wind to his mill. In *Sturges v. Bridgman* (*ubi sup.*) it was held that a person could not gain by prescription a right to make a noise which for many years affected no one, and which no one therefore could have prevented him from making. Similar reasoning from sect. 4 has induced some judges to say that some user must be proved in each year of the period mentioned in the statute. See *Lowe v. Carpenter* (*ubi sup.*). Looking, from this point of view, at a right of way exercised only at long intervals of time, it is difficult to see how its exercise can be interrupted or resisted except at those times when it is exercised. If it cannot be interrupted or resisted during the full period of twenty years, it is difficult to see how it can be actually enjoyed for such period "as of right" and "without interruption," as required by sect. 2 of the statute. The difficulty, however, of distinguishing between long and short intervals of enjoyment is not removed by such reasoning. The difference is one of degree rather than one of principle, and the statute does not afford any certain test by which the difficulty can be solved. The truth is, that the question whether, in any particular case, a right of way has, or has not, been actually enjoyed for the full period of twenty years appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the court sees that, having regard to sect. 6, and the other provisions of the statute, there is no evidence on which the jury can properly find such enjoyment. This view of the statute will explain several decisions which are apparently conflicting, and which it is necessary to notice. In *Lawson v. Langley* (*ubi sup.*), decided in 1836, a right of way was claimed under sect. 2 of the statute. Enjoyment for the full period of forty years was pleaded and sought to be proved. There appears to have been some difficulty in proving actual user for the whole period; and evidence was tendered to show a user of the way more than forty years ago. The evidence was rejected at the trial, but a new trial was ordered on the ground that the evidence ought to have been received. The court evidently thought the evidence admissible for the purpose of enabling the jury to draw an inference of fact, notwithstanding the rule in sect. 6 against presumption. Little Dale, J. said: "If evidence of user beyond forty years were to be excluded, it might be that after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one." In *Hall v. Swift* (*ubi sup.*), decided in 1838, a watercourse was claimed. The claim was apparently made under sect. 2 of the Act. Enjoyment for the last nineteen years was proved, but for three years before that the water had not flowed in its accustomed course. Before those three years, however, enjoyment for some time was proved. The report says there had been some interruption about twenty-two years before the action; but it is tolerably plain that there had been no interruption within the meaning of sect. 4 of the Act, and that the interruption spoken of was only a cessation in the flow of water. The jury found in favour of the right claimed. An application was made to set aside the verdict on the ground (amongst

others) that actual enjoyment for the full period of twenty years before action had not been proved. The court, however, refused to interfere, Tindal, C.J. saying: "It would be very dangerous to hold that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment." This last remark seems to go rather too far, for under the statute the right is not acquired until it has been enjoyed for the requisite period, and if an immemorial, as distinguished from a twenty years' statutory, enjoyment can be proved, the right will be established independently of the statute, and will not be lost by a mere temporary non-enjoyment. These two cases, however, seem to establish that, if user before the statutory period is proved, and user for eighteen or nineteen years next before action is also proved, the mere fact of non-user for some time immediately after the commencement of the statutory period is not necessarily fatal; and this we consider good law, if the non-user is capable of explanation consistently with continued actual enjoyment as of right. *Bailey v. Appleyard* (*ubi sup.*) is supposed to be inconsistent with this view, but it is not really so, as will be seen by reading with the report of the case the note explaining it. This note is to be found between pages 778 and 779 in some copies of 8 A. & E., misplaced in binding. In *Bailey v. Appleyard* a right of common was claimed under sect. 1. Enjoyment for twenty-eight years before action was proved, for much more than two years before that there had been an actual obstruction of the right by means of a stang or bar. Before its erection, however, enjoyment was proved for some years. The judge asked the jury whether the stang or bar had prevented the plaintiff from exercising his right, and told them that, if it had, the proof of prior enjoyment would not assist him; and it was left to the jury to say whether there had been substantially an enjoyment for thirty years or for twenty-eight years only. The jury found for the defendant, i.e., against the right of common, and the Court held there was no misdirection. It is manifest that the verdict was right, and that the decision of the court was correct, for actual enjoyment as of right for thirty years next before action was disproved, and could not be inferred in the face of the evidence as to the obstruction. In the course of the argument Patteson, J. expressed an opinion "that the most undoubted exercise of enjoyment for twenty-nine and three-quarter years would not have been sufficient." But this was before *Flight v. Thomas* (*ubi sup.*). Had been decided, and must not be taken as literally true in all cases. In *Parker v. Mitchell* (*ubi sup.*), decided in 1840, a claim was made to a right of way under sect. 2, and both a forty and a twenty years' user were pleaded. The evidence showed a user for a period of fifty years before action, but not for the last four or five years. What the explanation of this was does not appear. The judge at the trial was of opinion that the claim was not supported, and by his direction the jury found against it, but the evidence of the user was not left to them. The Court refused a rule for a new trial, evidently on the ground that on the undisputed facts the jury could not properly find

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an actual enjoyment for the full period of twenty or forty years next before the commencement of the action, as required by sects. 2 and 4 of the statute (see per Patteson, J. in 3 Q. B. 585). This decision seems right in the absence of all explanation accounting for the non-user. In *Carr v. Foster* (*ubi sup.*), decided in 1842, the plaintiff claimed a right of common of pasture. He proved enjoyment for forty years next before action, with the exception of an interval of two years, which occurred eighteen years back, and was accounted for by the fact that his predecessor in title had then no commonable beasts. The plaintiff at the trial seems to have relied on the statute, and not on any title he might have acquired independently of the statute; and the case was dealt with both at the trial and by the court afterwards as turning on the provisions of the statute. The judge at the trial asked the jury whether substantially the right of common had been enjoyed for thirty years next before the action, and the jury found for the plaintiff. A rule was obtained to show cause why a nonsuit should not be entered or a new trial had on the ground that the verdict was against the weight of evidence; but on argument the rule was discharged, because there had been no interruption within the meaning of sect. 4, and the cessation of enjoyment was accounted for in such a way as to justify an inference that the right was actually enjoyed for the full period required by the Act, although there was in fact an intermission of enjoyment for two years, part of that period. This case certainly goes further than any other to be found in the books; but we are not prepared to say that it was wrongly decided, nor to hold that the case ought not to have been left to the jury, considering the explanation given of the non-user. At the same time it is difficult to reconcile this case with *Parker v. Mitchell* (*ubi sup.*), and with those cases already referred to in which it has been held that a way actually used for twenty years before action has not been enjoyed for those twenty years as of right, if for any part of that period the dominant and servient tenements have been occupied together. In the one case there has been a total cessation of user for a time, and in the other there has been no cessation of user at all; but only a cessation of user as of right. Why a temporary cessation of user as of right should be more fatal to the acquisition of the right than a total temporary cessation of user, it is not easy to see. The next and last case to which it is necessary to refer is *Lowe v. Carpenter* (*ubi sup.*), decided in 1851. The defendant there claimed a right of way under sect. 2 of the statute. He proved user for forty-eight years before action, with the exception of the last fourteen months, when it did not appear to be used at all. It also appeared that the way was not used every year, but only as occasion required—for carting timber, lime, &c., as occasion required—whether this was the reason why the way was not used for the last fourteen months is not stated. The case was tried before Patteson, J., who was one of the judges who had decided both *Parker v. Mitchell* and *Carr v. Foster*. He expressed himself not altogether satisfied with *Parker v. Mitchell*, and under his direction the jury found for the defendant, i.e., in favour of the right claimed, leave being reserved to the plaintiff to move to set aside that verdict and to enter a

verdict for himself with nominal damages. The plaintiff obtained a rule accordingly, and upon argument the Court decided in his favour. The court considered *Parker v. Mitchell* rightly decided, and that the jury could not upon the evidence find an actual enjoyment for the full period of twenty years next before the commencement of the action, as required by sects. 2 and 4 of the statute. Parke, B. expressed an opinion that proof of some user every year was essential to bring a case within the statute, and he referred to sect. 4 in support of that opinion. But at present there is no decision which goes this length; and we are not prepared to say that an actual enjoyment for the full period required by the statute may not be inferred, although there is no proof of actual user in every year. We think that, notwithstanding the rule against presumptions in sect. 6, if a user for more than twenty or thirty years, as the case may be, is proved, a non-user for more than a year within twenty or thirty years from the commencement of the action may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, as the jury in fact did in *Carr v. Foster*. The observations of James, L.J. in 17 Ch. Div. 600 show that this also was his opinion; at the same time the total absence of user for any year of the statutory period will be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user. We confess, however, that we do not appreciate the supposed distinction between a temporary non-user for a year occurring at the beginning, or the end, or in the middle of the statutory period. *Flight v. Thomas* (*ubi sup.*) and the language of sect. 4 show that an interruption for a year is fatal, and that an interruption for less than a year is not fatal whether it occurs at the commencement, or end, or at any part of the statutory period; so a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatever portion of the period the cessation occurs; and, on the other hand, a cessation of user which does not exclude such an inference is not fatal, even although it occurs at the beginning, or the end of, the period. The only difference is, that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before action is more difficult to draw than in other cases. But we are not prepared to say that as a matter of law such an inference can in no case be drawn. On the contrary, we think it may where sect. 6 does not apply. In *Parker v. Mitchell* (*ubi sup.*) and *Lowe v. Carpenter* (*ubi sup.*) the non-user at the end of the period was apparently unexplained, and was therefore fatal. In *Bailey v. Appleyard* (*ubi sup.*) the non-user at the beginning of the period was owing to actual obstruction, which was fatal; but, as already pointed out, *Hall v. Swift* (*ubi sup.*) and *Lawson v. Langley* (*ubi sup.*) show that non-user at the commencement of the period is not necessarily inconsistent with the actual enjoyment for the full statutory period, and *Carr v. Foster* shows that the same is true of a temporary cessation in the middle of the period. We have examined a great number of other decisions upon the Prescription Act, all indeed that we have been able to find, but none of them except those



to which we have referred appear to require comment for the purpose of deciding the case before us. It is difficult, if not impossible, to enunciate a principle which will reconcile all the decisions, and still more all the dicta to be found in them; the only safe course is to fall back on the language of the statute, to give effect to it, and to introduce into it nothing which is not to be found there. It is sufficient for the present case to observe that the statute expressly requires actual enjoyment as of right for the full period of twenty years before action. No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can an user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot, that it is not and could not be reasonably treated as the assertion of a continuous right to enjoy; and, when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute. Without therefore professing to be able to draw the line sharply between long and short periods of non-user, without holding that non-user for a year or even more is necessarily fatal in all cases, without attempting to define that which the statute has left indefinite, we are of opinion that no jury can properly find that the right claimed by the defendant in this case has been established by evidence of such limited user as was mainly relied upon, and as was contended by the defendant to be sufficient in the present case. Upon this point, therefore, we affirm the decision of the Divisional Court; and, as the defendant has failed both here and in the Divisional Court on the point of law on which he relied for his defence, he ought in our opinion to pay the costs of the appeal and of the motion made to the Divisional Court. This, however, does not quite dispose of the case. The jury found in favour of the defendant; and he gave some evidence of having carried timber from other parts of his wood along the road in question in several years besides in 1851-3, 1866-8, and just before the action. This evidence was not satisfactory, and there was a considerable amount of evidence on the other side showing that the user was by permission and not as of right, and Cave, J. thought the verdict ought not to stand unless the defendant was right in his legal contention. At the same time we are not prepared to say that the verdict can be set aside and judgment entered for the plaintiff. The Divisional Court have, however, gone that length. They apparently considered that there was no evidence of user, except in years 1851-3 and 1866-8, and if this had been the case their judgment would have been quite right. But there was some evidence, though unsatisfactory evidence, of more frequent user

than in those years; and although, now that the main point on which the defendant relied is decided against him, the verdict in his favour cannot stand, we think he is entitled to a new trial if he desires it, and the judgment of the court below must be varied accordingly. But it will be useless for the defendant to go down to trial again unless he is prepared with satisfactory evidence of a much more continuous user as of right than he relied upon before. If he elects to try the case again, the costs of the action and of the new trial will abide the event. If he does not try the case again, he must pay the costs of the action, and in any event he must pay the costs of the motion to the Divisional Court and of this appeal as already stated.

*Judgment varied.*

Solicitors for the plaintiff, *Field, Roscoe, and Co.*

Solicitors for the defendant, *Gears, Son, and Pease.*

June 21, 23, and July 12, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

THE PLUMSTEAD DISTRICT LOCAL BOARD v. SPACKMAN. (a)

*Metropolis—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 75—"General line of buildings"—"Decided by the superintending architect of the Metropolitan Board of Works"—Jurisdiction of magistrate—Architect's decision.*

*By the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) it is provided that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds fifty feet, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being;" and in case any building, &c., be erected without the consent of the board, complaint is to be made to a justice, and "if the said complaint shall be proved to the satisfaction of the justice," he shall make an order directing the demolition of any such building, "or so much thereof as may be beyond the said general line so fixed as aforesaid."*

*S., the owner of a house in the High-road, Lee, Kent, the frontage of which did not exceed fifty feet in distance from the said road, without obtaining the consent of the Metropolitan Board of Works, commenced to erect a building extending the frontage of the house to the road. Subsequently the superintending architect of the Metropolitan Board of Works for the time being fixed the general line of buildings, of which S.'s house formed part, in such a position that S.'s new building projected beyond it, although it did not extend beyond the line of a stable, chapel, and shops abutting on the same road, east and west of the ends of the general line of buildings fixed as aforesaid.*

(a) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

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THE PLUMSTEAD DISTRICT LOCAL BOARD v SPACKMAN.

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*Held, by Bowen and Fry, L.JJ. (dissentiente Brett, M.R.), on a case stated by a metropolitan police magistrate, that, on the hearing of a summons for a breach of the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 c. 102), the magistrate is bound by the architect's certificate as conclusive, and has no jurisdiction to consider for himself what is the general line of buildings.*

*Judgment of the Queen's Bench Division (50 L. T. Rep. N. S. 690) affirmed.*

*The Vestry of St. George's, Hanover-square, v. Sparrow (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209), and Simpson v. Smith (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87), disapproved.*

*Bauman v. The Vestry of St. Pancras (L. Rep. 2 Q. B. 528) approved.*

THIS was an appeal from a judgment of Lord Coleridge, C.J., Stephen and Mathew, JJ., reported 50 L. T. Rep. N. S. 690.

A case had been stated for the opinion of the High Court of Justice by Robert Henry Bullock Marsham, Esq., one of the magistrates of the police courts of the metropolis, sitting for the district of Greenwich, in the county of Kent, in accordance with the statute 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), the facts thereof being, so far as material, as follows:—

On the 9th March 1883 a summons was issued in the Greenwich Police Court, on the prosecution of Francis Freeman Thorne, a surveyor and officer of the Plumstead District Board of Works, against Arthur John Spackman, of 8, Newton-terrace, High-road, Lee, in the county of Kent, for that on the 15th Jan. 1883, and on divers other days, he unlawfully did erect or raise a building, structure, or erection in or on the north side of a certain street, place, or row of houses, called Newton-terrace, High-road, Lee, aforesaid, and adjoining or forming part of the premises known as No. 7, Newton-terrace, aforesaid, of which he was the owner, without the consent in writing of the Metropolitan Board of Works, and beyond the general line of buildings in such street, place, or row of houses as decided by the superintending architect to the Metropolitan Board of Works for the time being, contrary to the 75th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102).

On the hearing of the summons, on the 30th March 1883, the following facts were either proved or admitted:

The defendant was the owner of the house and premises, No. 7, Newton-terrace, mentioned in the said summons. The said house forms one of a terrace of nine houses, seven of which belong to the defendant, in the High-road, Lee, known as Newton-terrace. The frontage of the said house mentioned in the said summons, as well as the line of frontage of the other houses of the terrace, does not exceed fifty feet in distance from the said High-road.

The defendant had, on or about the date mentioned in the said summons, without obtaining the consent of the Metropolitan Board of Works (which consent had in fact been refused), commenced to erect, and had proceeded with the erection of, a building upon the forecourt of No. 7, Newton-terrace, aforesaid, thereby extending the frontage of that house to the High-road.

The complainant thereupon wrote a letter to the defendant requiring him to desist from the said erection. The defendant replied declining to do so, and on the 22nd Feb. 1883 the complainant again wrote, threatening proceedings against the defendant as soon as his board should have obtained the certificate of the superintending architect of the Metropolitan Board of Works, deciding the position of the general line of buildings of which the said premises formed part, in accordance with the 75th section of the Metropolis Management Amendment Act 1862.

On the 15th Feb. 1883 the complainant, representing his said board, and the defendant both attended by appointment before Mr. George Vulliamy, the superintending architect of the Metropolitan Board of Works, and were both heard by him with reference to the position of the said line of buildings, and afterwards the said Mr. George Vulliamy published his certificate with a plan thereto attached. [The certificate and plan were annexed to the case.]

Upon the south-east corner of the ground, abutting on the High-road at the west of the said plan, but not indicated thereon, is a wooden structure on brick foundations, consisting of a stable with a coach-house and dwelling-rooms above, and used by the occupiers of Hurst Lodge. This stable is at the spot at which the general line of buildings laid down by the said certificate ends, and is the only building between that spot and the grounds of Hurst Lodge, which extend for a considerable distance along the High-road, and the building, which is an old building, projects as much as the defendant's new building does. To the east of the spot for which the superintending architect has proposed to lay down a general line there is a chapel, shown on the plan, which abuts on the High-road, and projects in front of the building line laid down as much as the defendant's new building does, and immediately to the east of the chapel is a row of twenty houses and shops, all of which abut on the High-road.

The erection put up by the defendant in front of No. 7, Newton-terrace aforesaid, extended considerably beyond the general line of buildings as fixed by the said architect in his certificate, but not beyond the line of the stable, chapel, and shops before mentioned.

It was contended by the counsel who appeared for the complainant: (1) That the position of the general line of buildings, within the meaning of the 75th section of the Metropolis Management Amendment Act 1862, was the line fixed and decided to be such by the superintending architect, and that it was not open to the magistrate for the purpose of deciding the question raised by the said summons, and by way of reviewing the said architect's decision, to draw any new line of buildings, or to alter or re-define the line fixed by him; (2) that, in the event of the magistrate deciding that it was open to him to review, and determining to review the said architect's decision, the "general line of buildings," within the meaning of the said section, did not mean the general line of buildings of all the houses on the north side of the High-road, Lee, but meant the line of the buildings forming Newton-terrace, or of the houses between Brandram-road and Belgrave-villas, or, at most, of the houses between Brand-

ram-road and the boundary of Hurst Lodge, indicated on the said plan; and that he was bound, as a matter of law, to confine his attention to the said limited portions of the High-road, and could not take into consideration the buildings east and west of the said portions.

It was argued on the part of the defendant by the counsel representing him that the magistrate was bound, before deciding the said summons adversely to the defendant, to determine for himself the said general line of buildings, and to find, as a fact, what was the position of the general line of buildings of the said High-road at and about the part where the defendant's building was, and that he ought not to convict the defendant or order the demolition of his building unless it was, in his opinion, as well as in that of the superintending architect, beyond the general line of building, and he referred to the case of *Simpson v. Smith* (24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87) on the point.

The defendant further contended that the buildings to the east and west of the particular part to which the certificate of the architect applied ought to be taken into consideration in deciding on the general line, and that the line as laid down by the architect was not a general line, but a particular line arrived at by selecting just that portion of the road at which the buildings for the time being happened to stand back, and that the magistrate was not bound, as a matter of law, to confine his attention to the limited portion of the road suggested by the complainant, and that, on the contrary, if it was a question of law and not one of fact, he was bound, as a matter of law, to take into consideration the buildings east and west.

The magistrate decided against the complainant, and in favour of the defendant's contention upon both points of law, thinking the case of *Simpson v. Smith* applicable, and the other question to be one of fact, and that he was not bound, as matter of law, to confine his attention to the portions of the road suggested by the complainant, and he adjourned the hearing to allow of his visiting the premises and deciding for himself the true position of the general line of buildings, and whether it was necessary to take into consideration the other buildings in order to arrive at a general line.

After personally visiting the locality of the said premises the magistrate gave his decision that the general line of buildings, as defined by the said architect, was not the true general line of buildings in the street, place, or row of houses in which the defendant's building was situate, and held that it was necessary, as contended by the defendant, in order to arrive at a general line, to take into consideration the position of the said stable or of the other buildings to the east of Bransham-road above mentioned, or of all of them, and after full consideration of all the facts decided that the defendant had not built beyond the true general line of buildings, but stated that, had he confined his attention to the houses forming Newton-terrace, or to the houses between Bransham-road and Belgrave-villas, or between Bransham-road and the boundary of Hurst Lodge, his decision would have been the same as that of the said architect, there being no question whatever that in that particular position no building projects beyond the line laid down by the architect;

but in his opinion, after viewing the spot, there was no ground, in fact, for selecting that portion of the road, and laying down a special line for it, and he therefore dismissed the summons, subject, however, to the opinion of the High Court upon the case.

The magistrate also found, as a fact, that if the true position of the general line was a question of fact for him, the defendant's building did not project beyond it.

The questions for the opinion of the court were:

1. Whether the magistrate was bound by the architect's certificate as conclusive, or ought, as he did, to have considered for himself what the true general line of building was. 2. Whether he was bound, as a matter of law, in considering the general line of buildings, to confine his attention to the portions of the road suggested by the complainant; and if on either question his decision was in the opinion of the court wrong, the defendant was to stand convicted, and the magistrate was, on the case being remitted to him for the purpose, to make all further necessary orders on the application of the complainants for the demolition of the said building; but if the court, on the contrary, was of opinion that on both the points of law his decision was correct, the order dismissing the summons was to be confirmed.

The learned judges of the Divisional Court held that the magistrate was bound by the architect's certificate as conclusive.

The defendant appealed.

The statute 25 & 26 Vict. c. 102, s. 75, after repealing 18 & 19 Vict. c. 120, s. 143, and 7 Geo. 4, c. 142, s. 140, proceeds to enact in lieu thereof:

That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms or conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person, engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing . . . . .

*Charles, Q.C. and Channell* for the appellant *Spackman*.—The magistrate was not bound to accept the certificate of the superintending architect of the Metropolitan Board of Works as conclusive. The point was decided in *St. George's, Hanover-square, v. Sparrow* (10 L. T. Rep. N. S. 504; 16 C. B. N. S. 209) and in *Simpson v. Smith*

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(24 L. T. Rep. N. S. 100; L. Rep. 6 C. P. 87); though it is true that a contrary opinion was expressed in

*Bauman v. The Vestry of St. Pancras*, L. Rep. 2 Q. B. 528.

The complaint must be proved to the satisfaction of the magistrate, upon the hearing; there is no provision obliging the superintending architect to hear the parties, and, if his certificate is to bind the magistrates, the defendant may be convicted without even having been heard. They also cited

*Cooper v. Wandsworth Local Board*, 8 L. T. Rep. N. S. 278; 14 C. B. N. S. 180;

*Wandsworth v. Hall*, 19 L. T. Rep. N. S. 641; L. Rep. 4 C. P. 85;

*Paddington v. Snow*, 45 L. T. Rep. N. S. 475.

*Willis, Q.C.* and *J. L. Walton* for the respondent.—The general line is for the superintending architect to decide; and at the hearing before the magistrate that general line is to be considered as "so fixed as aforesaid," that is, fixed by the architect. It is clear that in the contemplation of the section the magistrate is not to go behind the architect's decision. They referred to

45 & 46 Vict. c. 14, s. 9.

*Tear v. Freebody*, 4 C. B. N. S. 228.

*Cur. adv. vult.*

July 12.—*BRETT, M.R.*—In this case there arises an extremely difficult question, and one on which there has been much difference of opinion. A summons was taken out against the appellant Spackman for erecting a building beyond the general line of buildings in the street in which the building was. The superintending architect of the Metropolitan Board of Works had given his certificate as to what was the general line of buildings in the street, but the magistrate saw the street and came to the conclusion that the general line was not as certified. He therefore declined to make an order that the building should be pulled down. It is said on behalf of the respondents that the certificate was conclusive, and that the magistrate had no jurisdiction to enter upon the question as to what was the general line of buildings, but was bound to make the order if, as a fact, the building in question was beyond the certified line. It is difficult to express the importance of the considerations arising upon this contention. A man builds a house on his own land and at his own cost on a spot adjoining a street. It may be that everyone who sees it would say that he had not built beyond the line, and had not contravened the real object of the statute. It may be that the architect may certify that he has done so, the architect taking a too strictly mathematical view, and even acknowledging that his view is a purely professional one; and yet it is said that the owner is to be forced to pull the building down; and even though the architect has made a mistake, the legal tribunal before which the matter comes is bound to make an order to do this monstrous injustice. It may be that this is the law. It may be that we shall have to come to the conclusion that the Legislature has inadvertently committed this great injustice, but at the outset my mind revolts against such an interpretation of the statute, and struggles against such a conclusion. The matter depends upon sect. 75 of the Metropolitan Management Amendment Act 1862. Without

doubt, the words of the section are capable of the strict construction contended for—I say are capable of it; but in 1864 Erle, C.J. and Willes, Byles, and Keating, JJ., after fully considering the matter, acted on this rule of construction—If the words of an Act of Parliament, although capable of an interpretation which would work manifest injustice, can possibly, within the bounds of a grammatical and reasonable construction, be otherwise construed, then the court ought not to attribute to the Legislature what is a clear, manifest, and gross injustice. Those learned judges that I have named, acting on this principle, gave an interpretation to this section. The section then came before the Court of Queen's Bench, of which Cockburn, L.C.J. was a member, and the opinion of the Court of Common Pleas was dissented from. Afterwards the same question came again before the Court of Common Pleas, the court consisting of Willes, Keating, JJ., and myself. Nothing has been urged in the argument of this case which was not urged before us then; we had before us the remarks of the Lord Chief Justice in the case in the Queen's Bench, and we most anxiously considered them; we considered carefully the words of the statute, and we gave a deliberate judgment that the Legislature did not mean to destroy the value of a man's own money expended on his own property without the usual safeguards. I think it is impossible to suppose that the Legislature intended to make a single person the sole arbitrator of a man's right of property in his own land. I think it is inconceivable that this should be so when we know in what trivial cases there is an appeal from one court of justice to another. Looking through the Act, I can find no provision that the architect must even hear either party or any evidence before giving his certificate. I can see no answer to the objection that, after a man has built his own house on his own land at his own cost, an architect sitting in his own room, without even hearing the parties or seeing the property, may make an order so that all that has been done must be pulled down and destroyed. I think it is begging the question to say that the result of upholding this decision will be to make the architect an arbitrator; there is really nothing in the Act to make him so. I do not wish to go through the arguments again, I indorse the judgment of Willes, J. What is the line of buildings is a reality, a fact. How is it to be determined? Let us suppose a road in which there are no houses. Two or three first owners build their houses back from the road. The architect may give his certificate after the next owner has built his house, and he may be obliged to put it back, and then the architect may change his mind, and in the next case may give a certificate of an altogether different line of buildings. It is said that he is more competent than the magistrate to decide this question; yet it is admitted that as to all other points that may be raised the magistrate may decide, but not as to this one. I am bound to state what is my strong conviction on this subject, and it is this—that according to the decision of the Divisional Court clear and gross injustice is done. In my opinion the true construction of the 75th section is to give power to the architect to decide, but not to prevent the magistrate from saying that his decision is unjust. I therefore think that this appeal should be allowed.

FRY, L.J.—The judgment which I am about to read is that of myself and Bowen, L.J. The questions in this case, which has been stated by a metropolitan magistrate, arise on the construction of the 75th section of the statute 25 & 26 Vict. c. 102, which deals with the general line of buildings in the streets and other places in the metropolis. The first question stated by the magistrate is, whether he is bound by the architect's certificate as conclusive, or ought to have considered for himself what the true general line of buildings was. This is a point which has been several times before the courts prior to the decision now under appeal, and which has elicited a great diversity of opinion. In the case of *St. George's v. Sparrow* (*ubi sup.*) and *Wandsworth v. Hall* (*ubi sup.*) eminent judges of the Court of Common Pleas expressed an opinion that the certificate of the architect was not binding on the justice, and in the case of *Simpson v. Smith* (*ubi sup.*) the court decided the question in accordance with their previously expressed opinion. But on the other hand, in the case of *Bauman v. St. Pancras*, Lord Cockburn, C.J. and Mellor, J. criticised the case of *St. George's v. Sparrow*, and expressed the opinion that the certificate of the architect was final and binding on the justice. In such a diversity of opinion on the point in controversy, we think that the Queen's Bench Division were right in considering that they were not precluded by authority from determining the question on its merits. We shall pursue the same course, not regardless of the views enunciated by the various judges who have expressed their opinions, but supported by remembering that in our conclusion, whatever it may be, though we must differ from some great authorities, we must also be in accordance with others. Before proceeding to the section in question it is desirable to observe that a general scheme for regulating the buildings in the metropolis was introduced by the Act of 1855 (18 & 19 Vict. c. 120); that that Act laid down certain general rules as to buildings, and created a body of district surveyors to give effect to these rules; that it placed the Metropolitan Board in a certain position of headship over the district boards (sect. 55 *et seq.*); that it required the Metropolitan Board to appoint an officer, termed a superintendent architect of metropolitan buildings (sect. 62), to whom (unless otherwise ordered) the district surveyors were to make returns, and who was to exercise a supervision over the proceedings of the district surveyors, and to receive from them the fees paid to them (sects. 54 and 65); and that his signature, countersigned by the chairman, was made the proper evidence of the board's approval of any plans or particulars (sect. 58). Lastly, sect. 143 enabled any vestry or district board to pull down any buildings which projected beyond the regular line of buildings, leaving the question what was such regular line to be determined, if necessary, by a jury, on an action of trespass brought by the building owner against the board. In 1862 the Act in question was passed for the amendment of the Act of 1855. The 75th section repealed the 143rd section of the Act of 1855, and also the provision of an earlier Act with regard to one particular road in the metropolis, and then proceeded to deal with two distinct cases: first, the case of a person building beyond the general line, in case

the distance of such line of buildings from the highway does not exceed fifty feet; and, secondly, the case of a person building within fifty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds fifty feet. As the present question arises on the former of these cases, we may omit so much of the section as deals with the second case, and then the enacting words will be as follows: "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being, and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons, requiring the owner or occupier of the premises, or the builder, or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons, to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable." It appears to us that one line only is spoken of throughout this section—namely, the general line of buildings; that, as regards each case under discussion, one decision of that line only is referred to—namely, the decision of the architect—and that decision is to be valid for all the purposes of the section in such case; and the pointed reference to this decision of the architect in the direction to be given by the magistrate—namely, to pull down the whole building, or so much thereof as may be beyond the said general line so fixed as aforesaid—appears to us to emphasise the proposition that the decision or fixing of the line by the architect is to be adopted by the magistrate if the rest of the case be made out to his satisfaction. If the architect and the magistrate are both to fix the line, it is conceivable that they may fix it differently. If they fix it in the same place no question can arise; but if they should fix it differently one or other of two cases must occur: If the architect's line be in advance of the magistrate's, the magistrate cannot act on his judgment and order the demolition of so much of the building as is in excess of his line—he can order only so much as is in excess of the architect's. If, on the other hand, the magistrate's line be in advance of the architect's, then, according to the contention of the appellants, the magistrate can order only so much of the building to be pulled down as is beyond his own line, whereas the statute speaks

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of the demolition of so much of the building as may be beyond the said general line as fixed by the architect. These observations seem to us to show that the statute not only contemplated only one line, but only one decision as to that one line in each particular case in controversy before the justice. It appears to us that there is nothing unreasonable or improbable in the conclusion that the power of finally determining this line should be vested in the superintending architect of the Metropolitan Board. He is, as we have already shown, an officer filling a responsible position under the Metropolitan Board; that board is itself entrusted with large powers of superintendence over the metropolis and over the vestries and districts. The question to be determined is one of a technical character, on which the Legislature might think an architect as good a judge as a magistrate, and it may have been thought that such a reference was more likely to secure uniformity of decision than leaving the question open to each magistrate before whom it might come. It seems to us improbable that the Legislature should have contemplated that the same line should be twice decided in each case between the building owner and the board, and that each decision should retain a certain validity, so that if the magistrate's line was behind the architect's the architect's should govern the extent of demolition, and if the architect's line was behind the magistrate's the magistrate's should prevail. The case would have been different if the second decision had been pronounced by way of appeal, and the magistrate who heard the appeal had been authorised to give effect to his decision by demolishing down to the line as ascertained by himself, which, as already shown, is not the case. It has been suggested that the Legislature are not likely to have required any proceedings before the magistrate if this question was not open to his decision, and if, to use the language of Erle, L.C.J., he was to act under the command of the superintending architect. But it appears to us that after the architect's decision several questions might arise and require judicial determination. The magistrate might have to determine (1) whether the building complained of was a building, structure, or erection within the meaning of the Act; (2) whether the distance of the line of buildings from the highway was less than fifty feet; (3) whether the superintending architect had fixed the general line of buildings for the case in hand; (4) whether the Metropolitan Board had given any consent; (5) whether that board had imposed any conditions, and, if so, (6) whether these conditions had or had not been broken; (7) whether the thing complained of was beyond the line laid down; and (8) within what time it was reasonable that the demolition should be made. Several points have been raised incidentally as to the time, manner, and character of the decision to be given by the magistrate. The case before us is not addressed to any question as to the validity or propriety of the decision given by the architect, but only to the duty of the magistrate to consider the question for himself, and therefore these points do not require detailed discussion or final decision. It may be enough to observe that, in our opinion, any duty of deciding the line in question cast upon the architect ought to be performed by him with a

due regard to the interests, no less of the building owner than of the public, both as regards the time when the decision shall be given, and the mode of arriving at the decision. We cannot think that the silence of the statute on the details of the architect's procedure exonerates him from this obligation, and we think that this obligation would rest on him equally whether his decision were final or not, for, on any construction of the statute, his determination of the line is a matter of moment to both parties, as the magistrate can never go beyond it. For these reasons, and notwithstanding the distrust which we always feel when differing from the Master of the Rolls, we are constrained to hold that the decision below was right, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitor for the Board of Works, *George Whale*.

Solicitors for Spackman, Shaw and Son, Greenwich.

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

CORRIGENDUM.—At p. 681, second column, line 3 from bottom, for "without" read "with."

June 20 and 28, 1884.

(Before BACON, V.C.)

BARNES v. SOUTHSEA RAILWAY COMPANY. (a)

*Railway company—Compulsory purchase by—"House"—Company taking part of paddock and private road—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), ss. 63, 92.*

*The owner of a freehold property built a house thereon, and laid out ornamental ground and a garden, and surrounded the whole by a wall. Immediately to the rear of the house and garden was a paddock, by the side of which a private road passed, leading from the house and through double ornamental gates into a public road.*

*A railway company gave notices to treat for a portion of the paddock and private road. The owner required them to take the whole of the property.*

*Held, that the paddock formed part of the "house" within the meaning of sect. 92 of the Lands Clauses Consolidation Act 1845, and that the company must purchase the whole property.*

THIS was a motion to restrain the defendant company from assessing compensation in respect of land which they proposed to take, and from taking compulsorily part only of the plaintiff's property.

The plaintiff was the owner of a house called Northumberland House, situated at Portsea, Southampton, which he had built upon a piece of freehold land, 590 feet long and 95 feet broad, purchased by him in 1874. The house, together with ornamental ground in front and a garden behind, was surrounded by a wall, and a carriage drive led from the front of the house into Festing-road, which formed the eastern boundary of the property. To the rear of the house, behind the garden, was a paddock of pasture land, containing about half an acre of land. By the side of this paddock ran a private road from the rear of the house, past the garden, and leading through

(a) Reported by G. MACAN, Esq., Barrister-at-Law.



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ornamental double gates into Seymour-lane, which formed the western boundary of the property. The paddock was inclosed by an ornamental hedge, except where the before-mentioned wall formed one of its boundaries.

On the 22nd Aug. 1882 the Southsea Railway Company served the plaintiff with notice to treat, expressing their intention to take a portion of the paddock (farthest away from the house), and also part of the private road leading from the house into Seymour-lane, comprising in the whole about eighteen perches. The effect of this would be to cut off the plaintiff from his access to Seymour-lane on the west.

On the 8th Sept. 1882 the plaintiff served a counter notice upon the defendants, under sect. 92 of the Lands Clauses Consolidation Act 1845, stating that the land mentioned in the notice to treat was part only of his house or buildings, and that he was able and willing to sell the whole of the land, buildings, and premises, and required the company to purchase the whole.

Nothing further was done until the 20th March 1884, when the company gave notice of their willingness to make another approach to the back of the house from Seymour-lane, but at a different angle from that made by the former road, and they gave notice of their intention to assess compensation money in respect of the land proposed to be taken.

The plaintiff then commenced his action, and moved as above.

The plaintiff, in his evidence, stated that the paddock was most necessary to the convenient enjoyment of his house, and could not be let apart from it; that carts containing heavy goods such as coals, manure, furniture, &c., came up the private road from Seymour-lane; and that the proposed new approach offered by the company would not be so convenient to him, and no other could be made without considerable injury to the property. Evidence was adduced by the company that a road might be made from the back of the house into the carriage drive leading into Festing-road.

*Marten*, Q.C. and *Chadwyck Healey* for the plaintiff.—By the 92nd section of the Lands Clauses Consolidation Act 1845, it is provided, "That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." The question is whether the portion of the paddock proposed to be taken by the defendant company is part of the "house," within the meaning of the 92nd section. If the paddock is necessary for the convenient occupation of the house, it will be part of the house within that section, and the defendant company must take the whole property. In *Coke upon Littleton* (Co. Litt. 5 a, 5 b) Lord Coke says that "by the grant of a messuage or house, *messuagium*, the orchard, garden, and curtilage doth pass, and so an acre or more may pass by the name of a house;" and at page 56 b he says that "the word house containeth the buildings, curtilage, orchard, and garden," and that "even six acres of land may be parcel of a house." In this case, the paddock is less than two roods. In many cases where gardens and small portions of land were required for the purposes of a com-

pany, the company were compelled to take the houses also:

*Grosvenor v. Hampstead Junction Railway Company*, 1 De G. & J. 446;  
*Cole v. West London and Crystal Palace Railway Company*, 1 L. T. Rep. N. S. 178; 27 Beav. 242;  
*Hawson v. The London and South-Western Railway Company*, 8 W. R. 467;  
*King v. Wycombe Railway Company*, 2 L. T. Rep. N. S. 107; 28 Beav. 104;  
*Salter v. Metropolitan District Railway Company*, L. Rep. 9 Eq. 432.

Where land is held for pleasure and is not necessary for the convenient occupation of a house, a company will not be required to take the whole:

*Ferguson v. London, Brighton, and South Coast Railway Company*, 8 L. T. Rep. N. S. 718; 3 De G. J. & S. 653.

But here the paddock and road are necessary to the convenient enjoyment of the house; and it will not be possible to obtain as convenient an approach from Seymour-lane.

*Hemming*, Q.C. and *Phipson Beale* for the company.—It is a mere question of a money compensation. If, by taking land under their powers, a railway company render a houseless enjoyable for residential purposes, and consequently diminish its letting value, they must pay for so doing. But we submit that there is no question here of taking "part of a house" within the meaning of the 92nd section. This paddock is in no sense a part of the plaintiff's house. Supposing Mr. Barnes were to execute a conveyance of Northumberland House, would this field pass? We submit not. Orchard, garden, and curtilage will sometimes pass under the word "house," even though they may contain an acre or more; but no case has gone so far as to say that a meadow and part of a back road form part of a house. This paddock and road are not within the curtilage at all, but on the contrary, are separated from it by a wall and gates. And further, another entrance, such as is proposed to be made by the defendants, would be just as convenient for the kind of traffic for which this back road is used. The case is governed by *Pulling v. The London, Chatham, and Dover Railway Company* (3 De G. J. & S. 661; 10 L. T. Rep. N. S. 741); otherwise "there would be no limit to the extent to which cases of this description might be carried," as was said in that case by Turner, L.J. The plaintiff here has a right either to damages by reason of severance, under the 63rd section of the Act; or to accommodation works.

*Marten*, Q.C. in reply.

BACON, V.C.—This case is, in itself, one of the utmost importance; because, when the Legislature entrusts a railway company with certain powers to be exercised, beneficially in some degree, for the public, but mainly for the profit and gain of the railway company; and when it gives a railway company the right to interfere with the lawful possession of the owner of property, all the provisions of the Act by which such powers and rights are conferred must be considered with the greatest strictness; for the Legislature, whatever it does, does not give away any man's property for the benefit and gain of another. To my mind, the clause in the Act is distinct, and the law is perfectly distinct and plain. The Legislature, having to frame in words an expression which



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would cover the subject included in the clause, adopted this word "house," but did not affect to give any description of what a "house" means because none was necessary. The passage which has been cited from Lord Coke is not new law in itself, although it is a very plain and distinct definition. The meaning of "house" is *domus*, residence, possession, what a man has when he talks about "having a house." The meaning of the word "house" in the Act of Parliament, therefore, is the meaning which Lord Coke ascribes to it in Coke upon Littleton, and it includes all that which may be called the *domus*. In this case, a man buys a piece of land, and he builds upon it a house. He incloses it partly with a wall and partly with an ornamental hedge, and he makes it one entire, complete thing. To this house, so constructed, the entrance for visitors is on one side, and the entrance and the exit for the use and enjoyment of the house is on the other side; and for that purpose he, the owner of the house, has made a part of his piece of land into a roadway, by which he carries away from his house all the refuse or all that needs to be carried away, and by which also he gets from the railway station coals, goods, and other necessities; and that roadway forms the entrance to the backyard of his house. Then the railway company say they have a right to take part of his land and road away from him. A notable suggestion is made that, by taking somebody else's land, the company could still give him an entrance to this road of his. The plaintiff declines that. He says: "My house is that which I have inclosed by a wall and a sufficient boundary, and I will not suffer you to destroy my enjoyment and my possession of my property by taking part of it away. If you have power to take the whole, take it; but if you take any part you must take the whole." The law is clearly and distinctly laid down in the cases that that have been referred to. In *Pulling v. The London, Chatham, and Dover Railway Company* (*ubi sup.*), which was relied on by the defendants, the facts differ from those in the case before me; but the observations of Turner, L.J., in dealing in his judgment with the law of the case, are entirely opposed to the defendants' contention, and appear to me to cover the present case. The Lord Justice says: "In my judgment the land taken by the respondents for their railway is not part of the appellant's house within the meaning of the 92nd section of the Lands Clauses Consolidation Act 1845. It would not, as I think, pass by a conveyance of the house." Can that be said here? The learned judge, in dealing with the facts proved before him, the comparatively recent acquisition of one field, the use that was made of it, and the other facts in that case, came to the conclusion that the parcel there in question would not pass by a conveyance of the house; but that cannot be said in this case. The conveyance of the house must, in my opinion, include the way leading from the back of the house. Then Turner, L.J. goes on to say: "The house and the field (the Shoulder of Mutton Field) had, it appears, up to that time been separately occupied, and the field is separately demised by the lease. It is even more clear that Banks' Field could not have been part of the house until the lease of it to the appellant was granted. What has been done since these fields were demised to the appellant is not, in my opinion, sufficient to have made them part

of the appellant's house. It is one thing whether they are part of the grounds connected with the house; another whether they are part of the house itself, and would pass by a conveyance of it. They are described in the appellant's evidence as pleasure grounds. For the reason which I assigned in *Fergusson v. London, Brighton, and South Coast Railway Company*, I doubt whether, even if they were entitled to that description, they could be considered as part of the appellant's house within the meaning of the 92nd section. But I think it is going too far to call these fields pleasure grounds. They seem, indeed, to be occasionally used for the purpose of pleasure for which, according to the evidence, they have been used; they can only have been so used at some seasons of the year." Here, for every day of the year, the plaintiff had and enjoyed the right of fetching his coals and other commodities from the railway station, and had used the road for the domestic purposes of his house. Then the Lord Justice says further: "If indeed it is to be held that these fields are part of the appellant's house, I do not see why every part of a large park would not be entitled to be considered as part of the mansion standing in the park, and pass by a conveyance of the mansion." In my opinion, the present case falls clearly within the 92nd section. The plaintiff can only be deprived of the possession of this house of his upon the terms prescribed by the Act; that is to say, if the railway company want any part of it, they must take the whole of it. There must therefore be an injunction in the terms of the notice of motion, with costs.

Solicitors for the plaintiff, *Sole, Turner, and Knight*, agents for *Blake and Laphorn*, Portsea.  
Solicitors for defendants, *Bircham and Co.*

Thursday, Oct. 30, 1884.

(Before KAY, J.)

BAYLY v. WENT. (a)

*Mortgagor and mortgagee—Appointment of receiver by mortgagee—Subsequent distress by mortgagor—Injunction—Conveyancing Act 1881 (44 & 45 Vict. c. 41), ss. 19 and 24.*

*A mortgagee appointed a receiver of the income of the mortgaged property under the Conveyancing Act 1881, and gave notice of the appointment to the mortgagor. The mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver. The mortgagor claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent.*

*Held, that an injunction must be granted to restrain the mortgagor from interfering with the receiver, or receiving the rent.*

*Semble, that even if the mortgagor had proved negligence on the part of the receiver, distraining for the rent was not the proper mode of protecting his interests.*

THE plaintiff, Arthur Octavius Bayly, was the owner of a freehold estate at Wimbledon, known as the Dundonald Estate; and the defendants, William Went and John Bowen, had built on the estate several houses and four shops, one of which, known as No. 47, Dundonald-road, was the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

subject of this action. To enable the defendants to erect the shops, the plaintiff from time to time advanced them sums of money amounting to 500*l.* per shop, and in the aggregate to 2000*l.* The instalments were from time to time secured by an equitable charge on the defendants' building agreement, and by their promissory notes. The shops having been certified by the plaintiff's surveyor to be complete, and the leases having been granted, the shops were, by an indenture dated the 27th Feb. 1884, mortgaged to the plaintiff by the defendants for the residue of the several terms of ninety-nine years for which the same were held.

The mortgage contained a covenant by the defendants for payment on the 27th March 1884 of the principal sum of 2000*l.*, with interest thereon at the rate of 7 per cent. per annum, and a further covenant, so long after that day as any principal money remained owing, for payment of interest thereon quarterly. It was declared by the indenture that all the powers and provisions relating to mortgages, contained in the Conveyancing and Law of Property Act 1881, should apply to the security thereby made, and that the power of sale conferred by that Act should be exercisable if default should be made in payment of the mortgage moneys, or part thereof, for one calendar month after notice requiring payment of the same had been served on the defendants, or had been left at any part of the mortgaged premises, or if some interest due under the indenture should have been in arrear and unpaid for thirty days after becoming due. The indenture also contained a provision for acceptance of interest at the rate of 6 per cent. per annum, should the same be paid within ten days after it became due.

On the same day that the defendants executed the mortgage, but subsequent to such execution, they signed an agreement with William Quartermaine "to grant or procure to be granted" a lease of the shop known as No. 47, Dundonald-road, from the 25th March 1884, for the term of seven years, determinable at the expiration of the first, second, or third year, at the lessee's option.

The defendants did not pay the principal money and interest on the 27th March 1884 pursuant to their covenant, nor had they since paid any interest, and the full amount of principal and interest remained therefore owing to the plaintiff.

The interest being in arrear, the plaintiff, on the 29th Aug. 1884, sent to William Quartermaine a notice requiring him to pay the plaintiff the rent then due and thereafter to accrue due in respect of the premises leased to him by the defendants.

On the 19th Sept. 1884 the plaintiff, pursuant to the provisions of the Conveyancing Act 1881, appointed Edward Saffery receiver of the income of all the premises comprised in the mortgage, and on the same day the plaintiff gave the defendants notice of such appointment by letter.

Notwithstanding such notice and appointment, the defendants, on the 16th Oct. 1884, distrained on certain effects upon the premises No. 47, Dundonald-road, and were in possession of the same under such distress for 25*l.*, being arrears of rent alleged to be due to them at Michaelmas 1884.

William Quartermaine had not paid any rent  
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to the plaintiff or the receiver pursuant to the notice.

The defendants having refused to relinquish possession, the plaintiff issued a writ for an injunction, and on the 17th Oct. 1884 an application was made to Chitty, J., *ex parte*, for an interim injunction. Chitty, J. made an order that, the plaintiff undertaking as to damages, and to pay 30*l.* into court, the defendants should be restrained from interfering with the receiver appointed by the plaintiff in the collection of the rents, from distraining for the rents, from continuing in possession under any distress already made by them, and from selling and disposing of any goods or things taken under any such distress.

A motion was now made before Kay, J., to continue the injunction.

*Graham Hastings*, Q.C. and *Frank Evans*, for the plaintiff, referred to Conveyancing Act 1881, ss. 19, 24. [They were stopped by the Court.]

*Maidlow* for the defendants.—Sect. 24 of the Conveyancing Act 1881 provides that the receiver shall be the agent of the mortgagor, and that the mortgagor shall be solely responsible for the receiver's acts or defaults. The mortgagee cannot, by appointing a receiver, restrain the mortgagor from interfering. The mortgagor is still entitled to receive the rents in the first place, and must hand them over to the receiver. If it were otherwise, when the receiver was negligent in collecting the rents, the mortgagor would have no remedy, and the receiver, being his agent, would still be liable for his default. [KAY, J.—The receiver is only made the agent of the mortgagor to save the mortgagee from being liable for his defaults.] The receiver is the party to complain, and he has not come before the court.

KAY, J.—Sect. 19 of the Conveyancing and Law of Property Act 1881 provides that a mortgagee, where the mortgage is made by deed, shall by virtue of the Act have certain powers "to the like extent as if they had been in terms conferred by the mortgage deed," including a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property. The mortgage money in this case did become due, and the mortgagee accordingly appointed a receiver under the Act. The effect of that is precisely the same as if it had been made under a power contained in the mortgage deed itself. The 24th section of the Act states under what circumstances the receiver is to be appointed, and provides that the receiver shall be deemed to be the agent of the mortgagor, and that the mortgagor shall be solely responsible for the receiver's acts or defaults. Now, if this mortgage deed had contained a power to appoint a receiver, and the appointment had been made under that power, could it have been said that the mortgagors had the right to interfere with the receiver? Even if the receiver had been guilty of default in neglecting to collect the rent, the mortgagors could not have interfered in this way, that is, by distraining for the rent. But no default on the part of the receiver has been suggested. The excuse of the mortgagors contradicts itself. I shall grant an injunction to restrain the receiver from being interfered with by the mortgagors, and to restrain the mortgagors from

receiving the rent. I shall also order the money paid in by the mortgagee to be paid out to him.

Solicitors for the plaintiff, *Combs, Bayly, and Henley*.

Solicitor for the defendants, *T. J. Angell*.

Oct. 27, 28, and 31, 1884.

(Before KAY, J.)

ASHBURY v. WATSON. (a)

*Company—Memorandum of association—Alteration of, in matters not required to be specified therein—Ratification—Acquiescence—Ultra vires—Preference and ordinary shareholders—Alteration of rights of—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 8, 12.*

By the memorandum of association of a limited company incorporated under the Companies Act 1862, the capital was defined, and it was declared that some of the shares were to be preference shares.

The memorandum then expressly provided that the preference shares should have right to a dividend of 7 per cent. in priority to the ordinary shares, and to one-fifth of the remainder of the net revenue after deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares, which were also to be entitled to four-fifths of the remainder of the net revenue.

In 1872 special resolutions were passed altering this appropriation of the net revenue as between the preference and ordinary shareholders, to the detriment of the ordinary shareholders.

These resolutions were acted upon, and dividends were from time to time paid in accordance with them; and no question as to their validity was raised by any of the shareholders.

In 1883 special resolutions were passed, whereby the original mode of appropriation of the revenue, as provided by the memorandum of association, was substantially restored.

The question then arose as to how the revenue ought to be dealt with as between the preference and ordinary shareholders, and whether the resolutions of 1872, or the subsequent resolutions of 1883, or the memorandum of association of the company, were to prevail.

Held, that the company could not, even with the assent of all the shareholders, alter the appropriation of revenue prescribed by its memorandum; that the resolutions of 1872 were therefore wholly ultra vires and invalid, and incapable of being ratified; and that the revenue must in future be applied in the manner originally prescribed by the memorandum.

JAMES ASHBURY was the holder of 1270 fully paid-up unredeemed preference shares of 20*l.* each in the Smyrna and Cassaba Railway Company, Limited, and he acquired such shares prior to 1867. He commenced an action on behalf of himself and all other holders of preference shares in the company (except those who were defendants to the action) against the directors and the company, and by the writ, issued on the 25th July 1883, he claimed a declaration that certain special resolutions passed by the company in 1883 were ultra vires, and not binding on him or any other

dissentient shareholder; also an injunction to restrain the defendants from applying any of the profits or revenue of the company otherwise than in accordance with certain special resolutions passed by the company in 1872.

It was subsequently agreed that a special case should be stated for the opinion of the court, embracing all the facts, pursuant to the Rules of Court 1883, Order XXXIV.

The company was incorporated in 1864 under the Companies Act 1862, for the purpose of making, managing, and working a railway from Smyrna to Cassaba, in the empire of Turkey, and for other objects specified in its memorandum of association.

By such memorandum of association the capital of the company was defined as follows:

The capital of the company is 800,000*l.*, divided into 40,000 shares of 20*l.* each. A portion of this capital not exceeding 14,000 shares shall have the right of receiving a dividend by preference and priority over the other 26,000 shares.

The shares of the first description are called preference shares, and those of the second, ordinary shares.

The preference shares shall have right: 1. To a dividend of 7 per cent. per annum upon the amount paid up by preference and priority over the ordinary shares. 2. To one-fifth of the remainder of the net revenue, after the deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares.

The ordinary shares shall have right: 1. To the rest of the dividend, whatever it may be, up to 7 per cent. per annum upon the amount paid up after the payment of the said dividend of 7 per cent. to the preference shares. 2. To four-fifths of the remainder of the net revenue, after deduction of a sum sufficient to pay the above-mentioned dividends to the preference and ordinary shares.

It is, however, understood and agreed that, if in any year or years the dividend on the ordinary shares shall fall below 7 per cent., and that in subsequent years means shall exist of dividing larger profits than the above-mentioned first dividend of 7 per cent. per annum, the surplus profits shall be, first of all, applied to make up the deficiency borne by the ordinary shares in preceding years, and the remainder shall then be divided as expressed in the preceding paragraph.

The articles of association of the company, as originally framed, contained (*inter alia*) the following clauses:

Art. 82. The net revenue shall be subject (reference being had to the conditions of the articles of association) to the following priority of deductions and preferential payments:

1. To the deduction of a sum equal to the ninety-fifth part of the capital paid up for the redemption of shares in accordance with art. 84.

2. To the payment of interest on loans, if any are contracted by the company.

3. To the guarantee of 5 per cent. upon the paid-up capital.

4. To a division of 2 per cent. in addition to the 5 per cent. mentioned in paragraph 3, in order that the ordinary shares may also have their 7 per cent. previous to any further division of profits.

5. To the repayment of any advances made by the State to the company in conformity with the conditions of the Government guarantee. The sum remaining upon these deductions shall constitute the surplus of the net annual receipts.

6. From this surplus a sum of 10 per cent. at least shall be set aside as a "reserve fund" until such fund shall amount in the opinion of the board to a sum sufficient for the purpose, when such deduction shall cease; but in case the reserved fund shall ever be reduced below that amount, the same deduction shall recommence and be continued until the reserved fund shall again attain a proper amount in the opinion of the board.

7. The remainder or residue of the surplus shall be divided in the following proportions, viz., nine-tenths in favour of redeemed and unredeemed shares, and one-

tenth in favour of the board of directors as a further remuneration for their services.

Art. 83. In the event of the net revenue not being sufficient after payment of all expenses of maintenance and working of the railway to provide the sum equal to one ninety-fifth part of the paid-up capital in conformity with art. 84, such a sum as may be necessary to make up the same one ninety-fifth shall be taken from the reserved fund, and in case there shall be no reserved fund, or the reserved fund shall be insufficient, then the amount required shall be taken from the first disposable receipts in future years in preference and priority of any distribution of dividends to the shareholders.

Art. 84. A sum equivalent to one ninety-fifth part of the paid-up capital shall be annually carried to the debit of revenue, and applied in the redemption of principal sums paid up on so many shares as the same one ninety-fifth part will redeem.

Art. 85. The shares to be redeemed shall be determined by lot at the annual general meeting in the month of April, in conformity with such regulations as shall be determined by the board, and the numbers of the shares drawn shall be published in the newspapers specified in art. 12.

Shortly after its incorporation, the company acquired from the Turkish Government a concession for the construction of the railway, the enjoyment thereof when constructed for a term of ninety-nine years, together with and for the various rights and advantages mentioned in the concession.

The railway was subsequently constructed, and was being worked by the company.

In 1872 a convention was made between the company and the Turkish Government, whereby the original concession was modified, and an extension of the railway from Cassaba to Alaschehr, which had been built and equipped by the Government, was added to the company's railway, and such convention contained provisions, by virtue of which the Turkish Government would, at the expiration of sixteen years, become absolutely entitled to the company's said railway.

From the incorporation of the company until 1872 the profits of the company were applied in substantial accordance with the provisions in its articles of association, and none of the members raised any objection to such application.

On the 26th Nov. 1872 the following special resolutions were passed:

Art. 82. Subject to the condition in the convention referring to the excess of net revenue and the necessary provision therefor, the net revenue shall be appropriated according to the following priorities and payments (that is to say):

1. To interest on debentures and loans (if any).
2. To a half-yearly dividend of  $8\frac{1}{2}$  per cent. on unredeemed preference shares.
3. To a half-yearly dividend of  $1\frac{1}{2}$  per cent. on unredeemed ordinary shares.
4. Subsequent to the 31st Dec. 1871, and until all the debentures and preference shares shall have been redeemed, all the remaining net revenue, after priorities 1, 2, and 3, shall be applied in the redemption of the debentures and preference shares in the order, mode, and proportion which the board of directors may from time to time, in their discretion, consider most advantageous for the company, and may be able to arrange.
5. After such redemption of the debentures and preference shares and priority 3 to a half-yearly redemption fund, equal to the sum which 398,000*l.* divided, if the extension to Alaschehr be not then opened, by double the number of the then unexpired years of the term of the original concession, and if such extension be then opened, by the number of the thirty-two half-yearly periods, which may then remain from the opening to Alaschehr for the redemption of the ordinary shares.
6. If the net revenue for any half-year shall not be sufficient after meeting priority 3 to provide the full

redemption fund directed by priority 5, the deficiency shall be made good out of the net revenue for the next half-year, or next succeeding half-year, after meeting in such half-year or half-years priority 3.

7. To an additional half-yearly dividend on unredeemed ordinary shares, up to but not exceeding  $2\frac{1}{2}$  per cent., so as with the aforesaid  $1\frac{1}{2}$  per cent. to make  $3\frac{1}{2}$  per cent. for the current half-year on such ordinary shares.

8. To the payment rateably on unredeemed ordinary shares and on certificates of redeemed ordinary shares, of the difference between a 7 per cent. per annum dividend thereon, and the dividends actually paid thereon during the undermentioned years, namely, as respects unredeemed ordinary shares all former years, and as respects certificates of redeemed ordinary shares the years prior to the redemption of the shares.

9. To the payment of 10 per cent. on the remaining sum (if any), as a further remuneration to the directors.

10. The balance of the remaining sum shall constitute "the surplus of the net revenue," and shall be divided into five equal parts, whereof one part shall be divided rateably amongst the holders of certificates of redeemed preference shares, and the remaining four parts rateably amongst the holders of unredeemed ordinary shares, and of certificates of redeemed ordinary shares.

Until 1882 no member raised any objections to the resolutions of 1872, and after the passing thereof the net revenue was distributed among the shareholders in accordance with the priorities numbered 1, 2, and 3 in art. 82, as altered by the resolutions of 1872, and the remainder applied in redemption of the debentures and preference shares according to the same article. The company prepared certificates (called "surplus certificates") to represent the redeemed shares, certifying the rights of the shareholders to the benefit of art. 82 in respect of the redeemed shares, but such surplus certificates were never in fact issued.

For some time prior to the passing of the resolutions of 1872 the net revenue of the company had been insufficient to enable it to provide and set aside a sum equal to one ninety-fifth part of the paid-up capital, in conformity with the articles of association as originally framed.

On the 20th June 1883 the then directors, in pursuance of a requisition from shareholders, duly served notices on the members convening a general meeting for the 9th July 1883, for the purpose of considering and passing the following resolution:

The article numbered 82 in the regulations of the company, as existing under the special resolutions passed on the 30th day of October 1872, and confirmed on the 26th day of November 1872, shall, so far (if at all) as it is binding on the company, cease to be deemed a regulation of the company, and the net profits of the company available for dividends (having regard to the conditions of the convention and to the rights of the debenture-holders) shall, as from the 1st day of January 1883, be divided in accordance with the memorandum of association of the company; and in art. 84 (redemption of capital) the words "these certificates will give the right to participate in the surplus in accordance with art. 82" shall be struck out.

On the 4th July 1883 the directors caused a circular letter, signed by the secretary of the company, to be sent to the members in the following terms:

With reference to the company's circular of the 20th ult., I am desired by the directors, in reply to the request for further information by some of the shareholders, to inform you that the effect of the proposed resolutions, which will be submitted to the shareholders at the extraordinary general meeting of the 9th inst., will be that the net profits of the company, after due provision for the debenture debt, will be, as and from the 1st Jan. 1883, divided as follows: First, 7 per cent. to the preference shareholders; secondly, 7 per cent. to the ordinary shareholders; thirdly, the balance in the proportion of one-

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fifth to the preference and four-fifths to the ordinary shareholders. This division being in accordance with the memorandum of association, any priority of redemption in favour of the preference shares out of the net profits, after payment of the dividend on the existing share capital of the company, purporting to have been given by art. 82, will consequently cease.

The general meeting was held on the 9th July 1883, and at that meeting the proposed resolution was passed by a large majority, and the chairman of the meeting declared that the resolution was carried.

The members voting for the resolution were holders of 16,863 ordinary shares and 3192 preference shares. Those voting against the resolution were holders of 50 ordinary shares and 314 preference shares.

Each share in the company's capital conferred on the holder one vote.

Prior to the meeting a letter, signed by the plaintiff's solicitor, and addressed by him to the secretary and directors of the company, was delivered to the chairman of the meeting, and was as follows:

As solicitor for and on behalf of Mr. James Ashbury, a shareholder in the Smyrna and Cassaba Railway Company Limited, I beg to give you notice that Mr. Ashbury has been advised that the proposed resolution, notice whereof, dated the 20th June 1883, has been given by you, is *ultra vires* of the company, and that, on Mr. Ashbury's behalf, I protest against the passing thereof, and require the company and the directors not to act upon it, and warn them if they do so act Mr. Ashbury will hold them responsible for any damage, and for the costs of any proceedings he may think fit to take.

The directors duly convened another general meeting to confirm the resolution, and at such meeting, which was held on the 25th July 1883, a confirmatory resolution was unanimously passed, and at such meeting a further letter or protest, signed by the plaintiff's solicitor, and addressed to the secretary and directors of the company, similar in terms to the letter above set forth, was handed to the chairman and read thereat.

Of the shares of the company 7500 had been issued as preference shares and 20,708 as ordinary shares, and upwards of 1250 of the preference shares, and upwards of 1000 of the ordinary shares, had been redeemed. The share capital of the company therefore consisted of 6250 preference shares and 19,687 ordinary shares.

The application of profits according to the new resolution would be less beneficial to the holders of preference shares than the application of profits according to the resolutions of 1872, and, in particular, if the profits were applied in accordance with the new resolution, the holders of preference shares would not get the benefit of the provisions for the redemption thereof contained in the resolutions of 1872.

The plaintiff's contention was, that the resolutions of 1872, in so far as they purported to alter the mode in which the net revenue of the company was to be appropriated, were *ultra vires* of the company, and liable to be impeached by any dissentient member; but that every member acquiesced in and assented to such resolutions, and ever since the passing thereof had acted on such resolutions and treated the same as binding and operative, and dividends had been paid on the preference shares and ordinary shares, and preference shares had been redeemed in accordance with such resolutions.

The questions for the opinion of the court were:

1. Whether the net revenue of the company, available for dividend, ought in future to be applied in the manner originally prescribed by the memorandum of association of the company, either (a) by reason of any illegality or invalidity in the terms of the original articles of association, or the resolutions of 1872, prescribing a departure from such mode of application, or (b) by reason of the new resolutions.

2. If not, whether such net revenue ought to be applied in the manner prescribed by the resolutions of 1872, or how, and in what other manner, the same ought to be applied.

3. Whether the surplus certificates ought to be issued in respect of the ordinary and preference shares which had been redeemed or acquired by the company, or what ought to be done in respect thereof.

4. How the costs of the action and special case ought to be borne.

The special case now came on for argument.

Robinson, Q.C. (*F. Beaufort Palmer* with him) for the plaintiff.—The resolutions of 1872 were *ultra vires* of the company, and not valid and binding. Still they were not so *ultra vires* as to be incapable of being confirmed and ratified by acquiescence, and they were so confirmed by acquiescence of all parties interested therein extending over a period of eleven years. The resolutions of 1883 were equally invalid, and not having been so ratified, they are inoperative. The provisions referred to are not of the kind mentioned in sect. 8 of the Companies Act 1862, and therefore need not have been put into the company's memorandum of association at all. Although it is not competent for a company to vary its memorandum of association in respect of those matters which are required to be specified therein, it is competent, with the consent of all parties, to vary it in respect of other matters not by law obligatory:

*Re New Buxton Lime Company; Duke's case*, 34

L. T. Rep. N. S. 713; 1 Ch. Div. 620;

*Re Albion Assurance Company; Windstone's case*, 40

L. T. Rep. N. S. 838; 12 Ch. Div. 239.

He referred also to

*Guinness v. Land Corporation of Ireland*, 47 L. T.

Rep. N. S. 517, 525; 32 Ch. Div. 349, 364, 376;

*Spackman v. Evans*, 19 L. T. Rep. N. S. 151; L. Rep.

3 E. & I. App. 171;

*Lindley on Partnership*, 3rd edit. p. 274;

*The Phosphate of Lime Company Limited v. Green*,

25 L. T. Rep. N. S. 636; L. Rep. 7 C. P. 43;

*Hutton v. Scarborough Cliff Hotel Company Limited*,

12 L. T. Rep. N. S. 228, 229; 13 Ib. 57; 2 Dr. &

Sm. 514, 521; 4 De G. J. & Sm. 672.

*Horace Davey, Q.C. and Phipson Beale* for the defendants.—It is entirely beyond the powers of a company to vary or alter in any way its constitution as defined by its memorandum of association:

*Ashbury Railway Carriage and Iron Company v.*

*Riches*, 33 L. T. Rep. N. S. 450; L. Rep. 7 E. & I.

App. 653.

The authorities which have been cited in support of the contrary proposition were mere *dicta* and not decisions. The result is, that the resolutions of 1872 were wholly *ultra vires* of the company and invalid, and therefore incapable of being confirmed, and the application of the revenue must be in accordance with the resolutions of 1883 and the company's memorandum of association. They referred also to

*Re La Mancha Irrigation and Land Company*; Lord Claud Hamilton's case, 28 L. T. Rep. N. S. 652; L. Rep. 8 Ch. App. 548; *Hops v. International Financial Society*, 35 L. T. Rep. N. S. 623, 924; 4 Ch. Div. 327.

Robinson, in reply, referred to

*Harrison v. The Mexican Railway Company*, 32 L. T. Rep. N. S. 82; L. Rep. 19 Eq. 358.

*Ashton Vale Iron Company v. Abbot*, W. N. 1876, p. 119.

*Cur. adv. vult.*

Oct. 31, 1884.—The following written judgment was delivered by

KAY, J.—I reserved my judgment in this case because some of the questions argued seemed to me to be of considerable general importance. The short facts are these: The defendant company is a limited joint-stock company formed under the Act of 1862. By the memorandum of association it was provided that the capital should be 800,000*l.*, divided into 40,000 shares of 20*l.* each, of which a portion, not exceeding 14,000 shares, were to be preference shares; and the memorandum expressly provided that those shares should have right to a dividend of 7 per cent. in priority to the ordinary shares, and to one-fifth of the remainder of the net revenue after deduction of a sum sufficient to pay the like dividend of 7 per cent. on the ordinary shares, which were to be entitled to a secondary dividend of 7 per cent., and then to four-fifths of the remainder of the net revenue. In Nov. 1872 special resolutions were passed altering this appropriation of the net revenue as between the preference and ordinary shareholders. These resolutions were acted upon until July 1883, when by other special resolutions the original appropriation of the revenue, as provided by the memorandum, was restored. The question is, how that revenue is now to be dealt with as between the preference and ordinary shareholders. The plaintiff contends that, notwithstanding the resolution of 1883, it should be disposed of according to the resolutions of 1872, and the first consideration is whether those resolutions were valid. The peculiarity of the plaintiff's case is, that he agrees with the defendants that the resolutions were not valid, and this is necessary to his argument; for, if they were valid, then the resolutions of 1883, which restored the original state of things, were also valid. But the plaintiff insists that the resolutions of 1872, although invalid, were not so *ultra vires* that they could not be ratified, and that they have, in fact, been ratified by the express or implied assent of all the shareholders, and that the resolutions of 1883 were equally invalid, and not having been so ratified are inoperative. In the first place, I have to determine whether the resolutions of 1872 could be so confirmed. If they were, like the transaction in *Ashbury Railway Carriage Company v. Riche* (33 L. T. Rep. N. S. 450; L. Rep. 7 E. & I. App. 653), entirely *ultra vires* of the company in general meeting, then it is admitted, as was decided in that case, that if all the shareholders were *sui juris*, and expressly agreed to confirm them, they could not do so. But it is said that this was not the case; although they purported to alter certain provisions in the memorandum of association, yet these were provisions not mentioned in the 8th section of the Act of 1862, and which therefore need not have been put into the memorandum, and accordingly it is argued that the alteration of them is not *ultra*

*vires* in that sense. But, as I understand the decision of the House of Lords, the memorandum of association is the charter of the company, and any provisions therein, which are part of the essential constitution of the company, cannot be altered in any manner, and, unless I am bound by equal authority to hold otherwise, it seems to me that these provisions in this memorandum come within that rule. The cases relied on in support of the contrary proposition are, first, *Duke's case* (34 L. T. Rep. N. S. 713; 1 Ch. Div. 620), which decided that, where a person had signed the memorandum for fifty preference shares, he might satisfy the obligation he incurred to the company by taking twenty-five preference shares and twenty-five ordinary shares, because it was not necessary that he should describe in the memorandum the kind of shares he thereby agreed to take, but only the number, and therefore as to the kind of shares the memorandum was not irrevocable. Obviously, that has nothing to do with the constitution of the company, but only with the contract with that particular shareholder. Another case cited was *Winstone's case* (40 L. T. Rep. N. S. 838; 12 Ch. Div. 239), where the memorandum of an unlimited assurance company provided that the capital should be 50,000*l.*, divisible into 5000 shares of 10*l.* each. The articles provided that the company should consist of two classes of members, shareholders and assurance members, and it was argued that this was inconsistent with the memorandum; but the learned judge held that this was not so, because the memorandum was "totally silent as to who the members were to be." It is true that he went on to say that he was not convinced that everything in the memorandum was immutable where it embodied particulars not required by the statute, and he referred to the language of the judgment in *Duke's case* (*ubi sup.*), but he neither decided nor said that, if the memorandum contained provisions as to the constitution of the company which the Act of Parliament did not require to be put there, such provisions could afterwards be altered. In *Hutton v. The Scarborough Hotel Company Limited* (12 L. T. Rep. N. S. 228, 289; 13 Ib. 57; 2 Dr. & Sm. 514; 4 De G. J. & S. 672), where the memorandum declared the share capital to be 120,000*l.*, divided into 12,000 shares of 10*l.* each, it was held that the company could not, by a special resolution, authorise the issue of the unallotted portion of the capital with a preference dividend. The Lord Chancellor rested his judgment mainly on the ground that this would, in effect, be an alteration of the memorandum, which must be taken to mean that the shareholders were to have equal rights. Does it not follow from this decision that, if the memorandum expressly defines the rights of the shareholders in respect of dividends, that is a thing which the company have no power to alter? I do not find any decision or dictum which, rightly understood, conflicts with this view. This would be sufficient to dispose of the matter; but, even if this part of the plaintiff's argument could be accepted, I think his case fails for other reasons. It is obvious that, when shares have been issued on the faith of a memorandum like this, no resolution of the company, special or otherwise, can alter the contract between the company and all the shareholders thereof. Such a resolution does not amount to a new contract by every share

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holder, even if it were possible for a shareholder, by any contract, to alter the nature of his shares as against every subsequent holder of them. It may be that the receipt of dividends on the footing of the resolutions of 1872 would prevent any shareholder, who had received such dividends, from asserting a claim against the company for any larger payment during the period of such receipt. But how can that amount to the ratification of an implied contract that the dividends on those shares shall always be paid on the same footing? First of all, how is such contract to be implied? Those who passed the resolutions of 1872 must be taken to have known that they could at any time be altered by other special resolutions. Therefore the implied contract could not be larger than this, namely, that dividends should be accepted on the shares upon the footing of the resolutions of 1872 until altered by some further resolution. Upon the whole I am of opinion that the plaintiff's contention entirely fails, and the questions must be answered by saying that the net revenue of the company available for dividend ought, in future, to be applied in the manner originally prescribed by the memorandum of association; that the surplus certificates ought not to be issued; and that the costs of this action and special case ought to be borne by the funds of the company.

Solicitor for the plaintiff, *A. T. Hewitt.*

Solicitors for the defendants, *Bircham and Co.*

Thursday, Oct. 31, 1884.

(Before KAY, J.)

CANN v. CANN. (a)

*Trustees—Breach of trust—Trust fund—Deposit at bank—Delay—Failure of bank—Liability of trustees.*

*A will appointing trustees only authorised them to invest in parliamentary stocks or funds, or in freehold, copyhold, or leasehold hereditaments.*

*The will contained a provision that no trustee should be answerable for any banker, broker, or other person in whose hands any moneys might be deposited for safe custody or otherwise.*

*The trustees left the sum of 500l. on deposit at a bank, by way of interim investment, whilst they looked for a mortgage, for fourteen months, when the bank failed. Upon the question whether the trustees were liable for the loss thereby occasioned:*

*Held, that fourteen months was too long for the trustees to leave trust money on deposit at a bank; that if after six months they could not get a mortgage they ought to have invested the money in consols; that, from the moment they left it too long on deposit, they became responsible for the consequences of their default, and were therefore liable for the sum lost to the trust estate.*

By his will, dated the 12th April 1854, Samuel Cann devised all his real estate to the trustees therein named upon trust (*inter alia*) to accumulate the surplus rents and profits therein mentioned during such time as his grandson should be under the age of twenty-five years, and during the minority of any children of such grandson as therein mentioned, and to invest the same and the accruing dividends, interest, and annual produce in the parliamentary stocks or funds of

Great Britain, or at interest upon Government or real securities in England or Wales, and, at the end of the period or periods of accumulation therein mentioned, to convert the accumulated fund and apply the same in the same manner as therein declared and directed of and concerning the moneys to arise from the testator's personal estate thereafter bequeathed; and the testator bequeathed the residue of his personal estate to his trustees upon trust to call in, collect, sell, and convert the same, and, after making certain payments thereout, to invest the ultimate surplus, as opportunity might offer, in the purchase of freehold or copyhold hereditaments situate in England or Wales, or in leasehold hereditaments as therein mentioned, and until a proper purchase should be found to invest the same in or upon some of the stocks, funds, or securities thereinbefore mentioned, the dividends of which should be applied in the same manner as the rents of the hereditaments to be purchased as therein aforesaid.

The will contained the usual power to vary investments, and it was thereby also declared that no trustee should be answerable or accountable for the acts, receipts, neglects, or defaults of the other of them, or for any banker, broker, or other person with whom or in whose hands any moneys should or might be lodged or deposited for safe custody, or otherwise, in the execution of the trusts thereinbefore mentioned, or for the deficiency or insufficiency of any security on which any moneys should or might, in pursuance of the will, be placed out or invested, or for any other involuntary misfortune, loss, or damage whatsoever.

The trust estate produced an annual income of about 700l.

In May 1869 a sum of 500l. belonging to the trust estate (which had been previously invested on mortgage and had been paid off) was deposited by the trustees at Harvey and Hudson's bank at Norwich, in order that they might look for another mortgage.

The money remained on deposit until the 16th July 1870, when the bank failed.

The evidence showed that the defendants had been peremptorily requested on former occasions not to keep such large balances at the bank as they were in the habit of doing.

A suit for the administration of the testator's estate was instituted by the widow of the testator's grandson, as next friend of her three infant daughters, against the surviving trustees and executors of the will.

By the decree made in the suit, dated the 5th March 1874, the Court directed the usual accounts and inquiries to be taken and made, including an inquiry (in case it should appear in taking the accounts that any unauthorised investments or dealings with the trust estate had taken place, or that any funds had not been invested when the same should have been invested) under what circumstances the same investments or dealings were made, or there was such omission to invest, and whether any and what loss had been sustained thereby, and, if so, how and when, and by whose default, and under what circumstances.

By the chief clerk's certificate it was certified, amongst other things, that a sum had been lost to the trust estate through the failure of Harvey and Hudson's bank, and that he had disallowed

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.



the trustees a proportion of what they had left on deposit there, viz., 138*l.* 11*s.* 4*d.*

The defendants took out a summons asking that the chief clerk's certificate might be varied so that they might be allowed the sum of 138*l.* 11*s.* 4*d.*

The summons was adjourned into court, and now came on to be heard.

*Graham Hastings*, Q.C. and *E. Beaumont* for the applicants.

*W. Pearson*, Q.C. and *Methold* for the respondents.

KAY, J.—It is extremely difficult in these cases to know where to draw the line. Here there is an estate producing 700*l.* a year. A mortgage of 500*l.* is paid off, and the trustees pay that money into a bank for the purpose of getting another mortgage. The question is, whether it was within their powers, as trustees, to leave that sum in the bank for fourteen months. It seems to me that that was too long. If after six months they could not get a mortgage they ought to have invested the money in consols. Without attempting to draw a hard and fast line—for I consider that each of these cases must be judged on its merits—I say that leaving that money in the bank for fourteen months was leaving it there too long. The moment they began to leave the money there too long they became responsible for all the consequences of their default; and they are therefore liable for the 138*l.* 11*s.* 4*d.* which has been lost. I must dismiss the summons with costs.

Solicitors: *G. F. Hudson, Matthews, and Co.*; *Remnant, Penley, and Grubbe*.

May 19, 20, and June 12, 1884.

(Before KAY, J.)

BOXALL v. BOXALL. (a)

*Grant of administration—Will not appointing executors—Suppression of will—Revocation of grant—Sale of leaseholds before revocation—Title of vendor—Married woman—Equity to a settlement—Settlement of entire fund.*

*A testatrix, who died in 1874, bequeathed to her daughter B. certain leasehold property held for the residue of a long term of years, she paying the debts of the testatrix. The will did not appoint any executors.*

*B. was a married woman, but in 1876 her husband deserted her, leaving with her his three children. From the time he left her he contributed nothing towards the support of her or of his children, except by allowing her to receive the rents of the leasehold property, which were of small amount.*

*In 1879 B., upon an affidavit stating that she was a widow and that her mother had died intestate, obtained a grant of administration.*

*She then mortgaged the leasehold property partly to pay a debt of the testatrix; and afterwards she agreed to sell it to P., who paid a portion of the purchase money in discharge of the mortgage, and the rest to B. by instalments, for her maintenance, except a small amount.*

*P. purchased without any knowledge of the will, or that B. had a husband living.*

*Proceedings were subsequently taken by B.'s husband*

*to recall the grant of administration, and in 1883 the letters of administration were revoked, and new letters, with the will annexed, were granted to B.*

*The questions were, whether the sale of the leasehold property could be supported, and whether B.'s husband had any right to recover, against his wife or P., the purchaser, any part of the purchase money.*

*Held, that a grant of administration, obtained by suppressing a will which contained no appointment of executors, could not be treated as utterly and ab initio void, and that the sale by B. under the first administration was a valid transaction.*

*Abram v. Cunningham* (2 Lev. 182) distinguished.

*Held, also, that B. was entitled, under her equity to a settlement, to have the whole proceeds of the leasehold property secured to herself, and, as the greater part of such proceeds had been expended in maintaining herself and children, the action must be dismissed with costs.*

THE facts of the case sufficiently appear from the judgment.

*Graham Hastings*, Q.C. and *Beddall* for the plaintiff.

*T. Ribton* for the defendant Plumridge.—As far as Plumridge was concerned the first grant of administration was valid. The will did not appoint any executors, and until an administrator has been appointed the property is, under the Probate Act (20 & 21 Vict. c. 77), vested in the judge of the Probate Court: (*Williams on Executors*, 8th edit. pp. 409, 410.) There is something on which the administration may operate, although it is obtained by fraud:

*Abram v. Cunningham*, 2 Lev. 182.

When a grant of administration has to be obtained, and it is given to the wrong person, the grant is voidable. It is good until set aside: (*Bac. Abr. Executors & Administrators*.) The Probate Court is, by sect. 16 of the Judicature Act 1873, made part of the High Court of Justice, and the letters of administration here are therefore an order within sect. 70 of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41). That section is in my favour. It makes no difference that this is a non-contentious case:

*Re Hall-Dare's Contract*, 46 L. T. Rep. N. S. 755; 21 Ch. Div. 41.

[KAY, J.—I doubt whether the letters of administration are an order.] The previous direction would be an order, even if the letters of administration are not.

The defendant Sampson, to whom Mrs. Boxall had mortgaged the property in question, appeared in person.

The defendant Mrs. Boxall was not represented by counsel.

*Hastings*, in reply, referred to

*Williams on Executors*, 8th edit. p. 595;

*Es parte Bradshaw*, 2 De G. M. & G. 900.

*Cur. adv. vult.*

June 12, 1884.—The following written judgment was delivered by

KAY, J.—This action is brought by Edward Boxall against his wife, and against a person who has agreed to purchase certain leasehold property from her, to restrain such sale and to recover the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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leasehold property and the mesne rents. The last part of the claim has been abandoned at the bar since the evidence was put in. The material facts are these: The property in question consists of a leasehold house, held for the residue of a long term of years. It was bequeathed with another, the lease of which has since been forfeited, by the mother of Mrs. Boxall, who died in 1874, to her absolutely, she paying the debts of the executrix. This will did not appoint any executors, and for some time no letters of administration were obtained, but on the 17th Nov. 1879 Mrs. Boxall, upon an affidavit stating that she was a widow, and that her mother had died intestate, obtained a grant of administration. She then seems to have mortgaged the property, partly to pay a debt of the testatrix, and afterwards she agreed to sell it to the defendant Plumridge for 250*l.*, out of which he states he paid 115*l.* in discharge of the mortgage, and he has paid the rest to Mrs. Boxall by instalments from time to time for her maintenance, except a certain small amount which still remains due. I am satisfied that Plumridge purchased without any knowledge of the will, or that Mrs. Boxall had a husband living. In the year 1876, before all this happened, the plaintiff deserted his wife, leaving with her his three children, then about twelve, eleven, and eight years of age. He says that she was drunken, and that she and her children and the house were in a filthy condition. She denies this, and alleges that he left her to cohabit with another woman, which allegation he in turn denies. I have no doubt that it is a clear case of desertion by him, and without any excuse which the law could recognise. From the time he left her he has not contributed anything towards the support of her or of his children, except by allowing her to receive the rents of this leasehold property, which were of small amount. After the commencement of this action proceedings were taken by him to recall the grant of administration, and by an order of the Court of Probate of the 1st May 1883 the letters of administration were revoked and cancelled, and new letters of administration, with the will annexed, were granted to Mrs. Boxall. The first question is, whether the sale of the leaseholds can be supported. In *Abram v. Cunningham* (2 Lev. 182) it was decided that, where administration was granted on concealment of a will which appointed executors, the grant was void from its commencement, and all acts performed by the administrator in that character were equally void, and could not be made good, though the executors should afterwards appear and renounce. A distinction, however, exists between that case and this, because in this case the will did not appoint executors. The report, like many reports of that time, has a short note of the judgment, not containing any reasons. But the argument is given at some length, and in it reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this I gather was the ground of the decision. No stress seems to have been laid upon the fraud committed in concealing the will, and indeed, when the question was whether a third person should suffer who had acquired the property in good faith from an administrator apparently duly constituted, 'it would not be reasonable to visit him with the

consequences of a concealment to which he was no party. In *Packman's case* (6 Rep. 18) administration was granted to a stranger, and was afterwards revoked, and it was held that the revocation did not affect acts done by the administrator in the meantime. If the grant had been reversed by a Court of Appeal it should be treated as void *ab initio*, but a revocation takes effect only from the time of the recall, and it was there said that, "Forasmuch as the first administrator had the absolute property of the goods in him, without question he might give them to whom he pleased. And although the letters of administration be afterwards countermanded and revoked, yet that cannot defeat the gift. But if the gift be by covin, it shall be void by the statute of 13 Eliz. against a creditor, but it remains good against the second administrator." The same point was decided in *Woolley v. Clark* (5 B. & Ald. 744). I have not been able to find any case conflicting with these, nor any authority for the proposition that a grant of administration, obtained by suppressing a will which contained no appointment of executors, could be treated as utterly and *ab initio* void. I am therefore of opinion that I cannot treat the sale by Mrs. Boxall, under the first administration, as void on that account. No other reason has been suggested for interfering with it, and I must therefore hold it to be a valid transaction. There remains the question whether the husband has any right to recover, against his wife or the purchaser, any part of the purchase money. It is the case of a man who, in the most heartless manner, has deserted his wife and children, and for eight years has not been near them. This man now comes to a court of equity to ask assistance to recover against his wife this small leasehold property. She, on the other hand, claims her equity to a settlement, and I have allowed whatever amendment of her defence is requisite to raise the claim. In such cases the court has not unfrequently, under the wife's equity, secured to her the capital as well as the income of a small property. In the case of *Re Broster*, on the 11th Jan. 1859, Wood, V.C. ordered the dividends on a sum of about 400*l.* in court to be paid to a wife, who had been deserted, for her separate use during her life, and gave her liberty to apply as to a settlement of the capital, or otherwise as she might be advised. A similar order was made by the late Master of the Rolls in the case of *Re Craddock*, 6th Nov. 1875. I have been furnished by Mr. King, the registrar, with a copy of the order, which, after making a settlement upon the married woman for life, with remainder to her children, gave her liberty to apply to the judge at chambers for transfer of all or any of the capital to herself by way of revocation of such settlement. I shall follow these precedents in this case, and being of opinion that the wife was entitled to have the whole proceeds of these leaseholds secured to herself, and seeing that the greater part of such proceeds—all, indeed, except a trifling sum—has been expended in maintaining herself and children, I dismiss this action with costs. The lease must be handed back to the defendant Sampson. I had also before me, at the trial, a summons for security for costs. I consider that the plaintiff's conduct in respect of the addresses he gave was such as entirely to justify that application, and the costs of it must be costs in the action.

Solicitors for the plaintiff, *F. Harvey and Co.*  
Solicitor for the defendant *Plumridge, G. O.*  
*Butter.*  
Sampson in person.

June 27 and 28, 1884.

(Before KAY, J.)

Re CARPENTER; CARPENTER v. DISNEY. (a)

*Will*—Stock belonging to wife standing in joint names of husband and wife—*Bequest by husband of life interest therein to wife*—*Claim of wife's representatives*—*Election.*

*A testator, after making certain bequests, and giving his wife a legacy of 3000*l.*, gave all the residue of his estate and effects, "including therein the money in my banking account in the Bank of England, and money in the public funds, and whether standing in my name alone, or jointly with my said wife," and all his shares and interest in any public company, and other effects, to his wife for her life, and after her decease to other persons.*

*At the date of the will, and at the time of the testator's death, there was only one sum (viz., 7110*l.* Consols) standing in the joint names of himself and his wife.*

*This stock had by a previous will been bequeathed to the wife, subject to two executory gifts over, which did not take effect, one in favour of her children, if any, and the other of her husband, if he survived. The stock had been received by the testator, and by him transferred into their joint names.*

*After the testator's death his wife received the income of all the residuary estate, including the 7110*l.* Consols, but made no attempt to deal with the stock as her own property. There was, however, no evidence to show that she knew what her rights were. She subsequently died, and her representatives claimed the stock.*

*The question was, whether they were bound, under the doctrine of election, to compensate the residuary legatees, who would be disappointed by their taking the stock, to any and what extent.*

*Held, that the testator intended the stock to pass, and was not dealing only with his right of survivorship; that he affected to give property belonging to his wife, and consequently the doctrine of election applied both to the wife and her representatives claiming under her; and that her representatives could only take the stock upon the terms of compensating the disappointed residuary legatees to the extent of the legacy of 3000*l.*, and of the amount actually received by the wife in respect of her life interest in the testator's own property.*

THOMAS WILLIAM CARPENTER, by his will dated the 3rd March 1878, appointed his brothers, William G. Carpenter and John N. Carpenter, and his wife, Emma Carpenter, executors and executrix and trustees thereof, and, after directing his debts, &c., to be paid, gave his wife all his household goods, furniture, &c., and also the sum of 3000*l.*, to be paid to her out of his general personal estate, for her own absolute use and benefit; and after several other legacies not material to be mentioned the testator declared that as to all the rest, residue, and remainder of his estate, both real and personal, and whether in possession,

reversion, remainder, or in expectancy, and of whatever nature or kind, including therein the money in his banking account with the Bank of England, and money in the public funds, and whether standing in his name alone or jointly with his wife, and all his shares and interest in any public company, and other effects which he might die possessed of, he devised and bequeathed the same, and every part thereof, unto his executors upon trust to receive the interest, dividends, and annual proceeds thereof, or permit and suffer his wife to receive and take the income of his residuary real and personal estate, for and during her life, as and when the same should become due and payable, to and for the sole and absolute use and benefit of his wife, and her receipt alone should be a sufficient discharge for any moneys she should receive from his trustees, independent of any future husband with whom she might thereafter intermarry; and from and immediately after the decease of his wife, the testator directed his trustees to divide the whole of his residuary real and personal estate equally between his brother William G. Carpenter and his sisters Mary A. Carpenter and Eleanor Carpenter, share and share alike, for their own absolute use and benefit respectively; but in case of the death of either of them during his lifetime, or in the lifetime of his wife, then the share of such one so dying should be equally divided between the survivors, or if only one of them should be living, then the whole of the residuary real and personal estate for that one for his or her own absolute use and benefit.

The testator died on the 10th Sept. 1880.

The only sum of stock that stood, at the time of making his will, or at the time of the death of Thomas W. Carpenter, in the joint names of himself and his wife Emma Carpenter, was the sum of 7110*l.* Consolidated Three per Cent. Annuities.

Emma Carpenter became absolutely entitled to, the same 7110*l.* Consols under the will, dated the 18th April 1841, of her father, William Cock, who died on the 6th Jan. 1847.

His will contained the following clauses:

I give and bequeath all my stock in the Three per Cent. Consolidated Bank Annuities unto and between my said two daughters Caroline and Emma, for their respective use and benefit, with benefit of survivorship as to the stock upon the events after mentioned; and I request my executors, jointly with them my said two daughters, to stand possessed of such Three per Cent. Consols as aforesaid, upon trust to permit my said two daughters to receive the interest and dividends arising from such stock equally between them, share and share alike, and upon the death of either of my said daughters unmarried, then the whole of such stock is to belong to and become the property of the survivor, but in case either or both of my said daughters marry, and have issue living at her or their respective decease, then it is my will that the share and interest of each of my said daughters in the said stock, dying leaving issue her surviving, shall belong to such issue, the child or children taking the deceased parent's share only: provided that in case either of my said daughters shall happen to die leaving a husband her surviving, then it is my wish, and I declare my will to be, that such husband shall be entitled to the interest and dividends of his deceased wife's share in the said stock during his natural life, and after his death the principal to go and be divided between the children of such deceased daughter, or to my surviving daughter, and the children of such surviving daughter, as the case may be, to and for their own use and benefit, equally if more than one, and if but one then to such only one.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Caroline, the daughter of William Cock referred to in his will, died on the 1st April 1852, unmarried, and shortly after that date the 7110l. Consols were received by Thomas N. Carpenter, and by him transferred into the joint names of himself and his wife, Emma Carpenter.

At the respective dates of the will and death of Thomas W. Carpenter, the sum of 5000l. Consolidated Three per Cent. Annuities stood in the joint names of Emma Carpenter, Thomas W. Carpenter, and William G. Carpenter. These consols formed part of the estate of Emma Carpenter, and came to her under the will, dated the 24th Oct. 1862, of William Cock the younger, who died on the 1st July 1866. By his will one-fourth of the proceeds of the sale and conversion of his residuary real and personal estate was devised and bequeathed upon trust for Emma Carpenter, during her life for her separate use, and after her decease for such persons and for such purposes as she should appoint. A portion of his estate consisted of a sum of 9700l. Consols, and accordingly the sum of 5000l. Consols (part of such sum of 9700l.) was, on the 31st July 1867, transferred from the account of William Cock the younger into the names of Emma Carpenter, Thomas W. Carpenter, and William G. Carpenter.

Other consols stood in the name of Thomas W. Carpenter alone at the dates of his will and death respectively.

Emma Carpenter duly received the specific and pecuniary legacies bequeathed to her by the will of Thomas W. Carpenter, and also received the income of his residuary real and personal estate (including the 7110l. Consols) from the death of Thomas W. Carpenter down to her own death, which happened on the 6th April 1884, but she made no attempt to deal with the 7110l. Consols as her own property.

Emma Carpenter also received the dividends on the 5000l. Consols until her death. She died without leaving issue.

By her will, dated the 14th Aug. 1883, she appointed Richard S. Disney and Charles A. Holt, the executors thereof.

On the 28th May 1884 an originating summons was taken out by William G. Carpenter and John N. Carpenter for the determination of the following questions:

1. Whether Emma Carpenter, and Richard S. Disney and Charles A. Holt, as her executors, were entitled to claim both the benefits by the will of Thomas W. Carpenter given to her, and the 7110l. Consols, or whether they were bound to elect between such benefits and the 7110l. Consols.

2. If the court should be of opinion that such election ought to be made, and if the defendants should elect to take the 7110l. Consols, to have it declared that the plaintiffs were entitled to prove, against the estate of Emma Carpenter, for the loss sustained by the estate of Thomas W. Carpenter by reason of such election.

The summons was adjourned into court, and now came on to be heard.

Graham Hastings, Q.C. and Philip Stokes, for the plaintiffs, argued that compensation ought to be allowed to them, as the trustees under the will of Thomas W. Carpenter, on the basis that, in the events which happened, Emma Carpenter prac-

tically elected to take the benefits under the will of her husband. They cited

*Rogers v. Jones*, 38 L. T. Rep. N. S. 17; 3 Ch. Div. 688.

[They were stopped by the Court.]

*Kekewick, Q.C. and Onwald*, for the defendants, submitted that there was no specific disposition of the consols by the will of Thomas W. Carpenter sufficient to put Emma Carpenter to her election, but that the words of the will were satisfied by referring to the interest in the consols, which would devolve on the husband by the survivorship. They cited

*Pickergill v. Rodger*, 5 Ch. Div. 163, 170;

*Dummer v. Pitcher*, 2 My. & K. 262;

*Crabb v. Crabb*, 1 My. & K. 511;

*Blommart v. Player*, 2 Sim. & Sta. 597;

*Jervoise v. Jervoise*, 17 Beav. 566;

*Streetfield v. Streetfield*, 1 Wh. & Tuf. L. Cas. 5th edit. 369, 381;

*Clemenson v. Gandy*, 1 Keene, 309;

*Padbury v. Clark*, 2 Mac. & Gor. 296.

No reply was called for.

KAT, J.—Several questions are raised in this case, the most important of which is, whether the will of Thomas William Carpenter put his widow, who takes large benefits under the will, to her election. Of course that depends upon whether the will does, by sufficiently clear terms, dispose of property to which the widow was, in the events which happened, absolutely entitled. That is the sort of case which raises the question of election. It is simply a case where the testator clearly disposes of property belonging not to himself but to another person, and gives by the same will an interest in his own property to that other person, and disposes of the property which is not his in such a way that it is impossible the legatee can take his own property out of the will without defeating the testator's intention. Then the rule applies that no person taking a benefit under a will can take both under and against the will, and that at once raises the question of election. Now, the words here, which it is contended raise the question, are these: After certain gifts which I need not refer to, the will goes on to say, "As to all the rest, residue, and remainder of my estate, both real and personal, and whether in possession, reversion, remainder, or in expectancy, and of whatever nature or kind, including therein the money in my banking account with the Bank of England, and money in the public funds, and whether standing in my name alone or jointly with my said wife, and all my shares and interest in any public company, and other effects which I may die possessed of, I give, devise, and bequeath the same and every part thereof," in effect to his wife for life, and then to other persons. These words have been closely criticised, and quite rightly so. First, it is said that the words "whether standing in my name alone, or jointly with my said wife," "refer to the testator's own property, because the residuary gift begins with the words, "As to all the rest, residue, and remainder of my estate both real and personal." That is a very fair criticism; but is that quite sufficient? The words are, "my estate" (I leave out the other words for a moment) "including therein the money . . . in the public funds, and whether standing in my name alone or jointly with my said wife." That is to say, "I include in those words 'my estate'

money in the public funds standing in my name jointly with my wife." The testator has said so in so many words. I must apply this will, as one is always bound to do, to the state of things existing, which I am told was this: At the date of this will, and thenceforward until his death, there was standing in the testator's name, jointly with that of his wife, a sum in the public funds. Does that pass or not by this residuary gift? I will notice, before I deal with that question further, another point which has been raised, namely, that there was also standing in the testator's name jointly with that of his wife and of another person, another sum of stock in the public funds. It is not contended that the will applies to that last-mentioned sum of stock. It is admitted that, in the events which happened, of the wife surviving the husband, that sum did not pass by this residuary gift, and no claim of election is made as to it. But what difficulty does the fact of the money standing in the names of the testator and his wife and another person introduce into the consideration of that gift? There might have been a curious question indeed if that money had been claimed; but how does the fact that there was another sum of stock standing in the names of the testator and his wife and a third person make it more improbable that the sum which stood in the name of his wife and himself alone should be intended to pass? That I do not see. The argument would be, that the sum which stood in the names of the testator and his wife is aptly and clearly referred to by these words, and the sum which stood in the names of himself and his wife and a third person is not so clearly referred to. It may be that that other sum would not pass by these words; but that does not in the least weaken the argument that the sum, at any rate, which stood in the name of himself and his wife alone would so pass. That sum was derived under another will, by which it was in effect given to the wife absolutely, but, in the event of her dying leaving children, it was to go to her children, or, if she died leaving a husband, then there was a gift over to the husband. These are the words: "In case either or both of my said daughters marry and leave issue living at her or their respective decease, then it is my will that the share and interest of each of my said daughters in the said stock dying leaving issue her surviving shall belong to such issue, the child or children taking the deceased parent's share only; provided that in case either of my said daughters shall happen to die leaving a husband her surviving, then it is my wish and I declare my will to be that such husband shall be entitled to the interest and dividends of his deceased wife's share in the said stock during his natural life, and after his death," then to the children. I understand that that gift, in the events which happened, became applicable to one daughter only, because the other daughter died without issue. The trustees of that will, it seems, parted with the fund, and the testator, the husband of this lady, received and invested it in his name and hers. That is the fund which is now in question. He died in his wife's lifetime, and therefore the real title to the fund seems to be this: Before its investment it belonged to the wife absolutely, subject to an executory gift over to her children, if she had any. She had no children, and consequently that

executory gift did not take effect. Then, the other executory gift was merely to her husband for his life in case he survived her, and that executory gift also did not take effect. Therefore, in the events which happened, the fund belonged absolutely to the wife, and neither of the executory gifts took effect. Accordingly, on the marriage, the fund passed to the husband, and became his absolute property. It was not a reversion. The wife had an absolute present interest in the fund at the date of the marriage, subject to executory gifts over in events which never happened, and accordingly the fund went absolutely to her husband. But then the husband did that which of course divested him of any interest in the fund. He invested it in the joint names of himself and his wife. Now, it is settled that such a dealing by the husband is *prima facie* an advancement to the wife in case she should survive—which in this case she did—and therefore upon his death the whole of that property would belong to her. That is exactly the state of things which existed at the date of this will. The property belonged to the husband, subject to certain executory gifts over which never took effect. He invested it in the names of himself and his wife, which would be an advancement to the wife in case she should survive, and she, by the effect of that, became entitled to the fund by survivorship. At present the only question is whether or not this will refers sufficiently distinctly, in the residuary gift which I have read, to that fund to show that the husband intended by this will to dispose of that fund. To complete what I have to say about the facts, it is proved that there were no other funds whatever in the joint names of the husband and wife except those which I have mentioned, and therefore, unless these words refer to those funds, they refer to nothing at all. I am bound, first of all, before I look to the question of what the result will be, to construe the will by the facts which I know. Having given the case very close attention, I am bound to say that I have not the slightest doubt that the fund to which the husband referred by these words in his will, "whether standing in my name alone or jointly with my said wife," was this fund which, at the date of his will, was standing in the name of himself and his wife, and which, at the date of his death, was so standing; for I find upon the face of the will a clear disposition of that property which, in the events which happened, belonged not to him but to his wife, and accordingly that would, *prima facie*, raise a case of election. But then it is argued that the testator had a possible interest in this fund, because, if he survived his wife, and there were no children, the ultimate interest in it would belong to him. True, but it is equally clear that he was not dealing with that, because he gives this property, which he has described, to his wife, and he contemplates not that he will survive her, but that she will survive him. It cannot be said that he was dealing with his possible interest by survivorship only, or that that interest by survivorship would in any way satisfy these words. It would not, because when he gives the fund he contemplates that the wife will survive him, and he gives it to her during her life. Therefore, I consider that there is enough upon the face of this will to show that he was dealing with that fund which stood in the

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joint names of himself and his wife. I think the case of *Dummer v. Pitcher* (2 My. & K. 262), which has been referred to, is a distinct authority for the view of the will at which I have arrived. It is a distinct authority, because it shows that, in the case of a will differently worded, the court felt itself bound to come to another construction, and the contrast between the words there used and the words I have at present before me confirms me in the clear opinion that, if the words in *Dummer v. Pitcher* had been the same as I have here, the court would have come to an exactly opposite conclusion to what it did. The words there were these: The husband had transferred to himself, in the joint names of himself and his wife, certain sums of bank annuities, as in this case. He then made his will, and bequeathed his four leasehold houses therein particularly described, and all the rents and proceeds of the aforesaid four houses, together with all the interest of all his funded property or estate of what kind soever, or wheresoever the same or any part thereof might be found, to trustees upon trust to pay the net rents and issues of the four houses and premises, and also the interest, proceeds, and profits of all his funded property, and all his estate of whatsoever kind, as the same should become due, to his wife, for her own sole use and benefit for her life. The question was whether that gift included the property which, in the event which had happened of his wife surviving him, was not his at all, namely, the property which was transferred into the joint names of himself and his wife. There the Lord Chancellor (Lord Brougham) said: "When an individual effects a purchase of stock in the joint names of himself and his child, or of himself and his wife, the transaction cannot of itself be considered as converting these parties into trustees, *quoad* their interest, for the purchaser whose money has paid the price of the stock. With respect to a child this, I think, is admitted. But it is said that the case of advancement to a child rests upon the peculiarity of the relation, and that the exception shall not be extended to the wife. That distinction, however, is not supported by the authorities." The first point he held was that which I have already indicated to be my opinion in this case, namely, that the purchase by the husband, in the name of himself and his wife, *prima facie* was an advancement to the wife in case she survived him. Then he goes on to consider whether there is a sufficiently clear disposition by the will of that property which, in the events which happened, did not belong to the wife at all, and he says: "There is nothing more undoubted in the law than that to make a case of election the intention must appear certainly and clearly, both as to the property assumed to be disposed of and as to the implied condition to be fulfilled. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him. As for his supposing himself to have rights which he had not, unless that appears plainly upon the face of the will, it would be most dangerous to be guided by any conjecture that may be raised to this effect, or to let, in extrinsic evidence in proof of it. 'If I was to receive evidence of the testator's fancy it would introduce a very desperate rule of property in this court.' These were the words of Lord Thurlow in a case (*Stratton v. Best*, 1 Ves.

Jur. 285) where, nevertheless, he stated that he had no doubt of the answer which the testator would have given if the question had been put to him as to his intention." Then he refers to some authorities, and goes on to say: "Has the court any right to say, upon this will, that the testator has given the stock which, it has been proved, was not his own to dispose of? The general gift to trustees, after specifying the leaseholds, is of all the interest 'of all my funded property, or estate, of whatsoever kind, or wheresoever the same or any part thereof may be found.' This of itself is sufficiently general, and extends to everything else as well as to funded property. But that this generality was clearly in his intention is clearly plain from the whole scope and character of the instrument, as from the particular language of the gift to the trustees." Then he goes through the will, to the terms of which I need not refer. Then he says: "There is nothing here to make it clear that the testator was dealing with the stock already purchased, or which should thereafter be purchased. On the contrary, the legacy is plainly, by all the rules on the subject, a general one. But it is contended that, in deciding upon the character of the ulterior legacies, the court must refer to the preceding general gift to the trustees, and to the life interest given to the widow, after whose decease those legacies are to take effect. This only brings it back to a clause of a nature as general, 'all my funded and other property.' There is nothing to justify the court in holding that the testator thereby intended to give what was not his own; namely, the stock in which his wife had the interest by survivorship, not to be defeated by his will." Supposing the words had been there as they are here, "stock standing in my name jointly with my wife," the stock standing in his name jointly with his wife would of course be a description of property which he would not be able to bequeath to his wife, because the only interest he had in that was an interest in case he survived his wife. If she survived him he would have no interest in it at all. Therefore, when he deals with that stock and gives his wife a life interest in it, it is plain that he means to dispose of the stock standing in the joint names of himself and his wife as if it was his own, whereas it was not his own. I therefore think that the case of *Dummer v. Pitcher* (*ubi sup.*) shows that, if the Lord Chancellor had had there the words which I have got here to deal with, he must have come to a conclusion precisely opposite to what he did come to in that case. Now, what happened here was this: The testator died, and the wife received the income of all this property, including the sum of stock, during her lifetime. She made no attempt to deal with the stock as her own. On the other hand, I have no evidence before me that she knew what her rights, in the particular events which have happened, were, although, if she did know, I think there would be quite sufficient evidence to show that she elected not to take against, but under, the will. Yet I cannot say that that is proved to my satisfaction. I have a strong impression that she did elect to take under the will, and not contrary to the will. I have a difficulty in holding that that is strictly made out. She is dead, and her representatives come to the court and say, "Pay us over that estate." There has been some suggestion that the question of election does not arise under those

circumstances. Why not? Is a request made by the representatives standing in the wife's shoes different to a request by her? Not in the least. I must treat the question just as if she were now living and said, "I insist upon taking that estate absolutely." This being a case where, according to the view that I take of the will, she would clearly be put to her election, she can only do so by giving up all the other advantages which she took under the will to such an extent as was necessary for the benefit of the ulterior legatees in the residue, so as to compensate them for the loss sustained by her taking this fund. That equity seems to me to apply precisely in the same way to her legal personal representatives, who come to make this claim, as it would apply to her, and accordingly I must hold that the legal personal representatives are entitled to have this sum of stock which was invested in the joint names of the husband and the wife, but that they can only take that after paying out of it, to the persons who will be disappointed by that election, and who will take so much less of the residue, all the advantages which the widow actually received under the will. That will be the amount that she received in respect of the life estate in the testator's own property, and the legacy which he gave her of 3000l.

Solicitors for the plaintiffs, *Yarde and Loader*, agents for *Charles Holt and Son*, Brighton.

Solicitors for the defendants, *Yarde and Loader*.

July 29 and 30, 1884.

(Before CHITTY, J.)

Re BIRCH; ROE v. BIRCH. (a)

*Executor—Creditor—Right to recover debt after standing by — Laches — Express authority — Devastavit.*

*A creditor of a deceased man, believing that the executors, who were authorised to carry on the business of the deceased by his will, had assets to meet his debt, allowed it to stand over, and received interest on it. On the failure of the business he sued for the whole of the debt. It was submitted that he had lost the right to recover his debt.*

*Held, that mere laches by a creditor in not compelling the executors to realise a testator's estate immediately for the purpose of paying his debts would not deprive him of his right to sue the executors for devastavit, unless, by his conduct, or by his express authority, he has misled the executors, and so allowed them, or induced them, to part with assets which were, at the date of the death of the testator, liable to, and sufficient to satisfy his claim.*

JEREMIAH BIRCH by his will, dated the 22nd Dec. 1871, appointed the plaintiffs Edgar Roe and Lionel Chapman, and his widow, Mary Ann Birch (the defendant), his executors and executrix, and directed that his widow should have the use of all his household effects for life or widowhood, and that, during such period, the farms occupied by him at the time of his death should be carried on by his executors, or the survivor of them, for the benefit of his widow.

The testator died on the 19th Sept. 1876, being

indebted to one Cutting, upon his promissory note, for the sum of 700l. The executors carried on the farming business from the testator's death up to Oct. 1881, and for this purpose obtained advances from their bankers. Cutting was informed by the executors that they would continue the farming business, and that they had sufficient assets to pay his debt and all other liabilities on the estate, and they agreed to pay him 5 per cent. per annum interest on the 700l. if he would let the debt stand over. He proposed that the executors should give him their promissory notes for this capital sum in exchange for those of the testator, but they declined, alleging that the estate was liable for the amount, and that if he liked he could call in the money, and that then they would realise the stock, and pay him in full. In consequence of this Cutting took no further step with reference to his debt until April 1881, on which date he gave notice to the executors demanding immediate payment of the debt, owing to the following circumstances:

The farming business was carried on at a heavy loss, in consequence of bad seasons. In 1880 the executors presented a petition (of which Cutting was aware) asking for the opinion of the court under Lord St. Leonards' Act, from which it appeared that a debt of 920l. was owing to the bankers, but that all the other debts of the testator had been paid, and no mention was made of the 700l.

Upon this petition Malins, V.C., on the 5th March 1880, decided that the farm and stock should be sold and the bankers paid out of the proceeds.

In Oct. 1881 the executors sold the farming stock, and, after paying out of the proceeds the debt due to the bankers (of which only 183l. had been incurred by the testator), a small balance was left.

On the 6th May 1882 Cutting commenced an action in the Queen's Bench Division against the executors to recover the 700l. and 42l. 12s. 6d. for interest.

In June 1882 the executors commenced the present action for administration of the testator's estate; and on the 7th July 1882 the action in the Queen's Bench Division was transferred to the Chancery Division, and the conduct of the action was given to Cutting.

In March 1883 an inquiry was directed in this action, "whether the assets of the testator which came to the hands of the executors, or were applicable to pay the debt of 700l., or any and what part of such assets, were appropriated and disposed of otherwise than in being realised and in paying such debt, at the instance, or with the consent, or through the laches of Cutting, and whether Cutting in any, and if any, in what way misled the executors, and induced them to refrain from realising such assets and paying such debts."

The chief clerk filed his certificate on the 10th Dec. 1883, and found that Cutting did mislead the executors, and induced them to refrain from realising the assets and paying such debt, such assets being sufficient at the testator's death for that purpose. There was a conflict of testimony as to what had taken place between the executors and Cutting, and contradictory affidavits were filed on each side.

The case now came before the court on an

(a) Reported by A. COYSGARNE SIM, Esq., Barrister-at-Law.



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adjourned summons to vary the chief clerk's certificate by striking out and disallowing his finding, and finding instead that there was no such consent or laches on the part of the applicant (Cutting), and that he did not mislead and induce the plaintiffs as alleged.

*Ince*, Q.C. and *Oswald* for the applicant.—The applicant cannot be deprived of his right to recover the 700*l.* and interest merely because he stood by and did not sue for it for a period which is within the statutory limit:

*Re Baker; Collins v. Rhodes*, 44 L. T. Rep. N. S. 414; 20 Ch. Div. 230.

[They were stopped.]

*Whitehorne*, Q.C. and *D. Round* for the respondents.—Mere laches undoubtedly would not be sufficient to justify the chief clerk's finding; but that is not the case here, for Cutting had not only stood by, but actually authorised the executors to carry on the business. The applicant knew that the executors were borrowing money for the purpose of carrying on the business, and he knew that if he had made the least objection they would have been compelled to stop and to realise. He deliberately chose to take the risk of the business, as he expected to get good interest for his money out of that business. His conduct was such that they abstained from realising, and it is too late for him now to come and complain of the *devastavit*. If it be held that he was merely guilty of laches, they were in his case so gross as to amount to an authority by him:

*Jewsbury v. Mummery*, 27 L. T. Rep. N. S. 618; L. Rep. 8 C. P. 56;

*Richards v. Browne*, 3 Bing. N. C. 498.

*W. Joyce*, for the defendant in the action (*Mary Ann Birch*), also referred to

*Stroud v. Stroud*, 7 Man. & Gr. 417;

*Williams on Executors*, 7th edit. p. 1974.

*Ince*, Q.C. replied.

CHITTY, J.—A creditor does not lose his right to sue the executors and to recover from them by mere laches. If any authority were wanted for such a proposition, it is to be found in the judgment of the Court of Appeal in the case of *Collins v. Rhodes* (*ubi sup.*). If the creditor misleads the executors so that they part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*. That I take to be the true meaning of the proposition to be found in the cases of *Jewsbury v. Mummery* and *Richards v. Browne*. In both those cases the law is only stated by way of dictum, because the decision was in favour of the creditor. Now, in *Richards v. Browne*, Tindal, C.J. says: "On the first point I admit that if, in the distribution of assets, a creditor does mislead an executor, either by laches or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets." The meaning, I think, of Tindal, C.J. is quite plain. Although he uses the term "laches," he does not mean that the mere doing nothing will deprive the creditor of the right to complain of the *devastavit*, but he means that there is something really more than mere laches, and I should prefer to use the word "conduct," so that the sentence would run, "either by conduct or express authority." Laches, no doubt, enters into the proposition of the Chief

Justice, that is, the doing nothing; but it means something more than that, namely, that there is some communication, or that some circumstances take place, from which an inference may be drawn which brings up the case fairly to an "express authority." Where there is express authority, then the question is beyond all doubt, but there must be some laches which amounts and points in the result to such authority. Kelly, C.B., in *Jewsbury v. Mummery*, states the law thus: "If the defendant could have shown before the arbitrator that, though assets had come to his hands, he had parted with them under circumstances which precluded the plaintiff from alleging that they had not been duly administered, clearly that would have been a defence under the plea of *plene administravit*. Therefore, one of two things must have been the case: either the evidence upon which the defendant now seeks to rely was not offered before the arbitrator upon the plea of *plene administravit*, and then the issue on that plea was rightly found against the defendant; or, if offered, the arbitrator must have considered that the facts proved did not amount, as against the plaintiffs, to a due administration of the assets that had come to the defendant's hands. If they had amounted to such an administration, the defendant would clearly have been entitled to have the issue found for him." Channell, B. in the same case, states a similar proposition: "Now if the defendant could rely upon the fact that such misappropriation took place at the plaintiffs' request, or under circumstances which show that the plaintiffs had misled the defendant into so applying them, it is clear that this would go to show that these sums of money were not, as between the plaintiffs and the defendant, assets in the hand of the defendant." Lord Blackburn (then Blackburn, J.) merely quotes the passage which I have read from the judgment of Tindal, C.J. in *Richards v. Browne*. Now, that is the law upon the subject. The facts are these: [His Lordship then stated the facts, as above, and continued:] Cutting says that he was not aware that the executors were borrowing money in the business until some time in 1881, and this point is made use of against Cutting to show that he was aware that they were borrowing money in the business. He only became aware of it at the time when the executors proposed to sell the business, and it cannot be for a moment said, as against Cutting, that the knowledge that he had of that petition, and of the order which was made upon the petition, affected his right in any way, or that merely reading the petition with the knowledge that the executors were going to ask for leave to sell was any consent on his part, or any act done by him, which misled the executors into believing that they might carry on the business. I am therefore brought back to the conversation which passed between the parties. Here there is a conflict of testimony. The burden of proof is wholly upon the executors, and they must establish their defence. There were several interviews, which took place with regard to this debt. There were several conversations, the effect of which is fairly represented on the affidavits. Here Cutting no doubt stands alone, and his affidavit is not corroborated. The affidavits of the plaintiffs are supported also, to some extent, by Mr. Roe, and, in one sense, it may be said that, in point of

numbers, the plaintiffs' witnesses preponderate. There has been no cross-examination on either side. Now, I cannot find in the evidence of the plaintiffs any express statement by the plaintiffs' witnesses that Cutting made to them any statement to this effect, "Now, do not realise the business, but carry it on." I am asked to infer that, from various statements that are made. It is plain that the assets at the death of the testator were sufficient for payment of this debt, and it was so stated to Cutting, as I have said, and truly stated to him. It appears to me, on the evidence, that he had no reason to believe that the assets were insufficient, or would become insufficient, by carrying on the business until he had notice of the petition. It is clear that he makes his demand very soon afterwards. As I have said, the only effect of his seeing the petition is this: he was aware that they were going to sell, and he does not make a demand immediately, because probably he considered it was not a neighbourly thing to press for payment until they had got the means of payment by a sale. Now, without going through the affidavits at length, there is a fair sample, I think, of what took place, given, according to the plaintiffs' version, in their affidavit. There it is stated that Cutting again proposed that a promissory note should be given by the executors for the payment of the 700*l.*, the amount of his demand, in place of the notes he held, and Mr. Roe, the deponent, says: "I replied that I could not do so, and thereupon he inquired if the money was all right, and I told him I believed it was so. We considered that, if the farming stock were then sold, it would realise sufficient to pay the said debt, and other claims upon it. Cutting still pressed me for a fresh note of hand, which I again declined to give him, and I told him that the estate was liable for the amount, or that he could call in the money, and that if he did so we would realise the estate, and pay the debt out of the proceeds. Notwithstanding such statement Cutting did not call in the debt." Mrs. Roe was present, and is also a witness to the same effect. Now, the result of that appears to me to be, that he was pressing for the debt, that he was pressing for a promissory note from the executors, not telling them that they were not to be held personally liable for any debt which they might incur by their carrying on the business, and that he did not in terms assent or consent to the business being carried on. It appears from the affidavits of the executors that they thought it was the duty of the creditor, if he wanted his money, to call it in; whereas, it was their duty to pay him, having assets to do so. From that they seem to have drawn an inference that he consented to the business being carried on. I think it would be a very dangerous thing to hold, under these circumstances, that the executors were entitled to do so, because it would prevent a creditor acting with reasonable indulgence towards those who were interested beneficially in the assets of the testator. If I held, under these circumstances, that the creditor had lost his right, it would compel him to press for payment in numerous cases, where he might say, "I will take my chance, I will not do anything, I do not know what you are doing; I do not assent, nor do I dissent from it, but you may go on;" and it would be, to my mind, a hard thing, not upon the

creditor, but upon the executors and the persons beneficially interested in the estate under the executors, if I were to hold that upon such facts as are now before me there was sufficient to induce the creditor to press for payment. It would be compelling me to do that which would ordinarily be termed, if the case were inverted, a harsh course. The plaintiffs sum up their case in their affidavit thus: "By not calling in the debt in spite of such repeated invitation on our part, Cutting induced us to believe that he wished the farming business to go on." Cutting had no interest in wishing the farming business to go on; the only thing that can be said is, that by not enforcing payment of the debt he was receiving 5 per cent. interest. That is a comparatively small matter, and the case is not such a one as to call for interference where there is a doubt about the sufficiency of the assets, and the executor says, "I doubt whether there will be enough to pay you, but will you take the chance? Let me go on with the business, and I think I shall be able to make enough." That is a very different thing. In that case it would be quite clear that the creditor would have got nothing. I think in the result there has not been any misleading or any consent which has deprived him of his right. I allow the summons, and the costs of this application will be costs in the action.

Solicitors for Mr. Cutting, *Rhodes and Sen.*  
Solicitor for the respondents, *W Holcombe.*

Tuesday, Oct. 28, 1884.

(Before CHITTY, J.)

WILLIAMS v. WILLIAMS. (a)

*Will—Words of purchase or limitation—"Issue" with words of limitation superadded—Estate tail—Construction.*

*A testator by his will, dated 1860, disposed of all his real estate, subject to an interest therein to his wife for life, in favour of his six nephews, "and all my right, title, and interest to and in the same and every part thereof, to be equally divided amongst my six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns." The question arose whether the word "issue," with the words of limitation superadded, operated to give an estate tail, or whether the issue took as purchasers.*

*Held, that the words in question created an estate tail in the six nephews; that the addition of a limitation to the heirs general of the issue would not prevent the word "issue" from operating to give an estate tail as a word of limitation; that in this case the words "equally divided" made the estate divisible into six shares, and there were no words to subdivide those shares, and consequently that the subsequent words, "heirs, executors, administrators, and assigns," must be rejected.*

*Jarman on Wills, 4th edit. vol. 2, p. 419, followed. Dictum by Lord St. Leonards in Montgomery v. Montgomery (3 Jo. & Lat. 57) discussed.*

*R. WILLIAMS, by his will, dated the 7th June 1860, after devising and bequeathing to his wife a certain dwelling-house, outhouses, and land, to*

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be enjoyed by her during her life, provided as follows:

Also, after the decease of my said wife, I give, devise, and bequeath my property in form and manner following; that is to say, unto my six nephews, the within-named houses and land called Penhiwfrane, and also the houses and land of the late W. Lawrence [and he then provided for the disposal of certain leaseholds], and all my right, title, and interest to and in the same and every part thereof, to be equally divided to and amongst my said six nephews, share and share alike, and their issue after them, to and for their heirs, executors, administrators, and assigns.

The testator died on the 23rd Oct. 1860, and a question now came before the court on an adjourned summons, whether the word "issue," with the words of limitation superadded, operated to give an estate tail, or whether the issue took as purchasers.

*Bomer, Q.C. and H. Johnson* for one of the six nephews.—The word "issue" in a will *primâ facie* means heirs of the body, and there is nothing in this will to cut down that meaning so as to make the issue of the nephews take as purchasers. Had the testator intended to give a life estate, it is clear from the rest of the will that he knew what words to use:

*Martin v. Swannell*, 2 Beav. 249;

*Campbell v. Bouskell*, 27 Beav. 325;

*Underhill v. Roden*, 34 L. T. Rep. N. S. 227; 2 Ch. Div. 494;

*Morgan v. Thomas*, 46 L. T. Rep. N. S. 431; 8 Q. B. Div. 575, 643;

*Hawkins on Wills*, p. 195.

The dictum of Lord St. Leonards, "that a devise to A. for life, with remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A. will give to the word 'issue' the operation of a word of purchase," does not apply to this case:

*Montgomery v. Montgomery*, 3 Jo. & Lat. p. 57.

*Upjohn* for another nephew.—The gift in this case must create either a fee simple or an estate tail in the nephews. The rule laid down by Jarman on this point is right: (Jarman on Wills, 4th edit. vol. ii. p. 419.)

*Macnaghten, Q.C. and Christopher James* for the issue of the nephews.—The words "after them" mean at the death of the nephews who only take a life estate. In *Martin v. Swannell* (*ubi sup.*) there were no subsequent words of limitation used such as there are here, and so that case is inapplicable. *Montgomery v. Montgomery* is a clear dictum in our favour.

*CHITTY, J.*—I think that this is an estate tail in the six nephews. The gift is of the property, which consisted of houses and land, which are described, and leaseholds. Then the testator says, "And all my right, title, and interest to and in the same and every part thereof." It appears to me that these words apply to the whole subject-matter of the gift. Then he says, "To be equally divided to and amongst my said six nephews, share and share alike, and their issue, after them, to and for their heirs, executors, administrators, and assigns." The word "issue" is, *primâ facie*, a word of limitation, which can be turned into a word of purchase more easily than the word "heir," but the mere addition of words of limitation is not sufficient to turn it into a word of purchase. Lord St. Leonards appears to have laid it down in the case of *Montgomery v. Montgomery* that a devise to A. for life, with

remainder to his issue, with superadded words of limitation in a manner inconsistent with a descent from A. will give to the word "issue" the operation of a word of purchase. But it seems to me that that dictum has no application to the present case, and that the rule laid down in Jarman on Wills, 4th edit., vol. 2, p. 419, is right, namely, that "the addition of a limitation to the heirs general of the issue will not prevent the word 'issue' from operating to give an estate tail as a word of limitation." That rule, I think, applies to the will before me, because here there are no words which amount to words of division among the issue. The words are "to be equally divided to and amongst my said six nephews, share and share alike," and so forth. The words "equally divided" apply so as to make the estate go in six shares, and I do not find any words to subdivide those six shares. I think that, on the true construction of this will, the word "issue" is a word of limitation, and that, treating the disposition as a whole, I must reject the words "heirs, executors, administrators, and assigns," and hold that there is an estate tail in the six nephews. I am compelled to say whether there is an estate tail or an estate in fee simple, and I think that the words "their issue after them" must have some effect given to them. I see no other way of dealing with them than by saying that they are governing words, and consequently the six nephews take an estate tail general.

Solicitors for the parties: *Gibbs*, for Messrs. *Gibbs, Lewellyn, and Lock*, Newport, Monmouthshire; *Wrentmore*, for Messrs. *James and Co.*, Merthyr Tydvil.

Thursday, Oct. 30, 1884.

(Before PEARSON, J.)

Re AINSLIE; AINSLIE v. AINSLIE. (a)

Settlement—Protector—"Owner of prior estate"—Trustee—Tenant for life—Annuitant—Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 22.

In considering who is "protector" of a settlement, as "owner of a prior estate" in settled lands, within the meaning of sect. 22 of the Fines and Recoveries Act, the principle is to consider who is to be deemed the substantial owner of such estate.

Lands were devised to trustees taking the legal estate for a term of ninety-nine years upon trust to pay M. 250l. a year, to manage the estate, and to pay over all the surplus rents and profits to H.; and subject to this trust the lands were devised to H. for life, with remainder to his sons in tail. Held, that H. was the substantial owner, and therefore the protector of the settlement.

*Re Dudson's Contract* (39 L. T. Rep. N. S. 182; 8 Ch. Div. 628) followed in principle.

On the 1st Feb. 1884 M. Ainslie, the testator, died, having by his will devised certain estates in Westmoreland to two trustees, their executors, administrators, and assigns, for the term of ninety-nine years if his eldest son, Montague, should so long live, "upon the trusts and with, under, and subject to the powers, provisoes, and declarations hereinafter contained concerning the same; and immediately after the expiration or sooner determination of the said term I devise

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the same to the use of my second son, Henry Ainslie and his assigns during his life without impeachment of waste, and after his death to the use of his first and every other son successively according to their respective seniorities in tail male.

The trusts of the term of ninety-nine years were as follows:

Upon trust that the trustees during the continuance of the term shall manage and cultivate and let the said estates and fell timber and wood thereupon in such manner in all respects as to them or him shall seem advantageous, and out of the proceeds of the felling and sale of such timber and wood, if sufficient, and if not then out of the rents and profits thereof respectively in proportion to the values thereof respectively (and as to such value the decision of the said trustees or trustee shall be final and conclusive), pay an annuity or clear yearly sum of 250*l.* to my said son Montague Ainslie and his assigns during his life, and subject thereto shall pay and apply the surplus arising from the felling and sale of timber and wood upon and the rents and profits of the said Grisedale and Satterthwaite estates respectively to or for the benefit of the person or persons for the time being entitled in reversion immediately expectant upon the said term to the rents and profits of the said estates respectively.

Montague and Henry Ainslie were both living, as was also a son of the latter.

The question to be decided was, who was the protector of the settlement created by the will, having regard to sect. 22 of the Fines and Recoveries Act, viz.:

If at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this Act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this Act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof, or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

The present summons was taken out accordingly.

Montague Ainslie was not represented by counsel.

*Covens-Hardy, Q.C.* and *Wolstenholme*, for the summons, referred to

*Re Dudson's Contract*, 39 L. T. Rep. N. S. 182; 8 Ch. Div. 628.

*Pauli* for Henry Ainslie.

*Ribton*, for the trustees, did not claim to stand in the position of "protector."

PEARSON, J.—I think in this case, to use the words of the Court of Appeal in *Re Dudson*, I must look to see who is really the substantial

owner for the time being of the estate. The property is devised to trustees, who take the legal estate for a term of ninety-nine years, upon trust thereout to pay to the elder son 250*l.* a year, to manage the estate, and to pay over all the surplus rents and profits to the second son Henry, and subject to the term the property is devised to Henry for life, with remainder to his sons in tail. The question is whether, under those circumstances, the second son ought not to be considered, and is not, the substantial owner of the estate. I think that he is. I think Montague, the eldest son, has simply a charge of 250*l.* upon the estate, which he is entitled to receive from the trustees; he has no estate at all, he has simply an equitable right to the 250*l.* a year. With regard to the claim of the trustees it was very properly abandoned, because I conceive that it is settled beyond dispute that you are to look, not to those in whom the bare legal estate, or even the legal estate accompanied by some powers, is vested, but you are to look to the person who is the beneficial owner. The trustees certainly cannot be said to stand in the position of beneficial owners here in any way whatever. I think the first beneficial owner is Henry. The prior estate to the estate tail is in Mr. Henry Ainslie. Therefore I must so decide. The court must declare that Mr. Henry Ainslie is the protector of the settlement.

Solicitors for all parties, *Mills, Dowson, and Co.*

Thursday, Nov. 13, 1884.

(Before PEARSON, J.)

WRIGHT to MARSHALL. (a)

*Vendor and purchaser—Trustees—Power of sale at request of tenant for life—Will—Disentailing deed—Resettlement—Construction.*

A testator devised lands to trustees for a term of 500 years, upon and with certain trusts and powers, including a power of sale, at the request "of any person who by virtue of that his will should be tenant for life in possession;" and subject to such term he devised the lands to J. for life, with remainder to J.'s sons in tail male. J. and his eldest son F. (being of age) afterwards executed a disentailing deed by which, "with the consent of J., as protector of the settlement made by the will," they conveyed the premises to a trustee "subject and without prejudice to the uses and estates by the said will limited, which were prior to the estate in tail male of the said F., other than the uses and estates limited to the said J. during his life, and to the powers annexed to such prior uses and estates, or exercisable during the continuance thereof," so far as subsisting, to such uses as J. and F. should jointly appoint, with remainder to such and the same uses, upon such and the same trusts, and with and subject to such and the same powers, provisoes, and declarations as were subsisting in the said premises, or capable of taking effect therein immediately before the execution of those presents, so as to restore and confirm the same uses, trusts, powers, provisoes, and declarations." J. and F. mortgaged the property for J.'s benefit, and then by an indenture of resettlement jointly appointed that, subject to the said mortgage, it

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

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should, "subject and without prejudices to the uses and estates subsisting in the same premises by virtue of the said will" (in the same manner as in the disentailing deed), and subject, as to J.'s estate, to the said mortgage, "go, remain, and be . . . to the use of the said J. and his assigns during his life, without impeachment of waste, in restoration and by way of continuance and confirmation of the former life estate of the said J. under or by virtue of the said will," with remainders over. And the indenture also declared that nothing in it should "in anywise affect the power of sale contained in the said will, . . . and that the uses, estates, and powers limited or created by the then present indenture . . . should and might from time to time be overreached by the exercise of any of the powers contained in the said will," as if such uses, estates, and powers had been created by the will. A contract having been entered into for the sale of the premises, the purchaser objected that a good title could not be made, the trustees having only power to sell at the request of a tenant for life "under the will," and there being no such person.

Held, on the authority of *Harrison v. Round* (2 De G. M. & G. 190), that the trustees could make a title, inasmuch as J. answered the description, the test being the intention of the parties.

THIS was a summons taken out under sect. 9 of the Vendor and Purchaser Act by a purchaser, in order to determine whether the vendor was such a tenant for life of certain settled property contracted to be sold as to be able to request the trustees to sell, and so make a good title.

Some time before 1878 J. Wright (a), the testator, died, having by his will, dated the 23rd Dec. 1835, devised the hereditaments in question to certain uses to raise annuities, with powers of distress and entry; and subject thereto to the use of trustees for a term of 500 years upon certain trusts, and subject thereto to the use of his son F. Wright for life, without impeachment of waste, with remainder, after trusts to preserve contingent remainders, to the use of testator's grandson, John Wright (eldest son of F. Wright), for life, with remainder, after trusts to preserve contingent remainders, to the use of the first and every other son of John Wright successively in tail male, with remainder over. And the testator declared that

It should be lawful for the trustees . . . at the request in writing of any person who, by virtue of that his will, should be tenant for life in tail male or in tail in possession of any of the hereditaments and premises thereinbefore devised, or any part or parts thereof respectively, or should be entitled to the rents and profits of any of the same hereditaments, or any part or parts thereof respectively, and who should have attained the age of twenty-one years, to dispose of, either by way of absolute sale or in exchange for other estates in fee simple in possession to be situate in Great Britain, the hereditaments and premises of which such person should be so tenant for life in possession or tenant in tail male or in tail in possession, or to the rents and profits of which any such person should be so entitled as thereinbefore mentioned, or any part or parts of the same hereditaments and premises,

with power to the trustees, for the purposes of such sale or exchange, and at such request, to

(a) The name "Osmaston" was assumed before the events leading to the present summons in substitution for "Wright;" but, to avoid confusion, the original name is adhered to throughout.

revoke the uses and trusts and declare new ones.

At some time previous to March 1878 Francis Wright died, and on the 9th of that month F. P. B. Wright, eldest son of John Wright, the testator's son, attained twenty-one.

By a disentailing indenture, dated the 29th May 1878, and made between the said John Wright of the first part, F. P. B. Wright of the second part, and J. Martin, as trustee, of the third part, John Wright and F. P. B. Wright,

With the consent of the said John Wright as protector of the settlement made by the will of the said testator, did, and each of them did grant, dispose of and confirm unto the said J. Martin and his heirs the hereditaments in question, to hold the same unto the said J. Martin and his heirs, subject and without prejudices to the uses and estates by the said will limited which were prior to the estates in tail male of the said F. P. B. Wright (other than the uses or estates limited to the said John Wright during his life), and to the powers annexed to such prior uses and estates, or exercisable during the continuance thereof, so far as the same uses or powers were then subsisting or capable of taking effect, and to such charges as were subsisting on the life estate of the said John Wright, but freed and discharged from the said estate in tail male and all other estates in tail of the said F. P. B. Wright, and all remainders, reversions, estates, rights, titles, interests, and powers to take effect after the determination or in defeasance of such estate or estates in tail male or in tail, to such uses, upon such trusts, and with and subject to such powers, provisions, agreements, and declarations as the said John Wright and F. P. B. Wright should by any deed or deeds, with or without power of revocation and new appointment, from time to time jointly appoint; and in default of and until such joint appointment, and so far as no such joint appointment should extend, to such and the same uses, upon such and the same trusts, and with and subject to such and the same powers, provisions, and declarations as were subsisting in the said premises or capable of taking effect therein immediately before the execution of the [indenture now in statement], so as to restore and confirm the same uses, trusts, powers, provisions, and declarations.

By an indenture of resettlement, dated the 22nd June 1878, and made between John Wright of the first part, F. P. B. Wright of the second part, and F. Beresford Wright and J. B. Plumpton of the third part, after reciting the will of the testator, and that John Wright and F. P. B. Wright had lately mutually agreed that the estate in tail male of the latter in the premises, and all the remainder over should be barred, and that a sum of 35,000*l.* should be raised by mortgage for the benefit of John Wright, and that subject as aforesaid the said hereditaments should be resettled in manner thereafter appearing, and reciting the above-stated indenture of the 29th May 1878, and a mortgage by John Wright and F. P. B. Wright, under the power of appointment contained in such indenture, for 35,000*l.*; it was witnessed,

That in pursuance of such agreement, and in exercise of the power in that behalf given to the said John Wright and F. P. B. Wright by the thereinbefore-stated indenture of the 29th May 1878, John and F. P. B. Wright jointly appointed that all the hereditaments and premises, subject to the said mortgage, should . . . (subject and without prejudices to the uses and estates subsisting in the same premises by virtue of the said will . . . and which were prior to the estate thereby limited to the first son of the said John Wright in tail male, other than the uses and estates limited to the said John Wright and his assigns for his life, and to the powers annexed to such prior uses and estates, or exercisable during the continuance thereof, and subject also so far as related to the life estate or interest of the said John Wright [in a certain portion of the hereditaments

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specified in a schedule] to a mortgage debt of 20,000*l.* and interest and to the said debt or sum of 35,000*l.* and interest go, remain, and be to the uses, upon the trusts, and with and subject to the powers, provisions, agreements, and declarations thereafter declared and expressed concerning the same,

viz., to the use that F. P. B. Wright might, during the joint lives of himself and his father, receive certain annual sums by way of rentcharge, with power of distress and entry, and subject and charged as thereafter mentioned, to the use of the trustees for the term of 200 years, upon trusts thereafter expressed, and in the meantime, subject to such terms and to the trusts thereof,

To the use of the said John Wright and his assigns during his life, without impeachment of waste, in restoration and by way of continuance and confirmation of the former life estate of the said John Wright under or by virtue of the said will, with remainders over. And the indenture contained a proviso and agreement and declaration that nothing therein contained should in anywise prejudice or affect any of the powers of leasing and sale and exchange respectively contained in the said will of the said John Wright, the testator, and that the uses, estates, and powers limited or created by the said indenture (now in statement), or to be limited or created under any of the powers thereinbefore contained, should and might from time to time be overreached by the exercise of any of the said powers contained in the said will, in the same manner as if the said uses, estates, and powers, limited or created by this abstracting indenture, had been limited or created by the said will, and that the hereditaments to be purchased with the moneys to arise by any sale or to be received for equality of exchange under the powers of sale and exchange contained in the said will should (regard being had to the nature and tenure thereof) be settled and assured to the uses, upon the trusts, and with and subject to the powers, provisions, and declarations which should be subsisting or capable of taking effect under or by virtue of the said will and the present indenture.

A contract having been entered into by John Wright and the trustees for the sale of the property, the purchasers took the objection that the latter had no power to sell, inasmuch as they could only do so, if at all, under the will, and in that case the request of a tenant for life "by virtue of" the will would be necessary, whereas there was now, by reason of the disentailing deed, no such person in existence. The objection not being waived or satisfied, the present summons was taken out by the purchasers and adjourned into court.

*Cozens-Hardy*, Q.C. and *Ribton*, for the purchasers.—We are willing purchasers. The limitations of the will are gone altogether, and there is no tenant for life by virtue of it. The case of *Alexander v. Mills* (22 L. T. Rep. N.S. 336; L. Rep. 6 Ch. App. 124) is quite different in facts, the tenant for life whose covenant was necessary being expressly named, but we rely on the words used by James, L.J. at p. 133. [PEARSON, J. referred to *Fazakerly v. Ford*, 4 Sim. 390.]

*Cookson*, Q.C. and *Haldane* for the vendors.—The power is not gone. The operation of the will was only suspended so as to admit of the interposition of the powers of appointment in order to effect the mortgage. The manner in which this was done is purely a matter of conveyancing machinery. The parties never intended to destroy the operation of the will. They referred to

*Warburton v. Farn*, 16 Sim. 625;

*Long v. Rankin*, Sugden on Powers, 8th ed. p. 899;

*Davidson's Conveyancing* (Settlements), iii. pt. 1, p. 594;

*Tyrrell v. Marsh*, 3 Bing. 31;

*Roper v. Hallifax*, 8 Taunt. 845;

*Lord Jersey v. Deane*, 5 B. & Ald. 569;

*Shelford's Bankruptcy Act*, 8th ed. 375;

*Simpson v. Bathurst*, L. Rep. 5 Ch. 193.

[PEARSON, J.—Mr. Hardy, I wish to call your attention to the case of *Harrison v. Round*, 2 De G. M. & G. 190.]

*Cozens-Hardy*, Q.C. in reply.—In that case there was no absolute alienation of the life estate. The intention we have to regard is that of the testator (the settlor), not that of the parties. The power is annexed to the estate, which is gone. The very word "restoration" shows that it is gone; there was a new limitation. In the cases cited against me the person to consent was designated by name.

PEARSON, J.—I have no doubt that this case is an important case, but to my mind it has to be determined on tolerably simple principles, and principles on which this court has never had any doubt at all. [His Lordship then stated the will.] The grandson John Wright became tenant for life; he had a son named Francis, who became tenant in tail male subject to his father's life interest, and he attained the age of twenty-one. Then, when Francis attained the age of twenty-one, the father and the son were minded temporarily to displace the father's life estate for the purpose of making certain arrangements for the benefit of the father and the son. That was carried into effect, first of all, by what we are in the habit of calling a disentailing deed. [His Lordship then stated the disentailing deed.] To my mind the effect of that deed would be to create a power of appointment, and subject thereto to leave the existing uses of the will untouched. [His Lordship then stated the deed of resettlement.] That being so, John is now minded that the estate shall be sold under the power contained in the will, and John, as tenant for life under the will, unless his life estate under the will is gone and he has taken a new estate, requests the trustees to sell. The question which is argued before me is: Have the trustees a power to sell, or has the effect of the deed which has been executed been to displace altogether the estate which John had under the will and to give him a new estate altogether, so that he has no longer any power to request in writing the trustees to sell, and that the trustees have therefore no longer any power to sell? The question is, What estate does John take? On the one side it is argued that he takes an entirely new estate, that he now takes an estate under the disentailing deed and the further deed in exercise of the power of appointment under the disentailing deed, and that the life estate which he had under the will is gone, and that it could not by any possibility be restored or replaced as it is proposed to restore it and replace it under the deeds themselves. On the other hand, it is said that the deed ought to be construed according to the manifest intention of the parties, and that if the intention of the parties was manifestly not to touch the estates of the will any further than was necessary to introduce the changes which have been introduced upon the property, and subject thereto to leave the old estates existing in exactly the same manner in which they existed before those deeds were executed, then John has a life estate under the will, and, having the life

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estate which he originally had under the will, he is now entitled to request the trustees to sell. I am of opinion that the latter contention is the right one, and I should regret it exceedingly if I found myself compelled to come to a contrary conclusion, because the result would be to fetter parties exceedingly in making those provisions which are constantly called for when a tenant in tail arrives at full age. If it were to be held that it was impossible for the parties to arrange so that they could make the alterations which were rendered necessary by change of circumstances and lapse of time, and yet not destroy the original limitation under the original will or settlement, I think it would be a case in which some intervention, even of the Legislature, would be required in order to enable parties to deal with property according to the exigencies of human life. To my mind, I am relieved from any doubt on the case by authority of the highest description, I mean the authority of Lord St. Leonards; because, to my mind, this very point was in substance raised in the case of *Harrison v. Round*. The question there undoubtedly arose, not upon a power of sale, but upon a shifting clause, i.e., upon a clause which this court has always been in the habit of construing with the greatest possible strictness. In that case there was a marriage settlement, and under that marriage settlement there were two estates, A. and B.; A. was limited, subject to the father's and mother's life interests, to the eldest son in tail male; the second estate, B., was limited to the second son in tail male, and then there was a shifting clause to the effect that, if the second son should come into possession of the first estate, A., the second estate limited to the second son was to go over; and in the lifetime of the father, by the death of the elder son, the second son did become entitled in remainder subject to his father's life interest, to estate A. and he and his father thereupon by recovery settled that estate; and I will mention presently from Lord St. Leonards' judgment the manner in which that estate was settled. First of all, let me call attention to the shifting clause: "Provided always, and it is hereby declared and agreed, by and between all the said parties hereto, that in case it shall happen that the second, third, or any other younger son, or sons, of the body of the said J. H. Harrison, on the body of the said S. T. Fiske to be begotten, shall become an eldest or only son, and as such shall become entitled to the actual possession, or the receipt of the rents and profits of the aforesaid capital messuage called Copford Hall, and the aforesaid several other hereditaments first hereinbefore limited therewith to the first son of the body of the said J. H. Harrison on the body of the said S. T. Fiske to be begotten, by and under the limitations and provisions hereinbefore contained," then the estate would go over. I need not read the rest of the clause. It was only to go over if he became entitled to estate A. "by and under the provisions hereinbefore contained." Then the recovery was executed. "By the recovery deed," says Lord St. Leonards, "the father and son conveyed in the way which was at that time usual when deeds of that kind were prepared—they conveyed to the tenant of the præcipe during the joint lives of the father and of the person to whom the conveyance was made, so as to leave in the father a reversion of

his life estate; and there was also what was called the 100,000*l.* clause for the purpose of avoiding the conveyance." The recovery so suffered was only of estate A. "All this," says Lord St. Leonards, "shows that, as far as regarded the father's estate, the parties intended to leave it as far as they could unaffected by the operation of the recovery and the uses declared by the deed. These uses were to the joint appointment of the father and son, and in default of and until such appointment to the same uses to which the premises were previously limited." That is exactly the disentailing deed here. "The effect of this was that, subject to the exercise of the power of appointment by the father and son, the estate remained precisely in the same position as if the recovery had not been suffered; and if no mortgage had been created" (a mortgage was created afterwards here), "it is impossible to say that the strict terms of the proviso in question would not have been answered when the second son, after the death of his father, came into possession of the Copford Hall estate. The recovery did not so alter the estate as to prevent the operation of the proviso, for no rule of law would in such a case prevent the original intention of the parties from having its full effect and operation." Now, I rely entirely upon what Lord St. Leonards said there, he having given a great deal of consideration to the case, and beginning his judgment by saying that the case was one of considerable difficulty. He tells me that what I have to consider is, what was the intention of the parties, and that if the intention of the parties was to leave the original estate where it was, affected only by such matters as might be introduced, not for the purpose of destroying the life estate, but for the purpose of giving effect to the arrangement which the father and son intended to effect, the result was that the life estate would remain. In both these deeds I have the clearest intimation of the intention that the father joined in these deeds with the son in order to disentail the property, and in order to create the charge of 35,000*l.* and the rentcharges which are created for the benefit of the son. The intention of the father and son was to preserve the father's life estate under the will in the first place, and in the disentailing deed, subject to the power of appointment, as in the recovery deed here, the estate is limited to the same uses that are subsisting under the will. In the second place, when you come to the creation of the mortgage and the creation of the rentcharges, the use is to the use of John for life in continuance and restoration of his life estate under the will. I am of opinion, therefore, that the intention of the parties here was only to displace *pro tanto* the life estate of the grandson, but, subject to that, to preserve the life estate of the grandson under the will. I think that has been done, and, if it has been done, there is no question whatever that the grandson has the right to request the trustees to sell, and that the trustees have the power of sale, and I must so decide. I declare that John Wright sustains the character of tenant for life in possession "by virtue of the will," and that the power of sale contained in that will is, upon his request, exercisable by the trustees. The purchasers must pay the cost of the summons.

Solicitor for the vendors, H. Fox.

Solicitors for the purchasers, H. Hood Barra.



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Re ROSHER; ROSHER v. ROSHER.

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April 29, 30, May 5, 26, and 28, 1884.

(Before PEARSON, J.)

Re ROSHER; ROSHER v. ROSHER. (a)

*Condition—Repugnancy—Condition annexed to devise in fee—Restraint upon alienation—Period of restraint.*

*There is no exception, in favour of a restriction for a given period of time, to the general rule of law that a condition annexed to a devise in fee simple restraining the devisees from alienating the property devised, is void for repugnancy.*

*A testator devised certain properties to his son in fee simple, and annexed to the devise a condition that, as to one property, if his said son should desire to sell the same in the lifetime of the testator's widow, she should have the option of purchasing the same at a given price; and that, as to two other properties, if his said son should during the lifetime of the widow desire to let the same for a longer period than three years, the widow should have the option of renting the same at certain given rents.*

*The purchase price and the rents named by the testator were respectively only small proportions of the true selling and letting values of the properties as valued at the time of the testator's death.*

*Held, that the conditions were, under the circumstances, equivalent to a total prohibition against selling or letting the properties during the widow's lifetime, and as such were void for repugnancy.*

## SPECIAL CASE.

This was a case stated for the opinion of the court under Order XXXIV., r. 1.

The plaintiff was the widow of Jeremiah Burch Rosher, who died on the 26th Nov. 1874, and the defendant was his only son and heir-at-law.

The questions submitted by the special case arose under the following devise contained in the will of Jeremiah Burch Rosher, dated the 26th Nov. 1872:

I devise all my manor, commonly called or known as the Trewyn Manor, and all other my real estate, unto my said son Jeremiah Lilburn Rosher (meaning the defendant), his heirs, executors, administrators, and assigns, according to the tenure thereof respectively. Provided always, and I hereby declare, that if my said son, or his heirs or devisees, or any person claiming through or under him or them, shall desire to sell my manor and estate of Monmouth and Hereford, or any part or parts thereof, in the lifetime of my said wife, she shall have the option to purchase the same at the price of £1000. for the whole, and at a proportionate price for any part or parts thereof, and the same shall accordingly be first offered to her at such price, or proportionate price or prices. And I also declare that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall, during the life of my said wife, desire to let Trewyn House, garden, buildings, land, and premises, or any part or parts thereof now in my occupation, for a longer period than three years at any one time, she shall have the option of renting the whole of the lastly described premises for any period exceeding three years, as she shall desire, at the yearly rent of 25*l.*, to be payable half-yearly, and the same shall be first offered to her accordingly, and that if my said son, his heirs or devisees, or any person claiming through or under him or them, shall, during the life of my said wife, desire to let Lower Trewyn, or any part or parts thereof, for a longer period than seven years at any one time, she shall have the option of renting the whole of the said Lower Trewyn for any period exceeding seven years, as she shall desire, at the yearly rent of 35*l.*, payable half-yearly, and the same shall be first offered to her accordingly.

(a) Reported by J. F. WAGNER, Esq., Barrister-at-Law.

The real selling value of the manor and estate of Trewyn and other the estates of the testator in the counties of Monmouth and Hereford, subject to a certain annuity or jointure rentcharge given to the plaintiff, and also to a right of residence in a house called Ty Derlwyn, also conferred upon the plaintiff by the will, was, at the date of the will and at the time of the testator's death respectively, 15,000*l.* and upwards.

The real letting value of Trewyn House (unfurnished), with garden, buildings, land, and premises, was, at the date of the will and at the time of the testator's death, 100*l.* and upwards per annum.

The real letting value of Lower Trewyn, which consisted of about 100 acres of land, was, at the date of the said will and at the time of the testator's death, 100*l.* and upwards per annum.

The defendant claimed the right to sell Trewyn Manor and other the estates of the testator in the counties of Monmouth and Hereford, and to let Lower Trewyn, without reference to the provisos and conditions as to the plaintiff's option contained in the will.

The questions submitted to the court were: (1) Whether or not, according to the true construction of the will, the defendant was entitled to sell the devised estates without first offering to the plaintiff the option to purchase the premises intended to be sold at the price named in the will, or at a proportionate price, according to the quantity dealt with as the case might be, or whether the provisions and directions contained in the will with reference to the option of purchase were null and void; and (2) whether or not, according to the true construction of the will, the defendant was entitled to let Trewyn House, or any part thereof, for a longer term than three years, or Lower Trewyn, or any part thereof, for a longer term than seven years, without first offering to the plaintiff the option of renting the same respectively, as directed by the will, and at the respective rents named therein; or whether the provisions and directions in the will in reference to the letting of the said premises or either of them were void and of no effect.

The arguments proceeded, as will be observed, upon the footing that the law was equally applicable to the condition against selling and the condition against leasing.

W. Barber, Q.C. and Dauney for the plaintiff.—The conditions are valid. In the case of "a devise to my brother J. on the condition that he never sells out of the family," the condition was held to be good:

*Re Macleay*, 38 L. T. Rep. N. S. 682; L. Rep. 20 Eq. 186.

That case was brought before the Court on Appeal in *Dawkins v. Lord Penrhyn* (36 L. T. Rep. N. S. 680; 6 Ch. Div. 318), when Jessel, M.R. pointed out that there was there no estate tail. [PEARSON, J.—Jessel, M.R., in *Re Macleay*, said: "There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle." Suppose the defendant here had desired to settle, could he not do so?] The condition is not absolute against all alienation, but it is none the less valid to the extent specified. There is no objection to a

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condition against alienation within a particular period:

*Large's case*, 2 Leon. 82; 3 Leon. 182;  
*Jarman on Wills*, c. 27, ii.

The period in this case is the lifetime of the widow. Prohibitory provisions are not to be interpreted on a principle of tendency:

*Philpott v. St. George's Hospital*, 6 H. L. Cas. 338.

*Cookson, Q.C., Orpen, and Walford* for the defendant.—The condition is invalid, being repugnant to the devise to which it is annexed. It is as impossible to prohibit alienation, except for a particular price, as it is to restrain alienation absolutely. The right of alienation is incident to every estate in fee simple as to every other estate. The condition would be void if it could be construed as an executory devise to the plaintiff at a given price upon the defendant's proceeding to sell or lease, but it is not an executory devise, for its operation is expressly made dependent upon the defendant desiring to sell:

*Shaw v. Ford*, 37 L. T. Rep. N. S. 749; 7 Ch. Div. 669.

Nor does the condition operate as a conditional limitation:

*Re Machu*, 47 L. T. Rep. N. S. 577; 21 Ch. Div. 838.

It is nothing but a condition. In the case of a devise to T. for life, and after the determination of that estate unto the issue male of the body of T. lawfully to be begotten, and to their heirs, and for want of such issue over, and if T. or his issue should alien the premises, they were charged with 2000*l.*, it was held that the charge was repugnant to T.'s estate tail, and therefore void:

*King v. Burchell*, 1 Ed. 424; Amb. 379.

We admit that a restraint against alienation during a given lifetime may be good, when annexed to a devise in fee simple:

*Ware v. Cann*, 10 B. & Cr. 433.

But that is not the present case. The effect of *Large's case* (*ubi sup.*) has been misinterpreted. It was not a case of a condition purporting to defeat a previous estate. It was in fact a case of contingent remainder. It was well stated in

*Maudiebaum v. Macdonell*, 18 Amer. Rep. 61, 80.

See also

*Fearne Contingent Remainders*, edit. 1844, p. 5, p. 256;

*Sheppard's Touchstone*, p. 129;

*Jarman on Wills*, c. 27, ii.;

*Davidson's Conveyancing Precedents, Settlements*, vol. 3, i. p. 111, note, edit. 1873.

If a restraint extending to the whole life of the owner is bad, a restraint extending over the life of another person must equally be invalid. A condition not to alienate, except to one person, is invalid:

*Muschamp v. Bluet*, Sir J. Bridgman, 137.

[PEARSON, J.—Can *Muschamp v. Bluet* stand with *Doe v. Pearson*, 6 East, 173*F*.] *Doe v. Pearson* is not this case. The condition there was against alienation, except to a particular class; here it refers to a particular person. That decision is not to be treated as an authority in favour of the general validity of the condition. Lord Romilly, M.R. held that a devisee in fee could not be restrained from alienating except to one of his brothers:

*Attwater v. Attwater*, 18 Beav. 330.

See also

*Billing v. Welch*, 6 Ir. Rep. Com. Law, 88, 102.

The dicta of Jessel, M.R. in *Re Macleay* (*ubi sup.*) are in favour of the defendant's contention. Moreover it should be noted that in that case no arguments were in fact addressed to the court. The question was simply submitted. The condition is void also upon the ground of uncertainty. A condition divesting an estate must be construed very strictly, and must be ascertainable from the beginning:

*Clavering v. Ellison*, 3 Dr. 451; 7 H. of L. Cas. 707.

The word "desire" is an uncertain term. The defendant's desires are not to be ascertained:

*Re Esmouth; Esmouth v. Praed*, 43 L. T. Rep. N. S. 422; 23 Ch. Div. 158.

No case can be produced in which a condition of defeasance attached to an estate in fee simple has been held to be good, nor where an owner in fee simple in possession has been restrained from selling. The condition here against selling is practically a condition that if the feoffee sells he shall pay a fine to the nominee of the feoffee. There is no gift over, and on that ground alone the condition is inoperative. The estate of the defendant is unfettered:

*Hood v. Oglander*, 34 Beav. 513; 12 L. T. Rep. N. S. 626.

The tenant in fee, being also the heir-at-law, is the only person who could take advantage of the condition if it were operative to effect a defeasance of the estate devised.

*Barber, Q.C.* in reply.

After the arguments had been closed PEARSON, J. drew the attention of counsel to a case of *Spittle v. Davis* (2 Leon. 28), but no comments were addressed to the court upon it.

PEARSON, J.—In this case Mr. Jeremiah Burch Roshier, by his will dated the 26th Nov. 1872, devised as follows: [Reads it.] That is the whole of the devise which relates to the matter in dispute in this case. It appears by that devise that there is a devise in fee simple of this Welsh property to the son, which is clogged with two conditions, one with regard to selling, and the other with regard to leasing. I will deal first of all with the condition which relates to the selling. The question before me is, whether or not, there being an absolute devise in fee simple, those conditions are or are not invalid. It will, I hope, shorten the observations that I have to make if I first state the manner in which I interpret this condition against selling, and also deal with the only point upon which I intend to offer any opinion, and upon which I intend to decide this case. The restriction upon selling is this, that if the son, or any person claiming through or under him, is minded to sell during the lifetime of the testator's widow, the estates so intended to be sold, whether the whole of the estates or a part, must be offered to the widow at the price of 3000*l.*, or at a proportionate price in case the whole is not sold. By the terms of the special case it is agreed that the value of the estate at the death of the testator was 15,000*l.* It is therefore, in effect, a condition that, if the son desires to sell, he shall offer to the widow the estates for sale, and that she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale, during the life of

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the widow. I mean to treat it as if it had been, "During the life of the widow you shall not sell," and for this reason, because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the estate, is to my mind equivalent to a restraint upon selling at all, and I do not think I am wrong in that; or even that there is a want of authority for it, for in Sheppard's Touchstone, at p. 130, there is a reference to *Bragg and Tanner's case*, which is thus referred to; "And in Pasc. 19, Jac. B. R. it was held by Justices Doderidge and Chamberlain that if a feoffment be on a condition that if the feoffee alien he shall pay 10l. to the feoffor, that this is a good condition; but Chief Justice and Justice Houghton held the contrary, for then this shall be a circumvention of the law." And in the Irish case of *Billing v. Welch* (*ubi sup.*) which Mr. Cookson referred to, that case is referred to in this way (it was the judgment of the Queen's Bench delivered by O'Brien, J.): "The author then refers to a case in which Doderidge and Chamberlain, JJ. held that if a feoffment be on condition that if the feoffee alien he shall pay 10l. to the feoffor, the condition would be good, but in which case the Chief Justice and Houghton, J. held the contrary, on the ground that this would be 'a circumvention of the law.' In our opinion the ruling of the Chief Justice and Houghton, J. was the correct one. If a covenant be held good which in the event of a grantee in fee simple aliening the land merely imposes a fine upon him (or an additional rent upon the lands as in the case before us), the general rule might be evaded, and the principles of it violated, by fixing such an amount of fine or additional rent as would effectually prohibit the alienation, which would clearly be 'a circumvention of the law.'" To my mind, to compel the son in this case to sell, if he chose to sell at one-fifth of its value, was really prohibiting alienation absolutely during the widow's lifetime. The question then which I have to determine is this, is it or is it not the law that, after a devise annexed to a devise of a fee simple you may add a condition that during a limited period the devisee shall not sell. Now, in order to determine this case, we must begin with and go back to that which to a great extent is the fountain-head of the English law, I mean Coke upon Littleton. In the 360th section it states this: "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements (*pur ces que quant homo est enfeoffe de terres ou tenements*) he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." And in a note by Mr. Charles Butler to sect. 362 he says this: "A power of suffering a common recovery, and of levying a fine within the statutes of 4 Hen. 7, and 32 Hen. 8, is so inseparably inherent to the estate of a tenant in tail, that any condition or proviso restraining or prohibiting it is held to be repugnant to the nature of the estate and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed because (to use an expression of Lord Hobart) a condition annexed to an estate is a divided clause from the

grant, and therefore cannot frustrate the grant preceding it, neither in anything expressed, nor in anything implied, which is of its nature incident to and inseparable from the thing granted." I conceive, therefore, that Mr. Charles Butler, according to that, must have said that the power of sale is a thing incident to and inseparable from an estate in fee simple, and therefore that the condition against selling is absolutely void. But if I go to Lord Coke's observations in *Mary Portington's case* (10 Coke Rep. 307), and apply them here, I think it will make the case still plainer. I am quoting from 10 Coke's Reports, 38 b: "And it was well observed in this case, that to an estate tail there are three manner of incidents; some by the common law, others by Act of Parliament, and some by custom. By the common law such as are not restrained by the statute, and cannot be restrained by any condition, as dower and tenancy by the curtesy after issue, are incident to an estate tail, and cannot be restrained by condition. Also the estate of him, and of tenant in tail after possibility, are dishonourable of waste, so a collateral warranty is a bar to an estate tail, and a common recovery also, and none of these can be restrained by any condition or limitation. By statute law, as to make leases by the statute of 32 Hen. 8, c. 28, and to levy a fine by the statute of 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36, to bar issues, and none of these which are incidents to his estate by Act of Parliament may be restrained by condition; for when a man makes a gift in tail, he *tacite* gives these incidents to it; and therefore to restrain them by condition or limitation would be repugnant. For suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives according to the said Act; or to levy a fine with proclamations according to the Acts in such case to bar his issues; provided always that he shall not make leases, or levy a fine; none will deny but such provision would be repugnant; and by consequence in the other case such incidents are tacitly implied, for *Expressio eorum que tacite insunt nihil operatur*." And so when you come to a devise in fee simple, if I may translate it according to this instance of Lord Coke's, "I devise to A. B. and his heirs Blackacre in fee simple, and I give him power to mortgage, lease, and sell the estate or any part or parts thereof from time to time, and at all times or any time, in any market, to any person or persons, upon such conditions or terms as he shall from time to time in his own absolute will and pleasure determine, provided always that he shall not sell during the life of A. B. either in his own life or of C. D.'s." I think everybody would say, when you wrote it out in full in that way, the condition is repugnant to the grant which has been made before, and of course, if the matter had stopped there, there would have been no difficulty whatever in this case. The question which would have had to be determined would be simply the question whether the condition was in whole or in part repugnant to the gift to which it was annexed, and if so it would necessarily be void. But it is impossible to shut one's eyes to the fact that some exceptions at all events have been made to this general law. The general law seems to me to stand upon principles about which there can be no doubt, and which are easily intelligible. But in the very next section to that which I have read, namely, sect. 361, there is

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this, "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good." I confess I am absolutely at a loss to understand how that exception arose, because plainly this exception is just as much within the terms of the repugnancy to the condition as any other exception would be, for the power given that he shall be at liberty to alienate to any person or persons whom he pleases includes a liberty to alien to I. S. if he likes. It seems to me that unintentionally and unwittingly another principle has been introduced here, forgetting entirely that the question whether the condition was good or bad could be determined in the former case by its repugnancy to the gift, and that the question of policy has been allowed to intervene here, omitting altogether all considerations of repugnancy, just as a general restraint against marriage was always held to be bad, but a restraint against marriage with one particular individual was held to be good. So in the same way, although restraint of alienation in general was decided to have been bad, it seems to me to have been thought that the restraint of alienation to one individual or his issue was not bad. I confess I wish the law had been allowed to stand on the simple question of repugnancy, because then there would have been no uncertainty and no confusion. In Sir J. Bridgman's Reports (which I have not now got in court) there was a case, which was, I think, cited to me during the argument, of *Muschamp v. Bluet* (*ubi sup.*), in which the converse of this was tried; that is to say, a condition that you should alien only to one individual named, and that was held to be bad. But it is impossible not to see that, although that was held to be bad, the principle upon which that was held to be bad has certainly been departed from in later times, and of course I refer to those cases which had been decided up to the later case before the Master of the Rolls, *Re Macleay* (*ubi sup.*). Of the older cases there are two, namely, *Daniel v. Ubley* (Sir W. Jones, 137; Noy, 80; Latch. 9, 39, 134), and *Doe v. Pearson* (6, East, 173). Those cases were succeeded by a case before Lord Romilly of *Attwater v. Attwater* (*ubi sup.*), and finally followed by the case before the late Master of the Rolls, which I have just mentioned, *Re Macleay*, upon which I shall have to make some observations. They do not actually meet this particular case, because they were cases of restraint of alienation, not for a limited time as this is, but restraints of alienation to the world in general, and the question was whether or not the alienation to a certain class of individuals was sufficient, and sufficient to take the case out of the rule as being repugnant to the gift. Now, in the case of *Daniel v. Ubley* the devise was this: "I give and bequeath to Agnes my wife my house, &c., to dispose of at her will and pleasure, and to give to such of my sons as she thinks best." It appears that Sir W. Jones thought that the wife had an estate for life with power to dispose of it as she pleased at her pleasure during her life, and a power to give the reversion to anyone of her sons as she chose. If really and truly that is a correct translation of this devise, that she took merely an estate for life, and a power simply to devise her estate to one of

her sons, I need not say that *Daniel v. Ubley* would not touch the present question at all, and I cannot help thinking, if that case were to be decided in the present day, that that opinion which is expressed by Doderidge, J. would be held to be substantially right; but it is impossible to ignore the fact that judges have taken different views. I will now read from the judgment of the late Master of the Rolls in *Re Macleay*, because it is sufficient for me to refer to what he quotes there from these cases. He cites Lord Ellenborough in *Doe v. Pearson*, and Lord Ellenborough there says: "For according to the case of *Daniel v. Ubley*, though the judges did not agree as to the effect of a devise, and so forth, yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor, and if she did not, the heir might enter for the condition broken." Now, that is a stronger case still, because, as Lord Ellenborough and the other judges of the Queen's Bench read *Daniel v. Ubley*, all the judges agreed in the time of Sir W. Jones that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else—it was limited. There Doderidge, J. said, "He conceived she had the fee with condition that if she did alien, that then she could alien to one of the children," which is a very limited class; and he finally concluded by saying that "her estate was in fee simple, with a liberty to alienate it if she would, but with a condition that if she did alienate, then she should alienate to one of her sons." With all respect to the memory of Doderidge, J., I think that sentence shows that the two parts are about as repugnant as any two parts could well be. He first says that the estate was in fee, with liberty to her to alienate if she would, and then it follows on, "but with a condition that if she did alienate, then she should alienate to one of her sons." How the two could coalesce together I honestly say I cannot understand. Then Sir George Jessel first says: "In the case of *Doe v. Pearson*, the gift was a gift in fee upon this special proviso and condition, 'That in case my said daughters, Ann and Hannah Collett, or either of them, shall have no lawful issue, that then and in such case they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates as above given to them, except to her sister or sisters, or to their children.'" Then he says: "Now, it is to be observed that the number of alienees possible in that case was smaller than the number in this case; there it was limited to 'her sister or sisters, or their children.'" Then he says: "So that the power of alienation was very much more restricted in *Doe v. Pearson* than it is in the case before me. But the full court there held, after a long and elaborate argument, Lord Ellenborough giving judgment, and going into the authorities very carefully, that the condition was good. The case of *Daniel v. Ubley* is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the judges gave an opinion that it would be good, and following that old authority, Lord Ellenborough and the judges of the Queen's Bench in *Doe v. Pearson*, in the year 1805,

held that the condition was valid." I ask myself, and with all respect, I hope, to the learned judges who decided those cases, what was the principle upon which they decided them, and how by any possibility that principle is to be applied to cases for the future. In *Daniel v. Ubley* the devisee was to alienate to one of her sons. In *Doe v. Pearson* the alienation was limited to a sister or sisters or their children. What am I to say is the principle? Am I to say that there may be a condition that if you alienate you must alienate to a member of your family; or am I to say that you must look to the number of individuals to whom you may alienate; or, when I have got a number of individuals, not knowing at the moment what that number may be, am I to inquire whether they are able or likely to be willing to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if they are from their poverty unable, or if they are from their circumstances unwilling, am I to say that that condition is bad? I can only say that the adoption of any such rule as that would, as it seems to me, produce the greatest uncertainty and confusion, and in fact it is laying down a rule which is absolutely impossible for any judge to apply to a case which may come before him, unless that case is absolutely identical with the case which had been previously decided. Now, in *Attwater v. Attwater* there is no doubt that Lord Romilly challenged the decision in *Doe v. Pearson*. In *Re Macleay* the late Master of the Rolls thought that, inasmuch as *Doe v. Pearson* was decided in the year 1805, it was too late to find then against the decision in that case, and having in the case of *Attwater v. Attwater* a devise which was very nearly similar to the devise in *Doe v. Pearson*, he followed what he conceived to be the rule in *Doe v. Pearson*, and decided that the condition in *Re Macleay* was a good and valid condition. If there were nothing else in the case of *Re Macleay*, I do not think I need have discussed it any further, because the condition which I have now to deal with is not a condition which is to be found in any one of those cases to which I have referred. But no doubt there are some observations in *Re Macleay* which were very strongly relied upon (and very properly relied upon, because the authority of Sir George Jessel is very great), which I cannot possibly ignore, and to which I feel bound to take exception, for I cannot agree with the propositions which I find in his judgment, and upon which Mr. Barber very properly relied in support of the validity of this condition. After citing the section from Coke upon Littleton to which I first referred, and also referring to the case of *Muschamp v. Bluet*, Sir George Jessel says this (p. 189): "So that, according to the old books—Sheppard's Touchstone being to the same effect—the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance, and not of mere form." I apprehend from that that the meaning of the word "substantially" is this, Does the condition really deprive the devisee of the power of alienating, or does it only so restrain it that in effect he still has the power of alienation? If the latter, it is good. But he goes on thus: "Now,

you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows that there were a great many members of the family when the testatrix made her will—a great many are named in it. Therefore, you have a class which probably was large, and certainly was not small. Then it is not, strictly speaking, limited as to time except in this way, that it is limited to the life of the first tenant in tail. Of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled, or is not good law, this is a good condition." With all deference to Sir George Jessel, I do not find that in Coke upon Littleton which he seems to have found there, and I must say this, that when you refer to Coke upon Littleton, with all deference to that learned judge, one must bear in mind that he was not always consistent with himself. I find for instance this (I am quoting now from Coke upon Littleton, 223 b): "And yet if a man make a gift in tail, upon condition that he shall not make a lease for his own life, albeit the state is lawful, yet the condition is good, because the reversion is in the donor." When I turn to Sir Anthony Mildmay's case, which I read in 6 Coke's Reports, 43 a, I find this: "So if a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant." I find also this in the same passage of Coke upon Littleton to which I referred just now (223 b): "If a man make a gift in tail upon condition that he shall not make a lease for three lives or twenty-one years, according to the statute 32 Hen. 8, the condition is good, for the statute doth give him power to make such leases which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the Act, according to that rule of law, *Quilibet potest renunciare juri pro se introducto*. In the passage which I have already read in *Mary Portington's case*, there is this, p. 314: "For suppose that a man makes a gift in tail, and further grants that he may make leases for years or lives according to the said Act, or to levy a fine with proclamations according to the Acts in such case to bar his issues, provided always that he shall not make leases, or levy a fine, none will deny but such provision would be repugnant; and by consequence in the other case, when such incidents are tacitly implied;" that is, whether they are mentioned or not you cannot make a condition of that kind. I think Lord Coke must be read

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with a certain degree of caution, and I may say that any person who will take the trouble to read two or three passages in Sheppard's Touchstone will find that the learned professors of the law are perpetually at loggerheads as to what is a good condition and what is a bad condition, and the reason is this, because they have departed from the first principle which was laid down, that a condition which is repugnant to a gift is a void condition, and when you come to refer to the exceptions, the exceptions are made without any principle at all, and it is perfectly impossible to say, therefore, by any rule, what exceptions are held to be good and what are held to be bad. Now, I should be very sorry to do Sir George Jessel an injustice, and I must honestly say that my own feeling is this, that, in attempting to criticise so able and learned a judge as he was, I am always afraid of falling into some error myself, and I am not quite certain that I understand correctly the extent to which he meant these passages to go. If he meant to say this, that provided you give a power to mortgage or lease, you may restrain the power to sell, all I can say is this, that most respectfully I differ from him, and I cannot understand how Sir George Jessel, in this case, after he had cited a maxim from Coke, which I have cited, should have tried to lay down any such doctrine. Applying it to this case, if I am to take it that it means that the son is to take this estate which would be worth 15,000*l.*, and although there is a restriction against selling the son might immediately mortgage it for 15,000*l.*, or that although there was a restriction against selling he might lease it for 999 years, then I can only say this, it seems to me that both those things are hit by the maxim which he quotes with the greatest approbation, *Quando aliquid prohibetur fieri ex directo, prohibetur et per obliquum*; and that a case of that kind would be an infringement of any such condition is proved, if proof were wanting, by the case which was so much fought upon this occasion, the case to which I must presently refer, *Large's case* (*ubi sup.*), where there being a gift to a son with a condition annexed to it that he was not to alienate within a particular time, he having granted four leases for sixty years, to begin one after the other, it was held that that came within the prohibition. And so in all other cases it seems to me that, if you are to hold that the condition is a prohibition against sale in the ordinary sense of the word "sale," but that you may dispose of the estate in any other way, then the condition, to my mind, is an absurd one, and being so absurd, I am perfectly satisfied that the court would never allow advantage to be taken of the condition because in the present year something had been done in one way which might have been done effectually in another way. It still remains to be considered whether or not there is any limitation as to time, because, although I have dealt with these cases in order to clear the way with regard to the foundation upon which all these exceptions stand, still, as I hold that the exceptions stand upon a principle absolutely removed from the principle of repugnancy, there may yet exist an exception which has been made and which has been determined to be a good exception with regard to the limitation of time. Now, the authority cited for that was *Large's case*. It is to be found in vols. 2 and 3 of Leonard,

but I am about to cite it from the American case of *Maudlebaum v. Macdonell* (*ubi sup.*), to which Mr. Cookson referred me, and which contains a very elaborate and able judgment upon this part of the case. The very same point arose before the American court in *Maudlebaum v. Macdonell* as arises in this case. It cites *Large's case*, and I will take the statement from the American report as being that given in 3 Leonard, 182: "A. seised of lands in fee devised the same to his wife till William his younger son should come to the age of twenty-two years, the remainder, when the said William should come to such age, of his lands in D. to his two sons Alexander and John, the remainder of his lands in C. to two other of his sons, upon condition *quod si aliquis dictorum filiorum suorum circumabit vendere terram suam* before his said son William should attain his said age of twenty-two years, *in perpetuum perderet eam*." It seems to have been held by the text writers that this therefore was a condition attached to a devise not to sell within a limited time, and that that condition was good, because it was held in this case that one of the sons who had gone about to grant leases for terms of sixty years in succession had broken the condition, and that the breach of the condition might be taken advantage of. But what the judge points out here is, I think, perfectly accurate when you come to look at this case; there was no devise of the fee simple or anything of that kind. There was a contingent remainder limited to the son upon condition that before he came into possession, that is to say, before the son attained twenty-two years, he should not sell. That being so, the son having sold before that time, it was held that he could not come and qualify himself to take, under the contingent remainder, and that the contingent remainder therefore failed altogether, and the estate passed away from him. Now, the first citation of this case which deals with it as if it had been said that the limitation as to time was good in a condition of this kind, is in a note in Mr. Preston's edition of Sheppard's Touchstone. It is not in Sheppard's Touchstone itself, and the note runs thus (p. 130): "And the grantee may also be restrained from alienating for a particular time (*Large's case*, 2 Leon. 82; 3 Leon. 182)." Then Mr. Preston adds this in brackets, "being a reasonable time not trenching on the law against perpetuities," and the note so inserted in Sheppard's Touchstone has no doubt been copied into a good many other books. But there has been no judicial decision upon it, and it is a very curious thing that, although Littleton dates from more than 400 years ago, and although Lord Coke died 250 years ago, there is not a single judicial decision to be found in the books showing that this limitation as to the time is an addition to the condition which makes it a valid condition. Now, I perfectly admit that, although there had been no judicial decision, if I could possibly find that this had been an accepted dictum of law, and that it was likely to have entered into divers contracts and dealings between man and man, and that by not following it I should be actually disturbing anything which had been done in former times over and over again on the faith of this dictum, I should feel myself undoubtedly bound by it, and I should decline to decide in opposition to it. I hold most strongly that what the present



Master of the Rolls said in regard to policies of insurance ought to be applied to all doctrines with regard to conveyancing. I am quoting now from a judgment of Brett, M.R., in *Lohre v. Atchison* (38 L. T. Rep. N. S. 801; 3 Q. B. Div. 558, 561). It has simply reference to policies of marine insurance, but it may be equally well applied to all conveyances, and to all the doctrines that relate to conveyances at the present day: "The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our views of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the courts upon the construction or on the mode of applying the policy, or in customs proved before the courts so clearly or so often as to have been long recognised by the courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract, or as agreed modes of carrying it out." I think it would be exceedingly mischievous to attempt to alter any rule that had been adopted, and had been acquiesced in for more than a century. But in the present case I am bound to say that I cannot imagine that this rule has ever been acted upon, because to begin with it is so vague that I am perfectly certain there is no counsel capable of giving advice who would advise him to act upon this rule without better information than we possess at present as to what the rule means. What is the meaning of "a reasonable time?" Does it really extend, as Mr. Preston thinks it does, to a period so long that it does not trench upon the law against perpetuities? Does it simply rest upon the life of the individual himself, or the life of some other person; or is it to be applied in different cases according to the circumstances of each case? Is each judge before whom it comes to decide whether the time in the particular condition is a reasonable time or not; or is it to depend upon some other unknown quantity which this court has yet to decide? Under these circumstances I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift, is a plain and intelligible rule. So far as I find any exception to that rule laid down and judicially decided to be an exception, I am bound by that exception. But I will not add other exceptions to it for which I can find no authority, and the addition of which to my mind will add only uncertainty and confusion to the law which we have to administer. I must, therefore, as regards this condition, so far as it relates to the question of selling, declare that

the condition is void. I come now to deal with the leasing, and as to that there is a power to lease with a restraint upon it in this fantastical manner, that with regard to portion of the property, if the devisee desires to let it for any period exceeding three years, then he is to lease it, if the widow requires it, to her for any period exceeding three years as she shall desire, at the yearly rent of 25*l.*, and by the special case it is agreed that the real leasing value was 100*l.* Now I will take in favour of the condition that that does not enable the widow to require an indefinite lease of the house, I mean a lease for 999 years, or for a long period, but that the utmost she could require would be a lease for the period of her own life. I will take that in favour of the condition. I think, nevertheless, the same rule applies to this power of leasing as applies to the power of sale, and for the reasons before given, because the power to lease is just as much an incident to an estate in fee simple as a power of sale is, and, inasmuch as here the only restriction was that the widow was to have the lease at one-fourth of the real rent, I think that was an absolute restriction upon leasing for more than three years. It seems to me that the condition as to leasing the other property, which was practically the same as this, is void for the same reason. I must therefore answer those two questions, which are the only questions that are before me, by saying that both the restriction upon the power of selling and the restrictions upon the power of leasing are invalid.

Solicitors for the plaintiff, *R. J. Childs*, agent for *Sayce and Baker*, Abergavenny.

Solicitors for the defendant, *Marshalls*, agents for *Gabb and Walford*, Abergavenny.

#### QUEEN'S BENCH DIVISION.

Monday, June 16, 1884.

(Before MATHEW and DAY, JJ.)

HUNTER v. JOHNSON. (a)

*Elementary Education Acts 1870 (33 & 34 Vict. c. 75) and 1876 (39 & 40 Vict. c. 79)—Power to impose home lessons—Detention of child at school after school hours.*

*The master of a board school established under the Elementary Education Acts 1870 and 1876 is not authorised by those Acts in setting lessons to be prepared at home by children attending such school, and the detention of a child at school after school hours for not doing home lessons amounts to a criminal assault.*

THIS was a case stated by the justices of the borough of Bradford under 20 & 21 Vict. c. 43.

1. The appellant was a child ten years of age, residing with his mother, a widow, at Tyersal near Bradford. The respondent was head master of the mixed department of the Tyersal board school.

2. The said school was one of the schools of the Bradford School Board formed under the Elementary Education Act 1870 and amending Acts. The appellant attended the mixed department of the said school.

3. On and for some time previous to the 20th Sept. 1883 the school hours of the Bradford School Board open for the instruction of children of a similar age to the appellant were from 9 a.m. to 12

(a) Reported by DUNLOP HILL, Esq., Barrister-at-Law.



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noon and from 2 p.m. to 4. 30 p.m. during five days a week.

4. It had been the practice, in compliance with directions of the said school board, for some time previous to the said 20th of Sept. 1883, for the teachers of the different schools belonging to the board to set or give the children attending the schools "home lessons;" that is, scholastic work, exercises, and recapitulatory lessons, to do at their respective homes out of and beyond the school hours mentioned in the last preceding paragraph.

5. Previous to the 20th Sept. 1883 the mother of the appellant forbade him to learn or do home lessons, and notice thereof in the following form was served on the respondent :

Sir,—I beg to inform you that I have forbidden my child to do any more home lessons, and consequently request you not to set any more in future. —Yours respectfully, E. HUNTER.

6. On attending school on the 20th Sept. 1883, the appellant, in obedience to his mother's commands, had not learnt or done the home lessons given him the previous day, and he was kept in and prevented from leaving the school after the regular school hours for three-quarters of an hour by the respondent, and made to learn or do the home lessons. He was not kept in for any other reason or purpose.

On the 26th Sept. 1883 an information was duly laid on behalf of the appellant before one of Her Majesty's justices of the peace in and for the said borough, that the respondent on the 20th Sept. 1883 did within the borough aforesaid commit a common assault on the said Dick Hunter, contrary to the statute in that case made and provided.

A summons was duly issued on the said information, and the said information was heard before us, Thomas Adam Watson, Esq., Robert Kell, Esq., and Isaac Smith, Esq., three of the justices in and for the said borough, on the 6th Oct. 1883. Counsel for the appellant contended that, in face of the express notice and command of the mother, the giving and enforcing of "home lessons" to and against the appellant were illegal, and that a false imprisonment, and hence a common assault, had been committed on the appellant. The solicitor for the respondent contended that, assuming for the sake of argument that the respondent had no legal power to keep in the appellant for not having learnt or done "home lessons," yet no assault punishable by the criminal law had been committed.

The justices dismissed the summons, holding that no assault punishable by the criminal law had been committed. The case having been decided on this ground, the justices gave no opinion or decision with regard to the legality or otherwise of enforcing "home lessons."

The appellant contended that the justices should have convicted the respondent, but the respondent contended that the justices ought not in the event stated to have convicted the respondent of an assault punishable by the criminal law.

The question for the court is: Had the respondent under the facts stated any legal power to keep in the appellant for not doing "home lessons?"

If the court be of a negative opinion, then, Ought the justices to have convicted the respondent for an assault punishable by the criminal law?

If the court be of opinion that the justices ought to have convicted the respondent, the case

is to be remitted to us the said justices that a conviction may be entered.

Given under our hands this 22nd day of May 1884.

THOMAS A. WATSON.  
ROBERT KELL.  
I. SMITH.

By sect. 74 of the Education Act 1870 every school board is empowered to make bye-laws for (*inter alia*) (1) requiring the parents of children between the ages of five and thirteen to cause such children to attend school, and (2) for determining the time during which the children are to attend school. Certain immunities from attendance at school are conferred upon children employed in labour.

The Bradford School Board made the following bye-law :

The time during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age including the day fixed by Her Majesty's Inspector for his annual visit.

*Sidney Woolf* for the appellant.—The question here is, whether the Elementary Education Acts, or the bye-laws made under them, give to school boards the authority to impose upon children home lessons, and to detain them in school after school hours if they are not learnt. The 74th section of the Elementary Education Act 1870 empowers the School Board to make bye-laws fixing the time during which the children are to attend school. On reference to the Education Act of 1876 it is clear a child can only be made to attend school during the time the school is open. The bye-laws having determined the hours during which the Tyersal board school should be kept open, the respondent clearly exceeded his powers in imposing home lessons and in detaining the appellant in school after the school hours were over. With regard to the second question put by the justices, it is contended that an assault had been committed by the respondent. An assault is defined in Stephen's Digest of the Criminal Law, p. 162, as "the act of depriving another of his liberty without the consent of the person assaulted, or with such consent if it is obtained by fraud." He also referred to

1 Russell on Crimes, 5th ed. p. 60; and  
*Bird v. Jones*, 7 Q. B. Rep. 742.

The order imposing the home lessons and the detention of the appellant were both illegal acts, and the respondent ought therefore to have been convicted.

MATHEW, J.—I am of opinion that neither the Elementary Education Acts nor the bye-laws give any authority to the School Board authorities to impose upon children the duty of learning home lessons. The Acts must be construed strictly, inasmuch as they are a statutory interference with the liberty of the subject. After looking carefully at the Acts I am unable to find any power conferred upon the school authorities such as has been assumed by the respondent. A punishment was imposed upon the appellant for disobedience to an order which, as it seems to me, the respondent had no power to make. Having regard to the express protest of the mother and to the fact that the appellant was detained against his will, I think that an assault in law was committed, and that the respondent ought to have been convicted, but that the fine ought to be

merely nominal. With this opinion the case must be remitted to the justices.

DAY, J.—I am of the same opinion.

*Appeal allowed.*

Solicitors for the appellant, *Indermaur and Brown*, for *R. Newton Rhodes*, Bradford.

Friday, Aug. 1, 1884.

(Before LINDLEY, L.J. and BUTT, J.)

Re *ETHEL ROWE*, an Infant. (a)

*Infant—Custody—Father's common law right subject to equity rule—Habeas corpus—36 Vict. c. 12, s. 1—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 10.*

By the 1st section of 36 & 37 Vict., c. 12, it is provided that "it shall be lawful for the High Court of Chancery, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order . . . that such infant or infants shall be delivered to the mother and remain in and under her control, or shall, if already in her custody, or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the court shall direct," &c.

By the 10th sub-section of the 25th section of the Judicature Act 1873 (36 & 37 Vict. c. 66), "in questions relating to the custody and education of infants, the rules of equity shall prevail."

*R.*, a yacht master, applied for the custody of his daughter, an infant aged nine, under the following circumstances. On his marriage with the mother of the child he told her that his former wife had left him and gone to America more than seven years before, and died there. After the marriage the mother was informed that the former wife was alive, and that a letter had been received from her. She thereupon left *R.*, taking the child of the marriage with her to her parents, and continued to live with them, the child being then well cared for and well educated. An indictment preferred against *R.* for bigamy was thrown out by the grand jury.

Held, that, as *R.*'s affidavits did not show that he had made any search for his former wife and failed to find her, the Court were not satisfied as to the validity of the marriage, and that, as *R.*'s occupation necessitated long absences from the country, and he did not propose to provide any suitable fixed home for the child, and there being also affidavits (which he, however, denied) that he was a man of loose character, the Court in the exercise of its discretion would not, under such circumstances, order the child to be removed from the custody of the mother, where it was not questioned that she was being well cared for and well educated.

This was an appeal from an order of Smith, J. at chambers refusing to grant a writ of *habeas corpus* to bring up the body of one Ethel Rowe, an infant, on the application of her father, for the purpose of delivering her into his custody.

The facts of the case, so far as material, are fully stated in the judgment of Lindley, L.J.

*F. O. Crump* and *Bankes* for the appellant.—The father is clearly entitled to the custody of the child. The mother of the child has attempted

to prove that the child is illegitimate, and, having failed to do so, the father is entitled to succeed on this application. A prosecution for bigamy was instituted by the mother against the father, and it is a material fact in the case that the grand jury threw out the bill. [Butt, J.—Is not your argument resting upon the fallacy that the whole of the evidence was brought before the grand jury? It may not have been so.] No fresh evidence has since been produced, and, that being so, the presumption is, that a marriage which was confessedly duly solemnised was a valid marriage. [Butt, J.—It would have been possible for the appellant, in face of the evidence adduced by the respondent of the subsequent receipt of a letter from the first wife, to have given evidence of a search for her and of the failure thereof.] The court will not on any evidence now before it deprive the father of his common law right to the custody of his child by a duly solemnised and presumed valid marriage.

*Horace Browne* for the respondent.—The decision of the learned judge at chambers turned upon the present circumstances of the appellant as they appear upon the affidavits, and was to the effect that, considering those circumstances, together with the fact that the child was at present well provided for, it was not expedient to make the order prayed. This is the real issue upon which the case must turn. Now, by the Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 10, the rules of equity are to prevail in these cases, and the particular rule of equity bearing upon the present case is to be found in Story's Equity Jurisprudence, 1341, 10th ed., p. 595, and is there stated as follows: "Although in general parents are entrusted with the custody of their persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, and morals and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed—whenever, for example, it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children, in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them and superintend their education." This is the general rule, and the various cases on the point will be found collected in the judgment of Lord Coleridge in the case of *Re Goldsworthy* (2 Q. B. Div. 75). The first case referred to is that of *Wellesley v. The Duke of Beaufort* (2 Russ. 1) in which Lord Eldon enunciates the principles applicable to such cases. There the father was not allowed to have the custody of his child. In *Ex parte Fynn* (2 De G. & Sm. 457) it is true Knight-Bruce, V.C. refused to make an order changing the custody of the children, but the reason of his refusal was, as Lord Coleridge, C.J. says in his judgment in *Re Goldsworthy* (2 Q. B. Div. 83), "not because the misconduct of

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

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the father was not such as would in his opinion have justified such a course, but because the person to whose care he was asked to assign the children did not show sufficient grounds to satisfy the court that she was of ability to maintain and educate them properly." Here the opposite is the case, and therefore there is nothing in the case of *Ex parte Fynn* (*ubi sup.*) to militate against the application. Then, in *Re Goldsworthy*, Lord Coleridge concludes his judgment as follows: "I place my decision upon this ground, that it is made out to my satisfaction that there has been such gross and habitual intemperance, associated with the constant and habitual use of such improper and outrageous language on the part of the father, as cannot but be seriously prejudicial to the moral safety and welfare of the child. Believing therefore, as I do, that the elementary morals of the child are in serious danger from the gross and habitual intemperance of the father, coupled with the other conduct imputed to him by the mother, I am of opinion that the father has not made out a title to the custody or possession of his son." Here it does not appear that the father is going to provide any home at all for his child in the place of the comfortable home in which she is at present, and he does not tell us who is going to look after the child during his necessarily long absences. The affidavits also show that he is a man of loose character, in whose hands it is extremely probable that the elementary morals of the child would be in serious danger, and it is submitted that the court, taking into consideration these facts, and coupling them with the extreme doubt as to the validity of the second marriage, will not be disposed to grant the present application.

*Crump* in reply.—The observations of Sir J. Knight-Bruce in the case of *Ex parte Fynn* (2 De G. & Sm. 457), instead of being opposed to the present application, are decidedly in favour of it. The Vice-Chancellor in that case says: "The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and, in a sense, on condition of performing those duties, but there is a great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance, nor could a court of justice usefully attempt it. A man may be in narrow circumstances, he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed. He may be all this without rendering himself liable to judicial interference, and in the main it is well for obvious reasons that it should be so. Before this jurisdiction can be called into action between them, it must be satisfied not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position as to render it not merely better, but essential to their safety or to their welfare in some very serious and important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with. If the word 'essential' is too

strong, it is not much too strong." Here it cannot be said that it is "essential" to the safety or welfare of the child that the father's right should be superseded. The affidavits do not show any misconduct on the part of the father which at all approaches the conduct imputed to the father in *Re Goldsworthy* (*ubi sup.*). There there was habitual intemperance day after day, and in the day time constant use of improper language, and cruelty and ill-treatment of the mother. Here there is no definite proof of any misconduct, but merely a general charge of immorality, which the father denies; and, finally, the court will not be in any way influenced by the unsuccessful attempt which has been made to impeach the validity of the second marriage.

LINDLEY, L.J.—I am of opinion that this order ought not to be disturbed. The case, however, is peculiar, being an appeal from an order of Smith, J. made at chambers refusing to grant a writ of *habeas corpus* to bring up the body of Ethel Rowe, a child of the age of nine years, for the purpose of delivering her over into the custody of her father, at whose instance the application was made. The facts of the case are briefly as follow: The father of the child, who is desirous of getting the child into his own custody, and is to that intent appealing from the order of the judge at chambers, went through the form of marriage with the child's mother—who now has the custody of and is desirous of keeping the child, and therefore wishes to support the order—at a registry office in Portsmouth, and he appears to have told her at that time that he had been previously married to another woman, who, he alleged, had deserted him more than seven years before, and had gone to America and died there. Not long after this marriage at the registry office at Portsmouth, and before the child which is the subject of the present application was born, the mother of the child appears to have received information from a third party, a woman who has, however, declined to substantiate her statement upon oath both in the course of these proceedings and in the course of others which I am about to mention, that Mr. Rowe's first wife was not dead at the time of the alleged marriage with her, as Mr. Rowe had stated, but was alive, and that she, —the person giving the information—had subsequently to the second marriage received a letter from her, the first wife. This letter, however, she also declined to produce. In consequence of this information, and also it would seem from the affidavits, because she had reason to be dissatisfied with the conduct of the appellant in point of morality, the mother of the child left him and went back to her father's house at Southampton, where she has since continued to reside with her father and mother and the child of the marriage, which is the subject of the present application. Then, after the lapse of some little time, she appears to have instituted proceedings against the appellant for bigamy; but that these proved abortive is a result at which one cannot be surprised, since it appears to be true that the first wife had actually been absent from the country for more than seven years before the alleged bigamy, and, as I said before, the woman who had given the information that she was alive declined to give evidence to that effect and to produce the letter she alleged she had received from her. I am not, therefore,

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surprised that the grand jury, when the case came before them, threw out the bill; for, even if there had been any evidence that the first wife was alive, there was not, as far as I can see, a tittle of evidence to prove that the husband knew of it, or had any means of knowing it at the time he professed to enter into the second marriage. The failure, however, of these proceedings does not prevent the court from going into all the circumstances of the case, and forming its own conclusions from the evidence before it; and it does not and cannot in any sense follow that, because the grand jury very properly threw out the bill preferred against the appellant, the second marriage is therefore valid. On the contrary, there is a great deal of evidence before me to make me doubt its validity. From the general evidence in the case, I am by no means certain that it was a valid marriage, and, in addition to that, the evidence which the husband gives in support of it is not, to my mind, at all satisfactory; and it is very material to consider that, even if the husband was quite unaware whether she was alive or not, or even believed her to be dead, it does not at all follow that she was not alive at the time of the second marriage, and that that marriage was therefore invalid. I do not, however, wish to say more than that I am not satisfied from the evidence that this was a valid marriage. But at any rate, in the year 1882 the second wife had reason to suppose that the marriage was invalid, and, having that reason, left him, and the one child of the marriage, now nine years old, went with, and has since been living with and still remains with, the mother. Now, there is no suggestion that the child is not properly cared for where she is at present, nor that the mother is in any respect an improper person to have the care of her, no shadow of an imputation of any kind being made against her; but the father comes to this court, and, taking his stand upon his legal rights, asks us to grant him a writ of *habeas corpus* in order that the child may be delivered up to him on the ground that he is the person entitled to the custody of the child. Now, we are no longer subject in such matters to the old common law rules. The Judicature Act has enacted by the 10th sub-section of the 25th section that, "in questions relating to the custody and education of infants, the rules of equity shall prevail." One of these rules, and one which is applicable to the present case, is to be found in 38 & 37 Vict. c. 12, which enacts in the 1st section that "from and after the passing of this Act it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the court shall direct; and further to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said court shall deem

proper." Now, the object of this statute clearly is from its whole tenor to prevent the husband in these cases from unduly asserting those legal rights which he had under the old common law, before the passing of 2 & 3 Vict. c. 54, of which the Act I have just quoted was a re-enactment extending the age of seven years mentioned in the earlier Act to that of sixteen years. These, then, being our powers, the question is, How are we to act in the present case? We are asked to take away this child from the home in which she has hitherto been living with her mother, and in which she has admittedly been well cared for and well educated, and to hand her over to the custody of a man against whom imputations are made that he is a man of loose character. It is true that he denies this, but, apart from that, what is his position? According to his own affidavit, his employment is that of a seafaring man, being the captain of a yacht; and, that being so, the allegations that are made, that he is necessarily absent from this country on voyages which sometimes continue for long periods, are no doubt true. He himself does not tell us that he has any fixed home, and he does not suggest what he is going to do with the child if we make the order he asks, but simply takes his stand upon his strict legal rights. Under these circumstances I cannot but think that the discretion of the learned judge at chambers was rightly exercised, and that we should not be acting rightly if we overruled that discretion. I think, therefore, that this appeal must be dismissed with costs.

BUTT, J.—I am entirely of the same opinion.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Speechly, Mumford, and Langdon.*

Solicitors for the respondent, *Joel, Emmanuel, and Co., for Bell and Taylor, Southampton.*

#### QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

*Tuesday, Nov. 25, 1884.*

(Before CAVE, J.)

*Re HALL; Ex parte CLOSE. (a)*

*Equitable mortgage—Delivery order—Goods not paid for—Bills of Sale Act 1878, sect. 4—Ordinary course of trade or business.*

*Where the delivery order for goods was deposited with bankers by way of security for an advance, the said goods not having been paid for by the pledgor, who subsequently became bankrupt:*

*Held, that such a transaction was not within the mischief of the Bills of Sale Act 1878, sect. 4 (Amendment Act 1882), and did not require registration.*

APPEAL against the decision of the County Court judge sitting at Leeds.

The bankrupt, a shoe manufacturer, on a large scale, had an account, before his bankruptcy, with the Exchange and Discount Bank at Leeds, and in Nov. 1882, the account being considerably overdrawn, required a further advance. As a security for this he offered his property in certain leather which he had just purchased from Brown and Sons, of Liverpool, paying by bill of exchange,

(a) Reported by J. E. VINCENT, Esq., Barrister-at-Law.

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as raw material. He showed the invoice to the bank manager, by whom it was arranged that a special advance of 500*l.* should be made on the security of the leather, which was then on its way to Leeds.

Hall at the time delivered to the bank manager a letter in which he directed the railway company to hold the goods to the order of the bank, and a minute of the transaction was entered in the bank ledger stamped, and signed by Hall, in the words following:

Nov. 13, 1882.

Special account. To have 500*l.* against goods presented in H. Brown and Son's invoice for November for 95*l.* 1*5s.* 10*d.*, to be repaid 100*l.* per week, first payment on Nov. 22, 1882, and upon the whole amount being repaid even if in a shorter time, the leather to be released, provided the regular current account is in order. Terms 1 per cent. above bank rate, not falling below 5 per cent. and commission one half the amount of interest.

(Signed) W. HALL.

The debtor subsequently filed his petition without having reduced the current account to the agreed limit of overdraft—2500*l.*—and without having paid his debt on the special account. Thereupon the bank, after paying the railway company's charges for warehousing, sold the goods for 812*l.* 1*s.*, and the County Court judge refused to make an order directing the bank to pay the money to the trustee. Against this refusal the trustee appealed.

*F. C. Cooper Willis*, Q.C. (with him *West*) for the trustee.—The circumstances of this case are sufficient to bring it within the terms of sect. 11. of the Bankruptcy Act 1869, sub-sect. 15. The goods upon which Hall obtained an advance were not paid for and were supplied by the manufacturers as raw material for trade purposes. I argue, in the first place, that where goods are pledged as security for an advance it is the duty of the pledgees to act honestly, and in this case the pledgees were the very people who best knew the involved condition of Hall's finances. In the second place, the minute entered in the bank ledger was of the nature of a bill of sale, and ought to have been registered, and is void, under sect. 4 of the Bills of Sale Act 1878, for want of registration. It cannot be contended that this advance was "in the ordinary way of business."

*Linklater* (with him *Atkinson*) for the bank.—I take it that I have only to meet the point under the Bills of Sale Act. [*CAVE, J.*—I want to discover whether you think the bank holds a different position to an ordinary money-lender.] I think so, but I hope your Lordship will not hold me bound by it. My title is this: On the 9th Nov. a trader in large business, having twenty-eight shops, is pressed for money and offers the bank, as security for an advance, goods paid for by bill of exchange. It is argued that the goods were obviously sold on credit. [*CAVE, J.*—That is not a point to which you need direct yourself.] The delivery order was given to the bank, and they have reduced the goods into possession, therefore I need say no more about their title. The transaction is quite of an ordinary kind. We are neither within the mischief nor the terms of the Bills of Sale Act. The mischief is well defined in *Woodgate v. Godfrey* (42 L. T. Rep. N. S. 34; 5 Ex. Div. 24). Moreover the 3rd section of the Act of 1878 is not repealed, and we are within the exceptions there defined. In *North-Western Bank*

*v. Slee* (27 L. T. Rep. N. S. 461; L. Rep. 15 Eq. 72), Bacon, C.J. gives a plain and careful exposition of the mercantile transaction of pledge and advance. He also cited

*Marsden v. Meadows*, 49 L. T. Rep. N. S. 301; 7 Q. B. Div. 80.

*Atkinson*.—The Bills of Sale Act does not touch cases in which possession is immediately given to the grantee, and it would be impossible to frame a document within the schedule of the Act which would cover the present transaction.

*Willis*, Q.C. in reply.—In *Reeres v. Barlow* (11 Q. B. Div. 15), the remarks of Bacon, C.J. were disapproved of.

*Cur. adv. vult.*

*CAVE, J.*—This is an appeal against a judgment of the County Court judge at Leeds, refusing to make an order on the respondents to pay to the trustees the proceeds of the sale of some leather. Hall was formerly a boot and shoe manufacturer, and had a banking account with the Exchange and Discount Bank at Leeds. In Nov. 1882 this account was considerably overdrawn, and Hall, who stood in need of further assistance, applied to the bank to allow him to increase his overdraft on the security of some leather which he had just purchased of Hugh Brown and Son, of Liverpool, and which he had paid for by bills. Hall showed the invoice of the leather to the bank manager, who was, I have no doubt, aware of the terms of the purchase. It was arranged that the bank should make an advance of 500*l.* upon the leather on a separate special account, and that the leather was not to be redeemed until Hall had not only paid back the 500*l.*, but also reduced his overdrawn account within an agreed limit. When this arrangement was entered into the leather was on its way from Liverpool to Leeds consigned to Hall's order, and Hall, by a transfer order directed to the Great Northern Railway Company, and dated the 9th Nov. 1882, directed them to transfer the leather to the order of the Exchange and Discount Bank. This letter was sent by the bank manager to the Great Northern Railway Company, who on the 10th Nov. sent the bank an advice note of part of the leather, stating that it was held to the order of the bank, and on the 13th Nov. sent a similar advice note in respect of the remainder of the leather. On the same day the bank manager wrote to the railway company stating that they had advanced money against the leather, and requesting them to note that no lien could be placed against it except for warehouse rent. On the same day a minute was entered in the bank ledger and signed by the debtor as follows: "Nov. 13, 1882. Special account. To have 500*l.* against goods presented in H. Brown and Son's invoice for November for 95*l.* 1*5s.* 10*d.*, to be repaid 100*l.* per week, first payment to be made 22nd Nov. 1882, and upon the whole amount and expenses being paid, even if in a shorter time, the leather to be released, provided the regular current account is in order. Terms, interest 1 per cent. above bank rate, not falling below 5 per cent., and commission one half the amount of interest. Nov. 13, 1882, W. Hall." This minute was entered in the margin of a new account which the bank opened with the debtor, and thereupon the debtor obtained the agreed advance of 500*l.* At the date of the debtor's petition he had not discharged his liability to the bank upon the

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special account, and the regular current account was overdrawn beyond the agreed account to an extent considerably exceeding the value of the leather. The bank have since sold the leather for the net sum of 812l. 1s., and the trustee applied to the County Court judge for an order on the bank to pay over to him that sum, which order the judge refused to make. For the trustee it was contended that the minute of Nov. 13, 1882, was a bill of sale within the Act of 1882, and void because it was not in the form required by that Act, and not registered. The substantial question is, whether the Bills of Sale Act applies to documents regulating the rights and liabilities of the pledgor and pledgee, or is confined to cases where the possession of the goods dealt with by the bill of sale is intended to continue for some time, at all events, in the grantor. The Act of 1854 recites that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors. The mischief here pointed at is the false appearance of credit arising from the possession and so apparent ownership of property which the grantee of a bill of sale is really entitled to, and of which he has the power of taking possession. This is not the mischief which arises from a pledge, for in that case the possession being transferred to the pledgee, the pledgor cannot get false credit from an apparent possession giving rise to a false notion of ownership. The 1st section enacts that every bill of sale of personal chattels made after the passing of this Act either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, shall be filed, &c. Here it is to be observed that the section does not include all bills of sale whereby the grantee or holder shall have power to seize or take possession of any property comprised in the bill of sale. Now in the case of a pledge the essence of the transaction is that the possession is transferred at once, and the document regulating the rights and liabilities of the pledgee does not and cannot give him power to seize or take possession of the property pledged, because it is of the essence of the transaction that the pledgee shall have the possession, and if he does not get possession there is no pledge. Sect. 7 defines the meaning of the expression "bill of sale." But whatever documents are included by the definition within that expression, they must still by force of the 1st section, be documents whereby the grantee or holder shall have power to seize or take possession of the property comprised in or made subject to the document. This Act has been repealed as to bills of sale executed subsequently to 1st Jan. 1879 by the Act of 1878. This Act simply recites that it is expedient to consolidate and amend the law relating to bills of sale of personal chattels, and sect. 3 enacts that the Act should apply to every bill of sale executed on or after the 1st Jan. 1879, "whereby the holder or grantee has power

to seize or take possession of any personal chattels comprised in or made subject to such bills of sale." These words are to the same effect as those used in the 1st section of the Act of 1854, and cannot be widened by the definition contained in the 4th section. The Act of 1882 applies only to bills of sale given by way of security for the payment of money, but subject to the exception thus created the expression "bill of sale" has the same meaning in the Act of 1882 as in that of 1878. Sect. 7 provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the causes therein specified. By sect. 9 the bill is to be void unless made in accordance with the form in the schedule which contains a proviso that the chattels thereby assigned shall not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in the 7th section of the Act. There is very little authority on the subject. In *Ex parte North-Western Bank* (*ubi sup.*) there is an *obiter dictum* of Bacon, C.J., that a letter of hypothecation was not a bill of sale within the Act of 1854. In *Marden v. Meadows* (*ubi sup.*) Lord Bramwell says: "The Legislature has thought it right to say that, as against certain persons, such as execution creditors and trustees in bankruptcy, when it is attempted to separate the ownership of goods from the possession of them, a bill of sale shall be invalid unless it has been registered;" *Reeves v. Barlow* (*ubi sup.*) was also cited. In that case it was held that an agreement by a clause in a building contract that all building materials brought by the builder upon the land where the house was to be built should become the property of the landowner was not a bill of sale. The *ratio decidendi* there appears to be, that if such building agreements were within the Act of 1878, they were so only on ground which would have brought them within the Act of 1854, that they had been held not to be within the Act of 1854 by a decision of great weight which the Court of Appeal was not inclined to review, and consequently, in the absence of any word in the Act of 1878 showing that a change of the law was intended, that they would be held not to be within that Act also. But this only shows that such clauses in building agreements are outside the Act. Apart, however, from authority I am satisfied, on the construction of the Bills of Sale Acts that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction is an immediate transfer of possession from the grantor to the grantee. In this case there was an actual transfer of possession of the leather by virtue of the transfer sent by Hall to the railway company and of the advice notes sent by the railway company to the bank; and although I am of opinion that the minute of the 13th Nov. was intended to be a partial record of the transaction, I hold that the transaction itself was not one of those to which the Act of 1882 applies, and consequently that the minute of the 13th Nov. was not required to be in the form given in the schedule to the Act or to be registered. This view renders it unnecessary that I should deal with the other points raised by Mr. Linklater on behalf of the bank, but it must not be taken that

H. OF L.] GT. WESTERN RAIL. CO. v. SWINDON AND CHELTENHAM EXTENSION RAIL. CO. [H. OF L.]

I can at all assent to his proposition that a pledge by a trader of stock-in-trade which he has bought on credit and not paid for is a transfer in the ordinary course of business of his trade or calling. The judgment of the learned County Court judge must be affirmed with costs.

Solicitors for the trustee, *Bell, Brodrick, and Gray*, agents for *Walker and Tweedale*, Leeds.

Solicitors for the bank, *Torr and Co.*, agents for *Cousins and Cousins*, Leeds.

### House of Lords.

Feb. 11, 12, 14, and May 6, 1884.

(Before Lords WATSON, BRAMWELL, and FITZGERALD.)

THE GREAT WESTERN RAILWAY COMPANY v. THE SWINDON AND CHELTENHAM EXTENSION RAILWAY COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Railway company — Land — Easement — Lands Clauses Consolidation Act 1845, ss. 3, 16, and 85 — Special Act.*

By the special Act incorporating the S. Railway Company, the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18) was incorporated therewith, except where expressly varied thereby.

By sect. 8 it was provided that the line of the S. Company should be carried in one place over, and in another place under, the line of the G. W. Railway Company by a bridge and a tunnel. It was further provided that the tunnel was to be the property of the G. W. Railway Company subject to the right of the S. Railway Company to run trains through it, and that the S. Railway Company were not to purchase any land of the G. W. Railway Company, or interfere with their land except for the purposes of the above crossings.

The S. Railway Company were proceeding to make the crossings, but the G. W. Railway Company brought this action to restrain them on the ground that the whole of their capital had not been subscribed, and therefore, under sect. 16 of the Lands Clauses Act 1845, they could not put in force any of the powers of the special Act in relation to the compulsory taking of land.

Held, by Lord Fitzgerald, that the easements granted by sect. 8 of the special Act were not "land" within the meaning of sect. 16 of the Lands Clauses Act 1845, and that the action was not maintainable.

By Lord Bramwell, that sect. 3 of the Lands Clauses Act 1845, which says "the word 'land' shall extend to messuages, lands, tenements, and hereditaments of any tenure," must be construed to mean "of whatever tenure if any," and that sect. 16 extends to incorporeal hereditaments such as those granted by the special Act, but that the S. Company must be held to have entered on the land under sect. 85 of the Lands Clauses Act 1845, and not to have taken it compulsorily under sect. 16, and that the action was not maintainable.

By Lord Watson (dissenting), that this was a compulsory taking of land within sects. 3 and 16 of

the Lands Clauses Act 1845, and that the action was maintainable.

*Judgment of the majority of the Court of Appeal affirmed for different reasons.*

THIS was an appeal from the judgment of the majority of the Court of Appeal (Jessel, M.R. and Bowen, L.J.), Cotton, L.J. dissenting, which had reversed a decision of Chitty, J. The case is reported in 22 Ch. Div. 677, and 47 L. T. Rep. N. S. 709.

The action was brought by the appellant company to restrain the respondent company from making a bridge over and a tunnel under their line, in accordance with the provisions of their special Act, on the ground that the whole of their capital had not been subscribed, and therefore, by sect. 16 of the Lands Clauses Consolidation Act, which was incorporated with the special Act, they could not put in force any of the powers of the special Act in relation to the compulsory taking of land.

Chitty, J. held that the plaintiff company were entitled to the injunction for which they asked, but his judgment was reversed on appeal, as above mentioned.

The plaintiff company appealed to the House of Lords. The facts of the case, which were not disputed, appear sufficiently from the head-note and the reports in the court below, where the sections of the special Act are also set out in full.

Webster, Q.C. and R. S. Wright (with them (Romer, Q.C.) appeared for the appellants, and argued that what the respondents proposed to do under their special Act was a compulsory taking of land within the meaning of the Lands Clauses Consolidation Act 1845.

Upjohn, for the respondents, argued that the notice to treat was under the special Act, which superseded the provisions of the Lands Clauses Act, and made sect. 16 no longer applicable, even if these easements can be held to be "lands."

Webster, Q.C. was heard in reply.

The following cases were cited or referred to in the course of the argument:

- Pinchin v. London and Blackwall Railway Company*, 24 L. T. Rep. O. S. 196; 5 De G. M. & G. 851;
- Salisbury v. Great Northern Railway Company*, 17 Q. B. Div. 840;
- Taylor v. Corporation of Oldham*, 4 Ch. Div. 395; 35 L. T. Rep. N. S. 696;
- Senhouse v. Christian*, 1 T. R. 560;
- Great Northern Railway Company v. East and West India Dock Company*, 7 Rail. Cas. 356;
- Clark v. School Board for London*, L. Rep. 9 Ch. Div. 120; 29 L. T. Rep. N. S. 903;
- Hopkins v. Great Northern Railway Company*, 2 Q. B. Div. 224; 36 L. T. Rep. N. S. 896;
- Macey v. Metropolitan Board of Works*, 33 L. J. 377, Ch.;
- Re Metropolitan District Railway Company and Cosh*, 13 Ch. Div. 607; 42 L. T. Rep. N. S. 73;
- Reg. v. Cambrian Railway Company*, L. Rep. 6 Q. B. Div. 422; 25 L. T. Rep. N. S. 84.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 6.—Their Lordships gave judgment as follows:—

LORD FITZGERALD.—My Lords: This case comes before us on a writ, without pleadings, by which the Great Western Railway Company claimed an injunction to restrain the defendants from entering or



continuing on certain lands of the plaintiffs, and from putting in force any of the defendants' compulsory powers of taking lands or an easement therein, until the capital of the defendants shall have been duly subscribed. There is no controversy as to the facts. The plaintiffs did not either in the court below or here seek to amend, and the question is whether sect. 16 of the Lands Clauses Act 1845 applies to and governs the case. Before determining this question, we must examine the nature and description of that which sect. 8 of the special Act, expressed to be "for the protection of the Great Western Company," authorises the Swindon Company to take and to do, and calls "an easement or right of using." Sect. 8 of the special Act elaborately defines what may be done and what is prohibited. (1) The Swindon Company is not permitted to interfere with or execute any works whatever, under, over, or affecting the railway or lands of the Great Western Company until plans have been furnished to and approved of by the principal engineer of that company, or failing him, by an engineer to be approved of by the Board of Trade, and then such works are to be at the sole expense of the Swindon Company. (2) The Swindon Railway No. 1 is to be carried at one point-over, and at another point under, the Great Western, at each point by a bridge or arch of certain dimensions, with an express proviso to secure certain extensive easements at each place for the benefit of the Great Western Company, without payment for the same, so as to enable that company to provide for its own use additional lines of rails. (3) The archway which is to carry railway No. 1 under the Great Western is to be the property of that company, and form part of the structure of the Great Western Railway, with an obligation on the Swindon Company perpetually to maintain it in good and sufficient repair. (4) The Swindon Company is at all times to maintain and keep in good repair and good order and condition the bridges and other works so to be constructed. (5) Except for the purposes of those crossings, the Swindon Company shall not acquire any rights over any of the lands of the Great Western Company, or be enabled to take or use any land of that company, either temporarily or permanently, without the consent in writing of the Great Western Company, "and with respect to any lands of the Great Western Company which the company are by this Act from time to time authorised to use, enter upon, or interfere with, the company shall not purchase or take the same, but the company may purchase and take, and the Great Western Company shall sell and grant accordingly, an easement or right of using the same in perpetuity" for the purposes defined in the special Act. It will thus be seen that the special Act has not conferred on the Swindon Company any compulsory powers to take any land, messuage, or hereditament of the Great Western Company, but that the Swindon Company is authorised to purchase and take a right created by the special Act to carry the new railway over the Great Western by means of a bridge and under the Great Western by means of an archway, in consideration of compensation to be made to the Great Western Company, if they are entitled to any, and of the rights conferred on them of having certain extended easements over or under the line of the Swindon Company with-

out payment. We have therefore before us not the case of any known easement or of any hereditament of any tenure known to the law, but a right the result of a parliamentary arrangement of a peculiar and special nature, designed for the protection and benefit of the Great Western Company, by which, on certain expressed conditions, and subject to very special safeguards, the Swindon Company is entitled to the benefit of a perpetual statutable right to carry their railway at one point over, and to run their trains at another point under, the railway of the Great Western Company. Many questions have been discussed in the course of the argument on the construction of the Lands Clauses Act 1845, on which I do not find it necessary to express any opinion. It seems conceded that sect. 16 of that Act, if interpreted as it stands, and aided only by the context of the Act itself, would not be applicable to the case of a statutable easement such as that now before us. The interpretation of "lands" in the Lands Clauses Act, if that Act stood alone, would probably be that it was confined to the taking of "land" as commonly understood, and that land so taken should include all existing rights, hereditaments, and easements which affected that land. The general language of the Lands Clauses Act and its context with the form of the statutable conveyance (schedule A.) all indicate that such should be its interpretation. Lord Watson is, I believe, of opinion that sect. 16 may have a larger and wider application when incorporated in the special Act, and so as to be applicable to all cases of compulsory acquiring of easements created by the special Act. I do not dissent from this position, which must, however, depend on the language of the special Act, and renders necessary a critical examination of the defendants' special Act. Some stress was laid on the terms of the 2nd section of the special Act by which the Lands Clauses Act is incorporated, but that incorporation would have taken place independent of sect. 2, and was necessary for the purposes of sect. 5, which describes the railway to be made by the company and empowers the company to enter upon, take, and use such of the lands delineated on the said plans as may be required for that purpose. With sect. 5 and the prior incorporation of the Lands Clauses Act the compulsory powers given to the company are completed. Sect. 5 is followed by sects. 6, 7, 8, and 9, which require special attention. The 8th section "was inserted at the instance of the plaintiff company" for their protection. From what? The answer is, from the exercise of these powers which the defendant company would otherwise have possessed under the 5th section of the special Act and the compulsory powers of the Lands Clauses Act. Sect. 8 may be said to form a special enactment, the result of a parliamentary arrangement complete in itself and providing for all contingencies. I have already adverted to its rather complicated details. The defendant company is prohibited from taking or acquiring compulsorily or otherwise any land of the plaintiff company, and is strictly confined to acquiring two rights or privileges—the one to carry their rail over the railway of the plaintiff company by means of a bridge resting entirely on the land of the defendant company, but spanning by its arch the railway of the plaintiff company; and the other to carry their railway by means of

a tunnel or arch under the railway of the plaintiff company, but subject to the provision that the tunnel or arch shall, on completion, be the property of the plaintiff company, and be deemed part of the structure of their main line to Gloucester. The defendant company is prohibited from acquiring any land from the plaintiff company, but they may purchase the rights thus defined by the statute, which the plaintiff company is bound to sell and grant to them. The notice of the 12th Aug. 1882, called the "Notice to treat," is not a notice under sect. 18 of the Lands Clauses Act 1845, but is a good notice under sub-sect. 8 of sect. 8 of the special Act. When the defendant company thus gave notice of their election to purchase the rights specified in sect. 8, the two companies immediately stood in this relation to each other, that the one was bound to purchase and the other to sell those rights, and nothing remained to be done but to ascertain the price. Nothing is said as to price in sect. 8, but it is imported in the terms "purchase" and "sell," although the price may be nominal merely. It may be that the plaintiff company would probably sustain no loss or injury whatever from the exercise of the rights conferred on the defendant company, or might be held to be adequately compensated by the rights stipulated for and secured to them in sub-sects. 2 and 4 of sect. 8, but it was urged that no provision is made to ascertain price or compensation, and that we are thus compelled to fall back on sect. 21 and the following sections of the Lands Clauses Act. It seems to me that is not so. Sub-sect. 9 of sect. 8, in my opinion, provides for the case. Its language is very general: "If any dispute shall arise respecting the matters and provisions aforesaid or any of them, such dispute shall be settled by an arbitrator," &c. What are the matters and provisions aforesaid? The answer is to be found in the previous elaborate details of sect. 8, including the immediately preceding antecedent, viz., the purchase and sale of the statutable rights in question to the defendant company. But it was said that it was not reasonable to suppose that it was contemplated to appoint a civil engineer to settle price or compensation. Who could be more competent to determine the price, if any, to be paid for the easement conferred on the defendant company over the value of the easements provided for the plaintiff company? Sub-sect. 9 does not provide that the arbitrator should necessarily be an engineer, but when you refer back to sect. 6 relating to "the canal," and to sect. 7 relating to "the canal company," there is an express provision in sub-sect. 5 of the one and sub-sect. 12 of the other, that the arbitrator is to be an engineer who is, amongst other things, to settle the amount of money to be paid under the provisions of these sections. Before leaving sects. 6 and 7, I may observe that both relate principally to works of a cognate character to those which we have to deal with. It would be, in my judgment, wholly unsustainable to contend that the compulsory powers of the Lands Clauses Act referred to in sect. 16 of that Act had any relation to sect. 6 of the special Act; and as to sect. 7 of that Act, which provides for the protection of the Wilts and Berks Canal Company, it is remarkable that in sub-sect. 2, where an option is given to the canal company either to grant a perpetual easement or right of

using or else sell the fee, it is specially enacted that if the canal company fail to exercise their option "the company may enter and take and use the lands subject to the provisions of the Lands Clauses Act." This reference to the Lands Clauses Act was here wholly unnecessary if the contention of the plaintiff company is well founded. Adopting by anticipation Lord Bramwell's reading of sect. 3 of the Lands Clauses Act as to the interpretation of the word "lands," which he will himself express, and on the most careful consideration, I have come to the conclusion that the statutable rights given to the defendant company do not, nor does either of them, constitute "lands" within the meaning of sect. 16 as incorporated in the special Act, and that we ought not to strain the meaning of the section so as to embrace a case which, in my opinion, it was never intended to meet. In determining this case we cannot separate the two privileges created by sect. 8 of the special Act; and can it be said with accuracy that the privilege of constructing a bridge on their own land and carrying its one span of seventy-five feet through the air over the railway of the plaintiff company is the taking of land or of any messuage or tenement, or of any hereditament known to the law? I think that the only answer to this must be in the negative, notwithstanding the legal maxim *Cujus est solum ejus est usque ad cælum et ad inferos*. The ownership of land carries with it as one of its natural incidents the right to the air in a line above it, *usque ad cælum*, but the air is not land. As to the other privilege of driving a tunnel under the plaintiff company's railway and through their soil, it is to be borne in mind that, though the defendant company is authorised to interfere with the land of the plaintiff company by constructing the tunnel, they are prohibited from taking or acquiring any land of the plaintiff company, and that the archway or tunnel, and any extensions thereof, when constructed, continue to be the property of the plaintiff company and part of the structure of their line. The defendant company gets the privilege to construct, and when constructed, the further privilege of running their rails and carrying their trains over the floor of that arch or tunnel, but the arch itself becomes, and the *solum* remains, the property of the plaintiff company. In my opinion the judgment of the Court of Appeal should be affirmed on two grounds: (1) That the assertion of the rights conferred by sect. 8 of the special Act is not a "putting in force of the powers of the Lands Clauses Act, or of the special Act in relation to the compulsory taking of land;" (2) That even if the perpetual easements created by sect. 8 of the special Act would constitute "land" within the scope of sect. 16 of the Lands Clauses Act, yet the case has been taken out of the compulsory powers of the Lands Clauses Act by the provisions of sect. 8 of the special Act. There is another view to be considered, which may go a considerable way to reconcile what I believe is a main difference of opinion between my noble and learned friends. If I am in error in my opinion that the compulsory powers referred to in sect. 16 are not applicable to the case before us, it would seem to me, nevertheless, that the notice of the 12th Aug. 1882 was not a notice to treat within sect. 18, but constituted an election to accept the rights offered by sect. 8 of the special

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Act. That would seem at once to create such a relation between the companies of inchoate purchase and sale as to satisfy the difficulty entertained by Lord Watson, and enable him to coincide in opinion with Lord Bramwell, that the defendant company was in a position to take advantage of sect. 85 of the Lands Clauses Act, which stands outside the compulsory powers of the Act and is unaltered by sect. 16. Upon these grounds I move that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

LORD WATSON.—My Lords: The fact that this case has given rise to much difference of judicial opinion must be my excuse for stating fully the reasons for which I am unable to assent to the judgment which has been moved. Sect. 5 of their special Act confers upon the respondent company the usual powers to make and maintain the railways therein described, and to enter upon, take, and use such of the lands delineated on the deposited plans, and described in the books of reference, as may be required for that purpose. But that enactment is qualified by sect. 8, which (*inter alia*) provides that, except for the purposes of the two crossings in question, the respondent company shall not take or acquire any rights over any land of the Great Western Company; and further, that, as regards the lands of the Great Western Company which they are authorised to use, enter upon, or interfere with, "the company shall not purchase and take the same, but the company may purchase and take, and the Great Western Company shall sell or grant accordingly, an easement or right of using the same in perpetuity for the purposes for which, but for this enactment, the company might purchase and take the same." It appears to me to be the necessary result of these statutory provisions that the bridge to be erected by the respondent company over the Bristol line will belong to them in fee. No part of the structure rests upon the soil of the Great Western Company. The arch is part of a building erected upon adjoining land acquired by the respondents for the purposes of their undertaking; and such a projection, made by virtue of a right of easement, does not become the property of the owner of the servient tenement. The crossing under the Gloucester line is in a somewhat different position. In that case, the Great Western Company are vested with the property of the archway and works incidental thereto, which are in reality part and parcel of their own line, being the support substituted for the solid embankment to be removed in course of constructing the respondent company's railway. The *solum* beneath the archway remains the property of the Great Western Company; but such parts of the new railway as the rails and sleepers, and possibly the ballasting, will not, in my opinion, become the property of that company. The express provisions of sect. 8 (4) vesting the archway in the appellants appear to me to indicate that the Legislature did not intend to vest in them materials used for the formation of the new railway above the surface of the land. I cannot concur in the opinion expressed by Jessel, M.R., in the Court of Appeal, to the effect that the right thus given to the respondents is in substance equivalent to running powers. Were I able to adopt that view, I do not think I should hesitate to come to the same conclusion as the majority of the learned judges of the Court of Appeal. It

must, in my opinion, be conceded that a statutory right which is in reality nothing more than a privilege of running trains cannot be regarded as a power to take land within the meaning of sect. 16, or any other section of the Lands Clauses Act. But there does not appear to me to be any real analogy between a grant of running powers and the powers conferred upon the respondents by their special Act. Their right is to construct, maintain, and use in perpetuity, a railway of their own above or upon the land of the Great Western Company; and that is a very different thing from a mere right to run their trains over, or otherwise use, the undertaking of another company. The respondents maintain that the provisions of sect. 8 of their special Act constitute a complete voluntary agreement between the two companies for the purchase of the rights or easements in question. If that be the true construction of the clause, it is unnecessary for the respondents to resort to the powers of the general Act, either for the purpose of placing the Great Western Company and themselves in the relative position of vendors and purchasers, or for the purpose of fixing the compensation payable by them. I assume that the terms of sect. 8 were amicably adjusted between those two companies, with the object of protecting (as the clause itself says) the interests of the Great Western Company; but that does not make the clause an agreement of sale and purchase. It must be construed according to its terms, and I fail to discover in these a single expression importing that an agreement has been concluded for the purchase by the respondents of an easement over any portion of the appellants' lands. Sect. 8 enacts that the respondents "may purchase and take," and that the appellants "shall sell or grant" such easements, these being the terms in which a statutory grant of compulsory powers is usually expressed; and its provisions are devoid of all the essentials of a contract, inasmuch as they neither impose an obligation upon the respondents to take, nor do they define the subjects which are to be taken. The respondents are empowered to create these easements upon or above any portions of the appellants' land within their limits of deviation, which are, by sect. 8 (2), restricted to one hundred feet on either side of the centre line unless the appellants shall consent in writing to a further departure from it. The respondents are placed under no statutory obligations to purchase at all, or, if they do purchase, to take any particular part of the appellants' railways; and something must be done in order to fix that obligation upon them, and to define the subject-matter of the purchase. Sect. 8 makes no provision for effecting either of these objects, both of which must be accomplished before there can be even an imperfect contract leaving the purchase money indeterminate. I am therefore of opinion that the respondents, when they have resolved to avail themselves of the statutory powers conferred by their special Act against the Great Western Company, can only do so by agreement or by notice to treat, in accordance with the provisions of the Lands Clauses Act. Upon this part of the case I shall only say further that I do not think the ascertainment of the compensation which the respondents are to pay to the Great Western Company for the easements which they are authorised to purchase and take is one of the

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"matters and provisions aforesaid," disputes concerning which are referred to arbitration by sect. 8 (9) of the special Act. It appears to me that the whole effect of the enactments of that section, in regard to purchase and sale, is to substitute a right of use for a right of fee as the subject of compulsory purchase; that they are, in fact, a mere qualification of the power to take previously conferred by sect. 5 of the Act. Nothing is said about price in sect. 8; but the clauses of the general Act are incorporated, which do expressly provide for its ascertainment; and I am not prepared to hold that these express provisions are to be denied effect on the ground that such ascertainment ought by implication to be regarded as a dispute arising under a clause which makes no mention of price. It was next argued for the respondents that rights of use or easements, such as they are empowered to acquire by sect. 8, are not "lands" within the meaning of the 16th and other sections of the Lands Clauses Act which relate to compulsory taking; and accordingly that their proceedings for the purpose of taking these rights of use or easements could in no event fall within the scope of sect. 16. That argument raises a very important question on the construction of the general Act. In my opinion the view taken by Chitty, J. and Cotton, L.J. is the right one. The interpretation clause of the Lands Clauses Act (sect. 3) provides that the words and expressions therein defined shall "both in this and the special Act" have the several meanings thereby assigned to them "unless there be something either in the subject or context repugnant to such construction;" and it enacts that the word "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure." Now it is perfectly true that the word "lands," as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act *per se*, and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorised works injuriously affected the dominant land to which the easements are attached. As for the land upon which the railway is to be constructed, the compulsory clauses of the general Act contemplate that the company shall take the soil itself, and not a mere right to use it in perpetuity. On the other hand, I can see no reason for holding that in sect. 7, and other clauses of the Act, which relate to purchase by agreement, the word "lands" must be restricted to corporeal hereditaments. If a landowner is willing to sell a right of use, and such a right is sufficient for all the purposes sanctioned by the special Act, I cannot conceive that it was the intention of the Legislature to enact that the landowner should not sell or the company purchase that limited right. Granting, however, that the expression "lands" in the Act

of 1845 must, when the terms and context of that Act are alone regarded, bear a more restricted meaning than is assigned to it by the interpretation clause, it does not follow that it must continue to have the same limited meaning when its clauses are embedded in a context which enlarges the scope of the general Act. When that Act is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought by virtue of their new context to be construed so as to include and apply to hereditaments which are not corporeal. It was, according to my apprehension, the purpose of the Legislature that the clauses of the general Act should be capable of expansion so as to apply not only to the cases contemplated by that Act, but to all cases of purchasing and taking sanctioned by the provisions of any of the special Acts with which they were in future to be incorporated, subject, it may be, to the proviso that the words and expressions occurring in these clauses were not to be extended beyond the meanings severally assigned to them in sect. 3 of the Act. The respondents, however, maintained that an easement or right of use, such as their special Act empowers them to take, is not a "hereditament" within the meaning of sect. 3 of the Lands Clauses Act, and, at all events, is not a "hereditament of tenure." As to the first branch of the argument, I confess my inability to understand why the expression "hereditaments" in sect. 3 should not be held to include incorporeal hereditaments. I think it does, and it was so held by the Court of Queen's Bench in *Reg. v. The Cambrian Railway Company* (L. Rep. 6 Q. B. Div. 422; 25 L. T. Rep. N. S. 84), Blackburn, J. observing that "hereditaments," as used in the Act, includes "anything which is the subject of inheritance." That case was overruled by the Court of Appeal in *Hopkins v. The Great Northern Railway Company* (2 Q. B. Div. 224; 36 L. T. Rep. N. S. 898), on the ground that the injury to the ferry, for which the Court of Queen's Bench had held the company liable in compensation, was attributable to the user, and not to the construction of the railway. But Mellish, L.J., who delivered the judgment of the Court of Appeal, said: "In the case of *Reg. v. The Cambrian Railway Company* the judges rely on the clause in the Lands Clauses Consolidation Act by which the word 'lands' includes 'franchises.' This no doubt proves that, if franchises are injured by the construction of the railway or works, which they may be, compensation may be obtained." So that the Court of Appeal, in *Hopkins v. The Great Northern Railway Company*, did not differ from, but on the contrary approved of, the decision in *Reg. v. The Cambrian Railway Company*, in so far as it affirmed that an incorporeal hereditament, such as a franchise of ferry, is "land" within the meaning of sect. 3, and therefore "land" within the meaning of sect. 68 of the Lands Clauses Act. In the subsequent case of *Hill v. The Midland Railway Company* (21 Ch. Div. 143; 47 L. T. Rep. N. S. 225), where the company had power by their special Act to acquire (except in a certain event which had not occurred) a right or easement of precisely the same character as that which the respondent company are authorised to take for the purpose of crossing the appellants' Gloucester line, Fry, J. held that such right or easement was, by reason

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of its having been made the subject of compulsory acquisition by the provisions of the special Act, brought within the scope of the statutory definition of the word "lands" as occurring in sect. 18 and other clauses of the general Act, with respect to compulsory taking, as well as in sect. 85. The only authority to the contrary, which was relied on for the respondents, was *Pinchin v. The London and Blackwall Railway Company* (5 De G. M. & G. 851; 24 L. T. Rep. O. S. 196). The observations made by Lord Cranworth in that case are entitled to the greatest respect; but I agree with Cotton, L.J. in thinking that those observations were directed to the question whether the word "lands" in sect. 18 of the Lands Clauses Act, apart from any peculiar powers conferred by the special Act, includes an easement. What he, as I understand him, did say, was, that the context of the general Act forbade the application of sect. 18 to "lands" which were not corporeal hereditaments—a proposition which I do not think it necessary to dispute. Then, as regards the other branch of the argument, I do not think that, in order to bring it within the interpretation clause, an easement must be a hereditament of tenure. The words "of any tenure" were not, in my opinion, intended to restrict the scope of the enumeration which precedes them. I agree with Lord Bramwell, that they ought to be read in the same sense as if the expression in the Act had been "of whatever tenure, if any." These words do not seem to have been regarded as of any consequence; at least they were not made matter of argument or of judicial comment in the cases to which I have referred. At the time when an injunction was applied for, the respondents were about to make an entry under sect. 85 of the Lands Clauses Act, and I understand Lord Bramwell to be of opinion that sect. 16 does not apply to the power given by sect. 85, which is a power to "enter upon and use" and not to "take" lands. Now I desire to say that I agree with my noble and learned friend in thinking that an entry upon lands, in terms of sect. 85, is not the exercise of a power "for the compulsory purchase or taking of lands" within the meaning of sect. 123 of the Lands Clauses Act. That was expressly decided in *Salisbury v. The Great Northern Railway Company* (17 Q. B. 810), and I am not prepared to hold that the powers of sect. 85 are among the powers "in relation to the compulsory taking of land for the purposes of the undertaking," which are directly struck at by the prohibition of sect. 16. The respondents now say that the notice which they gave the appellants upon the 12th Aug. 1882 was not a notice to treat in terms of the Lands Clauses Act, but under their special Act; and that compensation for these rights of easement is not to be assessed under the provisions of the Lands Clauses Act, but by an arbitrator appointed pursuant to sect. 8 (9) of their special Act. I am not disposed to regard that contention with much favour. The notice of 12th Aug. 1882 contains all the essentials of a notice to treat under sect. 18 of the general Act, and, though it proceeds on a recital of the special Act, that Act (sect. 2) expressly incorporates the Lands Clauses Act, so that an objection founded on the non-recital of the Act of 1845 would, in my opinion, be merely technical and without substance. It is possible that the notice was so framed that it might do duty either as a notice under the general or the special

Act; but I am certainly under the impression that the respondents gave it to the appellants in the belief that it would be received by them as a notice to treat in terms of sect. 18. I am strongly confirmed in that impression by the proceedings which they subsequently took under sect. 85. The condition of the bond which they have executed, in compliance with the provisions of that section, in order to secure payment of the purchase money to the appellants, is, that they shall pay or cause to be paid, or deposit in the Bank of England for the benefit of the parties interested "under the provisions of the Lands Clauses Consolidation Act 1845, all such purchase money and compensation as may, in manner in the said last-mentioned Act provided, be determined to be payable by the said Swindon and Cheltenham Extension Railway Company." If the compensation is to be determined, as they now say it is, in terms of sect. 8 (9) of the special Act, then they have not given bond for its payment, according to the provisions of sect. 85. Thus far, I do not think there is any substantial difference between the opinions which I entertain and those which have been expressed by my noble and learned friend. But I have the misfortune to differ from my noble and learned friend in regard to certain points arising upon the construction of the Lands Clauses Act; and it is owing to that difference of opinion that I cannot assent to his proposal to affirm the judgment of the Court of Appeal. In the first place, it is my opinion that sect. 85 does not provide for a notice to treat, either in regard to purchase or purchase money, but simply affords to promoters the means of obtaining possession of land to which they have acquired right, as purchasers, under an inchoate or imperfect contract already constituted by compulsory notice or by agreement. I have recently had occasion, in *Tiverton and North Devon Extension Railway Company v. Loosemore* (9 App. Cas. 480; 50 L. T. Rep. N. S. 637), to explain my reasons for holding that opinion, and I shall not repeat them here. In that case Fry, J. held that the provisions of sect. 85 do not relate to compulsory taking within the meaning of sect. 123; but one of the grounds upon which the learned judge sustained the right of the company to proceed under sect. 85 was, that "they had given this notice to treat long before." Earl Cairns, in the same case, thus explains the scheme of the Lands Clauses Act, and the statutory consequences of a notice to take, duly given in terms of sect. 18: "The statute appears to me to place the company and the respondent, by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the lands, to take possession and make use of the land, whatever the legal consequences of that possession after the five years may be." To hold that promoters, who have neither made an agreement for purchase, nor given a valid notice in terms of sect. 18, can nevertheless obtain an entry under the provisions of sect. 85, would, I conceive, be productive of strange consequences. By sects. 24 and 31 of their special Act, the respondents' powers for compulsory purchase are

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limited to three years and their powers for making their line to five years, from the passing of the Act. The respondents, therefore, could not create the statutory relation of vendor and purchaser between the appellants and themselves, after the lapse of the three years, by giving a notice under sect. 18. But the powers of sect. 85 are not then taken away, and if they can be exercised independently of any previous contract, statutory or voluntary, then it must follow that a landowner who can no longer be compelled to sell, and who declines to make an agreement, may, at any time after the expiration of the three, but within the five years, be deprived of the possession of his land by virtue of sect. 85. It appears to me that the practical result would be to convert the provisions of sect. 85 into a power of compulsory taking, instead of a power to take possession under an antecedent but incomplete contract. In the second place, the service of a notice to treat, in terms of sect. 18, by promoters who are free to exercise their compulsory powers of taking, imposes upon the landowner, whether he will or no, the obligations of an actual vendor, and leaves him no right or interest in the land included in the notice, except to have the purchase money assessed and paid to him. According to the decision in *Salisbury v. The Great Northern Railway Company* (*ubi sup.*), that is the one act of taking which must be completed before the period limited for the exercise of compulsory powers expires; all the other powers of the Act, with respect to ascertainment of compensation, and entering into possession, being merely ancillary to it, and therefore not compulsory. It necessarily follows, in my opinion, that the promoters of a company, whose capital has not been subscribed, cannot give an effectual notice in terms of sect. 18; otherwise I am unable to discover, within the four corners of the Lands Clauses Act, any compulsory power to which the provisions of sect. 16 can apply. I do not say that a notice to take, given by promoters in that situation, would not be equivalent to an offer to purchase by agreement, which would be binding upon them if the landowner chose to accept it; but that it would be ineffectual to constitute a statutory contract, or to impose any obligation whatever upon a landowner who did not accept it. I agree with the decision of the Court of Common Pleas in *Guest v. Poole and Bournemouth Railway Company* (L. Rep. 5 C. P. 553.). Sect. 16 does not disable the promoters to purchase by agreement, and when the landowner to whom a notice is given under sect. 18 assents to it, as in that case, that constitutes a voluntary agreement, against the validity of which the promoters cannot plead the prohibition of sect. 16. I am accordingly of opinion that the respondents could not, in Aug. 1882, give the appellants a notice to treat, having any statutory effect, because sect. 16 made it unlawful for them to do so. The notice which they gave was ineffectual *per se* to bind the appellants as vendors; and seeing that the appellants had never assented to that notice and have made no agreement to purchase, the respondents had, in my opinion, no right to avail themselves of the provisions of sect. 85. The radical vice which tainted their proceedings was due to the fact that their capital had not been subscribed. If it had been subscribed, a notice to treat would have placed them in a position analogous to that

of purchasers from the appellants, and they would have been entitled, under sect. 85, to enter upon the subjects which they had so acquired. According to the construction which I put upon these statutes, their notice was bad, whether it was given under the Lands Clauses Act or under the special Act, and they were not, in my opinion, authorised by sect. 85 to take possession of land in which they had not previously acquired an interest. I have therefore come to the conclusion that the appellants ought to prevail. I also think that their action is well laid, seeing that, but for the non-subscription of their capital, the whole proceedings taken by the respondents would have been unexceptionable.

Lord BRANWELL.—My Lords: I agree in the conclusion and in the reasoning of Lord Watson save on one point (as to which I regret that we differ), and I desire to rely upon his arguments to support my own. I think that the first thing to be determined is what estate or interest the respondents are entitled to under their Act or under the appellants' Act in or on the appellants' land. It is clear to me that it is what the statute calls it, an easement, or rather easements, and nothing more. It is true that the property in the bridge over the railway is not vested in the appellants, but it does not follow from that that the respondents have any corporeal estate in it, any more than in the case of projecting eaves, or spout, or beam resting on a neighbour's wall. The respondents' estate or interest then is (if an hereditament at all) incorporeal. The next question is, as I think, are incorporeal hereditaments within the Lands Clauses Act, sect. 3, which says that "lands" shall extend to messuages, lands, tenements, and hereditaments of any tenure? If not, they are not within sect. 85, and the respondents had no right to enter. At first it struck me that no hereditaments were included save those that were of some tenure. And for this there is the high authority of Lord Cranworth. But, with profound respect for that most learned, able, and accurate lawyer, I have come to a different opinion, and for the following reasons: First, I think that, as a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. For instance, taking "horses oxen, pigs, and sheep, from whatever country they may come," the latter words would apply to horses as much as to sheep. And then the general words apply to those of the antecedents to which they are applicable and not to the others, and the words are to be read as "of whatever tenure, if any." Secondly, if the general expression is limited to "hereditaments," then it does not extend to messuages, lands, and tenements, except as included in hereditaments, which cannot be the case. Thirdly, if "hereditaments" was put in to include incorporeal hereditaments, we have not had any incorporeal hereditaments suggested to us which could be said to be subject to tenure. And that it was intended to include incorporeal hereditaments we ought to hold, not merely on account of the generality of the words, but also because it would be expedient to include incorporeal hereditaments in such an Act as the Lands Clauses. For it is to be remembered that that Act is not applicable to railways only, but to all



cases where land is required, and certainly some of those cases might include the acquisition of easements. For instance, suppose a school was built, it might be of the greatest importance that it should at once acquire an easement of light or way. And especially it is to be remembered that the Lands Clauses Act is to be read in connection with the special Act. Fourthly, unless the Lands Clauses Act enables the respondents to purchase this easement, I do not find any machinery for fixing the price. Then there is the authority of *Reg. v. The Cambrian Railway Company* (*ubi sup.*) and the reasoning in the Court of Appeal. I am of opinion then that "hereditaments" in the Lands Clauses Act, connected with the special Act, includes incorporeal hereditaments. I have said that I find no machinery for fixing the price of these easements other than that in the Lands Clauses Act. It is said that the matter is to be settled by sect. 8 of the respondents' special Act, and that it abrogates or supersedes the Lands Clauses Act, and for this there is the authority of Bowen, L.J. With sincere respect I cannot agree. We ought not to hold an Act repealed, not expressly as it might have been, but by implication, without some strong reason, and, if the Lands Clauses Act extends to incorporeal hereditaments, I see none. Sect. 8 of the special Act has a heading, or is under the rubric, "For the protection of the Great Western Company the following provisions shall have effect." The Great Western Company requires no protection as to price or the mode of ascertaining it, nor the respondents any provisions for compelling a grant. Then sub-sect. 9, which is supposed to be substituted for the Lands Clauses Act as to the ascertainment of price, says, "If any dispute shall arise respecting the matters and provisions aforesaid." Now there is nothing said as to "price." Next there might be no "dispute," and yet a settlement be necessary; *e.g.*, the respondents offer a price and the appellants are silent. How is there a "dispute"? Again, the president of the Institution of Civil Engineers is to appoint the arbitrator. Very reasonably, if the matter is one of engineering, and I am not prepared to deny that perhaps an engineer would be as well able to settle the price as a land valuer, but perhaps not more so. I cannot hold, therefore, that the clauses of the Lands Clauses Act for settling compensation are impliedly superseded by the respondents' Act. I must hold, then, that what the respondents are to have granted are easements, and that easements are within the Lands Clauses Act taken in connection with the special Act. But it is said that, even so, the respondents were entitled to proceed under sect. 85 of the Lands Clauses Act without their whole capital being subscribed, because under sect. 85 the land is not taken, but only "entered upon." I have come to the conclusion that Mr. Upjohn is right in this. From sect. 16 to sect. 68 inclusive are provisions giving power in relation to the compulsory taking of land. Sect. 69 is under a new heading; so are sects. 84 and 85. It is clear that sect. 84 applies to cases where there is an agreement as to price, as well as to cases where there is not. Sect. 85 supposes that an agreement may be come to after proceedings taken as therein mentioned. The expressions used in the heading, and in both sections, are "entry" and "enter." In sect. 89 the words are

"enter upon and take possession," not "take" merely. The sum awarded might be larger than the sum deposited, and the sureties might be insolvent. Surely the owner of the land would not have lost his land, or his lien for its price. Sect. 16 was for the protection of landowners, but they are sufficiently protected by sect. 85 in the cases it applies to. In short, the appellants' case would read into sect. 85 provisions relating to the power of compulsory taking, *i.e.*, purchasing, to which sect. 85 does not relate. Fry, J. expressly ruled to this effect in *Loosemore v. Tiverton and North Devon Railway Company* (47 L. T. Rep. N. S. 151; 22 Ch. Div. 25), and on this point his ruling was not dissented from. There is still a question, however, whether, assuming the use of the powers of sect. 85 not to be conditional on the capital being paid up, its language is applicable to an incorporeal hereditament. Not without some doubt I have come to the conclusion that it is. The way to ascertain this is to read the words in the interpretation clause as in sect. 85, and read the special Act in connection therewith and see if there is anything incongruous. If not, it applies. Read the words there thus: "If the promoters of the undertaking shall be desirous of entering upon and using any lands, messuages, or hereditaments, corporeal or incorporeal, which may be required under the special Act before," &c. I see nothing incongruous in this. An easement cannot be entered on indeed, but the land over which it is enjoyed can be. In the result, I think the judgment was right, and should be affirmed. This is the conclusion I have come to, and it is to me most unsatisfactory. For I not only should have great doubts on the question independently of the opinion of others, but, in addition, I find my opinion in part dissented from by Lord Watson, and not corroborated by Chitty, J. and Cotton, L.J.; for Chitty, J. first, Cotton, L.J. afterwards, and my noble and learned friend hold, as I do, that these easements are within the Lands Clauses Act, and that that Act is applicable; but they do not think, as I do, that sect. 16 does not apply to sects. 84 and 85. Chitty, J. and Cotton, L.J., indeed, had not, that I can see, the point presented to them, and so far therefore are not affirmatively against me. But my noble and learned friend has considered it, and has come to the conclusion that sect. 16 applies to sects. 84 and 85. We are therefore at direct variance on this. It adds another, and most serious one, to my many doubts. I will say no more on it than this, that notice to treat has been given, and that giving such a notice is not exercising any compulsory power, as it offers to treat, and may produce an agreement, with no compulsion. But I must notice the judgments of Jessel, M.R. and Bowen, L.J., because, if I could agree also with them, I need not put my judgment on the doubtful grounds I have mentioned, and not agreeing I must say why I cannot agree. I have had the greatest difficulty in understanding those judgments; very much, I believe, owing to the very imperfect and incorrect note we have of them. But I understand they mean this: The Lands Clauses Act is out of the question; there is an agreement between the two companies contained in the Act of Parliament, and that alone is to be looked to. In my opinion, this is not the way to interpret an Act of Parliament. That is a law, a compulsion, and may have been, and no doubt



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was, quite against the will of the appellants, and no more an agreement than submitting to a fine instead of imprisonment. At all events, we cannot interpret it on some speculation that it was not. I have already given my reasons for thinking that the Lands Clauses Act is not superseded. But supposing I am wrong, the next question is, what right had the respondents to act as though these easements were granted to them before they were granted, and before the extent and limits of the right, and how it was to be enjoyed, were ascertained? I am at a loss to know. Over and over again have I read the judgments of Jessel, M.R. and Bowen, L.J., and I cannot make out the reason. Whether it is my fault, or the fault of the shorthand writer, I know not, but there are passages to me unintelligible. With all respect to the late Master of the Rolls, I think his judgment has much of his characteristic rapidity, the exercise of which—no time taken to consider—is much to be regretted in this case, when he was overruling Chitty, J. and his colleague. He says that "the real question is, whether what in my opinion amounts merely in substance to running powers is a taking of lands," &c. Now, with respect, the right to be acquired by the respondents is not "running powers," nor anything the least like it. He is reported to say the appellants acquire property in the works which are placed on these (probably their) lands, making the whole thing part of the main line of the Great Western Railway. I can see nothing of the sort. He says: "The Swindon Company has a right to buy and the Great Western Company are compelled to sell the right of permanently using the Great Western Company's railway by means of running trains over it." Again, nothing of the sort. But supposing he has shown that the case is not one of compulsory taking, how does he show that the right can be exercised before it is actually acquired and paid for? I cannot see. He refers to sect. 9 of the special Act, but he does not show why the right can be used before it is granted. Bowen, L.J. has been kind enough to tell me that he held, as he recollects, that the Lands Clauses Act did not apply, and that therefore the appellants had no right to an injunction until the capital was paid up. He seems to have proceeded on the ground that the hereditament must be one of some tenure. I have already discussed that, and, with submission, cannot agree. His Lordship says, at the end of his judgment, "In my opinion it is not a taking of land in any sense." I respectfully differ. It is not land indeed, but it is land as interpreted. But he nowhere says, that I can see, why the right is to be enjoyed before it is acquired and paid for, except it is by saying that it is "an arrangement granting the Swindon Company that which is really analogous to, if not strictly the same as, a running power over the Great Western system for a limited portion of the Great Western line." I do not understand the last words, but I see nothing like the alleged analogy, nor do I see why, if it exists, the right can be exercised before it is granted and paid for. From what his Lordship has told me I think that his opinion was founded on this, that the prayer of the plaintiffs was wrong in asking that the defendants might be restrained until the capital was paid up. Lord Fitzgerald, I believe, admits the objection I have just stated, but meets it, as did Bowen, L.J., by

saying that it is not, and never was, the case of the appellants. That is to say, it may be that the respondents had no right to do what they did until the easements were granted, but that the appellants did not put their case on that ground. This point has not been taken in the court below; and I own, with great respect to my noble and learned friend, I entertain the strongest opinion that it ought not to prevail. It comes to this: the respondents are in the wrong, they have done what they had no right to do, and would have been decided against and restrained; but because the appellants put their case on a wrong ground the defendants are to succeed, though in no way prejudiced by the error. I am most clearly of opinion that this is a case for amendment. I feel bound to say this, as otherwise I must admit that I have been acting on wrong principles ever since I had anything to do with the matter, now for twenty-eight years. And in this particular case the appellants' claim to an amendment is very strong; for, as I think, the respondents intended to proceed under sect. 85 of the Lands Clauses Act, whether they thought or did not think that the case generally was within that Act. But whatever may have been the intention of the respondents, it is impossible not to say that they caused the appellants to believe that the proceedings were under the Lands Clauses Act. If so, the appellants had a right to say, "Stay them till they can proceed under sect. 85." Anyhow an amendment should be granted. As I have said, I have felt bound to notice this matter, to show why I cannot agree with the Court of Appeal, and so put my opinion on grounds other than those as to the correctness of which I feel so little confidence. Upon these grounds I think the judgment should be affirmed. I am glad to think that if I am wrong no great harm will follow, for the appellants' objection is really of no importance to them now except as to costs.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitor for the appellants, R. R. Nelson.

Solicitors for the respondents, George Davis, Son, and Co.

## Supreme Court of Judicature.

### COURT OF APPEAL.

March 6, 7, 8, 10, and April 3, 1884.

(Before COTTON, BOWEN, and FRY, L.JJ.)

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY v. WHIPP. (a)

*Mortgage — Priority — Custody of title deeds — Negligence of first mortgagee.*

*C., the manager of a company, executed a legal mortgage to the company of certain freehold property belonging to him, and handed over the title deeds to the company. These deeds were placed, with the other deeds of the company, in a safe, which had one lock, but duplicate keys, one of which was kept by C., as manager, and the other by the chairman of the company. Soon afterwards*

(a) Reported by W. O. BIRD, Esq., Barrister-at-Law.

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*C. took the deeds relating to his property, except the mortgage, out of the safe, and handed them to W., to whom he at the same time executed a mortgage of the property, to secure an advance then made to him, W. having no notice of the mortgage to the company.*

*Held (reversing the decision of the Vice-Chancellor of the County Palatine of Lancaster), that the mortgage to the company had priority over the mortgage to W.*

*The court will postpone a prior legal estate to a subsequent equitable security: (a) where the legal mortgagee has assisted in or connived at the fraud which has led to the creation of the subsequent equitable estate, of which assistance or connivance the omission to use ordinary care in inquiring after or keeping the title deeds may be sufficient evidence, where such conduct cannot otherwise be explained; or (b) where the legal mortgagee has constituted the mortgagor his agent with authority to raise money, and the security given for such money has by the fraud or misconduct of the agent been represented as being the first estate.*

*But the court will not postpone a legal mortgage to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence on the part of the legal mortgagee.*

*This was an appeal by the plaintiff from a decision of the Vice-Chancellor of the County Palatine of Lancaster.*

On the 11th Jan. 1878 Crabtree, who was the manager of the plaintiff company, executed a legal mortgage of a freehold property known as Milbank to the plaintiff company to secure 4500*l.*, and, according to the conclusion drawn by the Court of Appeal from the evidence, Crabtree, at or about the same time, delivered the title deeds to the company and received the 4500*l.* from the company in cash.

On the 24th May 1878 Crabtree made a legal mortgage to the plaintiff company of certain other freehold property to secure 2500*l.*, and the title deeds were, according to the conclusion at which the Court of Appeal arrived on the evidence, in like manner delivered to the plaintiff company. In respect to this mortgage it was not proved that the 2500*l.* passed in cash from the company to Crabtree, but it was in the opinion of the Court of Appeal the true conclusion from the evidence, that, at the date of the mortgage, Crabtree was indebted to the plaintiff company in a sum greatly exceeding 2500*l.* beyond the previous 4500*l.*

The deeds of the mortgaged properties were placed in a safe of the company, and were seen there on the occasion of the audit in May 1878.

Crabtree, who, as already stated, was the manager of the plaintiff company, was entrusted with one of the two keys which opened the lock which secured the safe in which the deeds of the company were kept; and it appeared that, in Nov. 1878, he produced the deeds in question to the defendant's solicitor, Mr. Milne Whitehead, to whom Crabtree had applied for a loan on mortgage of these two properties. As the result of this application, the defendant, Mrs. Whipp, advanced 3500*l.* to Crabtree on a mortgage, dated the 19<sup>th</sup> Dec. 1878, of the two properties included in the plaintiffs' securities, and she, at the same time, received from Crabtree the title deeds of the two properties, but not the mortgages to the plaintiff company. The defendant's mortgage was taken,

and the mortgage money paid by her to Crabtree in entire ignorance of the securities to the plaintiff company.

In Nov. 1879 Crabtree went into liquidation, and in the following month an order was made for winding-up the plaintiff company.

In 1880 the liquidator, in the name of the company, commenced this action against Mrs. Whipp, and Crabtree's trustee in liquidation, for foreclosure. The trustee disclaimed, and the action was dismissed as against him. Mrs. Whipp filed a defence and counter-claim by which she asked that the securities of the plaintiff company might be declared fraudulent and void against her; or in the alternative that they might be postponed to her security, and that the company might be ordered to convey the property to her, subject only to such equity of redemption as it was subject to under her mortgage.

The Vice-Chancellor held that the company ought to be postponed to Mrs. Whipp.

From this decision the company appealed.

Ambrose, Q.C. and Maberley for the appellants. —The Vice-Chancellor misconceived the principle on which the court deprives a first mortgagee who has the legal estate of the benefit of it. No case is reported in which he has been postponed for mere negligence in the custody of the deeds. In *Hewitt v. Loosemore* (9 Hare, 449) it was only held that making no inquiry for the deeds would postpone the legal mortgagee. In this case the company got possession of the deeds and were entitled to suppose that their servant would not commit a crime. [COTTON, L.J.—Had the company a right to trust him with a security given by himself?] That makes no difference. Mere negligence in the custody of documents does not make a person liable for the use improperly made of them:

*Barendale v. Bennett*, 40 L. T. Rep. N. S. 23; 3 Q. B. Div. 525;

*Bank of Ireland v. Evans' Charities*, 5 H. L. C. 369; *Arnold v. Cheque Bank*, 34 L. T. Rep. N. S. 729; 1 C. P. Div. 578.

[Fry, L.J. referred to the judgment of Kindersley, V.C. in *Rice v. Rice*, 2 Drew. 73.] *Evans v. Bicknell* (6 Ves. 174) is the leading case in equity on this subject. There Lord Eldon said (6 Ves. 190), that a first mortgagee is not to be postponed for parting with the deeds "unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention." That principle was adopted in *Martinez v. Cooper* (2 Russ. 198) and *Hewitt v. Loosemore* (*ubi sup.*). The only two cases in which the mortgagee possessing legal estate has been postponed are *Perry-Herrick v. Attwood* (30 L. T. Rep. O. S. 267; 2 De G. & J. 21) and *Briggs v. Jones* (23 L. T. Rep. N. S. 213; L. Rep. 10 Eq. 92). There the deeds were left with the mortgagor in order that he might raise money on them. *Hunt v. Elmes* (3 L. T. Rep. N. S. 796; 2 De G. F. & J. 578) and *Ratcliffe v. Barnard* (24 L. T. Rep. N. S. 215; L. Rep. 6 Ch. App. 652) are in our favour. In order to postpone a first legal mortgagee it must be shown that there was connivance or assistance in the fraud of the mortgagor. In all the cases where there has merely been negligence on the part of the mortgagee, he has been protected.

W. W. Karlake, Q.C. and Pankhurst for the respondent.—The directors were guilty of negli-

gence in trusting Crabtree, as he had free access to the deed chest, and these deeds were physically as much in his custody as before he mortgaged the property to the company. There was extreme negligence on the part of the directors with reference to the deed chest. Crabtree having access to it could easily take out these deeds, and leave the mortgage to the company behind, and then there was nothing to show a stranger that the property was mortgaged. Therefore greater care ought to have been taken than in an ordinary case. It is said that the negligence must be such that the court will impute fraud. But in *Colyer v. Finch* (5 H. L. C. 905, 928) it is said that to postpone the first mortgagee the party claiming by subsequent title must satisfy the court "that the first mortgagee has been guilty either of fraud or gross negligence," and the rule is similarly laid down in *Roberts v. Croft* (2 De G. & J. 1). [Fry, L.J. referred to the rule as stated in *Agra Bank v. Barry*, L. Rep. 7 E. & I. 735.] If in any case a first mortgagee having the legal estate can be postponed without having been guilty of actual fraud, it ought to be done here. They also referred to

*Waldron v. Sloper*, 1 Drew. 193;  
*Worthington v. Morgan*, 16 Sim. 547;  
*Perry-Herrick v. Atwood*, 30 L. T. Rep. O. S. 267;  
 2 De G. & J. 21;  
*Briggs v. Jones*, 23 L. T. Rep. N. S. 213; L. Rep. 10 Eq. 92;  
*Clarke v. Palmer*, 21 Ch. Div. 124;  
*Halifax Union v. Wheelwright*, 32 L. T. Rep. N. S. 802; L. Rep. 10 Ex. 183;  
*Dovle v. Sanders*, 10 L. T. Rep. N. S. 840; 2 H. & M. 242;  
*Scholesfield v. Templer*, Johnson, 165.

*Ambrose* in reply.

*Cur. adv. vult.*

April 3.—The judgment of the Court (Cotton, Bowen, and Fry, L.J.J.) was now delivered by

Fry, L.J., who after stating the facts as above, proceeded as follows:—The plaintiffs being possessed of mortgages earlier in date than the mortgage of the defendant, and, under these instruments, being the owners of the legal estate, are *prima facie* entitled to priority over the defendant, but the defendant seeks to postpone the plaintiffs' legal estate on various grounds. The main contention on the part of the defendant, which succeeded in the court below was, that by reason of the negligent conduct of the plaintiffs after they had taken their mortgages, these securities ought to be postponed to the security of the defendant, and this point has been argued at such length and with so extensive a reference to the authorities, that it appears to us necessary to consider the matter fully. The question which has thus to be investigated is, What conduct in relation to the title deeds on the part of a mortgagee who has the legal estate is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage? The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the court in depriving a legal mortgagee of the benefit of the legal estate. It has been contended on the part of the plaintiffs that nothing short of fraud will justify the court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough. The cases

which assist in answering the question thus raised will be found to fall into two categories: (1) those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds; (2) those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them. The two classes of cases will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for. In the case of a person taking the legal estate, and not seeking for or obtaining the title deeds from the mortgagor, the question may arise between the legal mortgagee and either a prior or a subsequent incumbrancer or purchaser. But in such a transaction the fraud about which the courts are most solicitous is that which is practised when a man takes the legal estate with knowledge of a prior equitable sale or incumbrance, and yet strives to put himself in a position to show that he took without notice—that kind of fraud which Lord Hardwicke explained in *Le Neve v. Le Neve* (Ambl. 436, 445), when he said: "The taking of a legal estate after notice of a prior right makes a person a *mala fide* purchaser. . . . This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate." On the other hand, when the legal mortgagee has obtained the possession of the title deeds and subsequently gives them up, no question can arise between him and a prior equitable owner, and no suspicion of the particular fraud which we have referred to can arise; the estate of the legal mortgagee can never be improved by any subsequent dealings with the deeds, and therefore, before the court can find a fraudulent intent in the legal mortgagee, it must be shown that he concurred in some project to enable the mortgagor to defraud a subsequent mortgagee, or that he was a party or privy to some other fraud in fact. The kind of fraud most to be looked for in this class of cases is such as was described by Cowper, L.C. in the case of the *Thatched House* (1 Eq. Ca. Abr. 322), when he said: "If a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, that fraud will without doubt in equity postpone his own mortgage. So if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprison as shall forfeit his priority." On the head of law now under consideration the observations of Lord Eldon in giving judgment in the case of *Evans v. Bicknell* (6 Ves. 174) are without doubt the leading authority. That case is remarkable for several reasons, and not the least so because it is the leading authority on a point which did not naturally arise in it. In that case a settlement had been made on the marriage of Stansell and his wife, the defendant Bicknell being the trustee of the settlement, and as such having possession of the title deeds. Bicknell had delivered the deeds to Stansell, and Stansell, having obtained the deeds, mortgaged the property to the plaintiffs and delivered to them the deeds. The plaintiffs alleged that Bicknell so delivered the deeds to assist Stansell

in his fraud. Bicknell, on the contrary, alleged and swore that he did it to enable Stansell to obtain credit in his trade by showing that his wife was tenant for life of the property; and the real question for decision was whether Bicknell could, on the ground of his alleged participation in Stansell's fraud, be made liable for the difference between the value of Stansell's life interest under the settlement and the amount of the plaintiff's mortgage. In considering this point, the Lord Chancellor was led to discuss the question of postponing the legal estate on the ground of conduct. It is, we think, impossible, to read the judgment and not come to the conclusion that Lord Eldon considered that the same fraud and the same kind of negligence which would support a suit for personal relief would justify the postponement of the legal estate. Having referred to the evidence of the principal witness, Lord Eldon said (6 Ves. 189): "I still entertain great doubt whether, upon such a transaction, a party should be charged personally: for even upon that it amounts to no more than that a trustee delivers the deeds into the hands of a party who has the settlement. I do not say it is not negligence; but it is too dangerous, upon such loose evidence, to hold that it is that gross negligence that amounts to evidence of fraud." The Lord Chancellor then turned to consider a judgment in which Buller, J. had erroneously affirmed that it was an established rule in equity that a second mortgagee who has the title deeds without notice should be preferred, and, after adverting to his mistake, observed (6 Ves. 190): "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself sufficient ground to postpone the first mortgagee." The expression "gross negligence that amounts to evidence of a fraudulent intention" is certainly embarrassing; for negligence is the not doing of something from carelessness and want of thought or attention, whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing, not carelessly, but for a purpose. But Lord Eldon seems to have meant by his words to describe the not doing of something so ordinarily done by honest men under the given circumstances as to be really attributable, not to negligence or carelessness, but to a fraudulent intention. In short, it appears to us that, in the mouth of Lord Eldon, the word "negligence" was used simply to express nonfeasance. In a subsequent passage of his judgment the Lord Chancellor varies the form of his language, but without throwing any fresh light on his meaning. In one place (6 Ves. 191) he speaks of "negligence so gross as to amount to fraud," which seems like speaking of carelessness so great as to amount to design; in another place (Ibid. 193) of "negligence so gross as to amount to constructive fraud;" and again (Ibid. 193) of a "circumstance of so gross negligence . . . that it is conclusive evidence of fraud." In the subsequent case of *Martinez v. Cooper* (2 Russ. 198, 217) Lord Eldon referred to *Evans v. Bicknell* as having settled the principle which he again expresses in nearly similar language. "There must be," he says, "either direct fraud or negli-

gence amounting to evidence of fraud to induce this court to interfere for the purpose of postponing a party who insists on the legal benefit of his deed." All this language of Lord Eldon, though loose and difficult to construe, appears to us to point to fraud as the necessary conclusion before the court can deprive the owner of the legal estate of his legal rights derived from that estate. This fraud, no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be a fraud because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded; or because the original fraudulent intention had no particular person in view: (*Beckett v. Cordley*, 1 Bro. C. C. 353; and per Lord Eldon in *Evans v. Bicknell*, 6 Ves. 192.) That fraud, and fraud alone, was the ground of postponing the legal estate was, we think, the opinion of Lord Hardwicke in *Le Neve v. Le Neve* (Ambl. 436, 447). "Fraud, or *mala fides*, therefore," he said, "is the true ground on which the court is governed in the cases of notice." That Sir William Grant entertained the same view, and considered it as the result of *Evans v. Bicknell* is apparent from his observations in *Barnet v. Weston* (12 Ves. 130, 133), where he said that the old cases for postponing the first mortgagee had been shaken unless a case of fraud could be made out. That James, L.J. adopted the same rule is plain from what he said in the case of *Ratcliffe v. Barnard* (L. Rep. 6 Ch. App. 652). "The legal mortgagee must," he said, "have been guilty of fraud, or of that wilful negligence which leads the court to conclude that he is an accomplice in the fraud." From this consensus of expression as to the true rule, some departure is said by the learned counsel for the defendant to have occurred in the language used by Lord Cranworth, L.C. in the case of *Colyer v. Finch* (5 H. L. Cas. 905), and of *Roberts v. Croft* (2 De G. & J. 1). It is enough to say that in our opinion the Lord Chancellor plainly intended in both of these cases to lay down no new principle, and his use of the expression "negligence so gross as to be tantamount to a fraud," and his emphatic reliance on the cases of *Evans v. Bicknell* and *Martinez v. Cooper*, in his judgment in *Colyer v. Finch*, are sufficient evidence of this intention. Turning now to the decisions, mostly subsequent to that of *Evans v. Bicknell*, which have been cited in argument, it will be found that the cases which have arisen on the conduct of the mortgagee in not obtaining possession of the title deeds may be ranged in the following classes: (1.) Where the legal mortgagee or purchaser has made no inquiry for the title deeds, and has been postponed, either to a prior equitable estate, as in *Worthington v. Morgan* (16 Sim. 547), or to a subsequent equitable owner, who used diligence in inquiry for the title deeds, as in *Clarke v. Palmer* (21 Ch. Div. 124). In these cases the courts have considered the conduct of the mortgagee in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity; and in the latter case that a subsequent mortgagee, who was, in fact, misled by the mortgagor taking advantage of the conduct of the legal mortgagee, could as against him

take advantage of the fraudulent intent. (2.) When the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery, and has accordingly lost his priority, as in *Barnett v. Weston* (12 Ves. 130); *Hewitt v. Loosemore* (9 Hare, 449); and *Agra Bank v. Barry* (L. Rep. 7 E. & I. 135). (3.) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all, and has accordingly not lost his priority, as in *Hunt v. Elmes* (3 L. T. Rep. N. S. 796; 2 De G. F. & J.); *Ratcliffe v. Barnard* (L. Rep. 6 Ch. App. 652); and *Colyer v. Finch* (5 H. L. Cas. 905). (4.) Where the legal mortgagee has left the deeds in the hands of the mortgagor with authority to deal with them for the purposes of his raising money on security of the estate, and he has exceeded the collateral instructions given to him. In these cases the legal mortgagee has been postponed, as in *Perry-Herrick v. Attwood* (30 L. T. Rep. O. S. 267; 2 De G. & J. 21). This case was decided not on the ground that the legal mortgagees had been guilty of fraud, but on the ground that, as they had left the deeds in the hands of the mortgagor for the purpose of raising money, they could not insist as against those who in reliance on the deeds lent their money, that the mortgagor had exceeded his authority. The cases where the mortgagee, having received the deeds, has subsequently parted with them or suffered them to fall into the hands of the mortgagor, will be found to fall into the following classes: (1.) Where the title deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them, and the legal mortgagee has retained his priority on the subsequent equities, as in *Peter v. Russell*, or *Thatched House case* (1 Eq. C. Abr. 321), and *Martinez v. Cooper* (2 Russ. 198). (2.) Where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee: (*Briggs v. Jones*, 23 L. T. Rep. N. S. 213; L. Rep. 10 Eq. 92.) In such cases the court has, on the ground of authority, postponed the legal to the equitable estate. This is the same in principle as the decision in *Perry-Herrick v. Attwood*. No case has been cited in which the legal mortgagee has (as by the Vice-Chancellor in this case) been postponed by reason of negligence in the custody of the deeds. The decisions on negligence at common law have been pressed on us in the present case; but it appears to us enough to observe that the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty; and that in the present case it is impossible to find any duty undertaken by the plaintiff company to the defendant, Mrs. Whipp. The case was argued as if the legal owner of land owed a duty to all other of Her Majesty's subjects to keep his title deeds secure, as if title deeds were, in the eye of the law, analogous to fierce dogs or destructive elements, where, from the nature of the thing, the courts have implied a general duty of safe custody on the part of the person having their possession or control. This view is, in our opinion, impliedly negatived by the whole course of decisions, and it is expressly repelled by the

observations of the present Lord Chancellor in *Agra Bank v. Barry*, where he said: "It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and no doubt there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest ought by himself or his solicitor to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case." These observations appear to us conclusive on the point, and they, at the same time, suggest the conclusion that if in any case it shall appear that a prior legal mortgagee has undertaken any duty as to the custody of the deeds towards any given person, and has neglected to perform that duty with due care, and has thereby injured the person to whom the duty was owed, there the legal estate might be postponed by reason of the negligence. But no such case appears as yet to have arisen, nor does it seem one likely often to occur. The point certainly does not arise in the present case, and we therefore give no opinion upon it. The authorities which we have reviewed appear to us to justify the following conclusions: (1) That the court will postpone the prior legal estate to a subsequent equitable estate: (a.) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which assistance or connivance the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence where such conduct cannot otherwise be explained; (b.) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate. But (2) that the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner. Now, to apply the conclusions thus arrived at as to the facts of the present case. That there was great carelessness in the manner in which the plaintiff company, through its directors, dealt with their securities, seems to us to admit of no doubt. But is that carelessness evidence of any fraud? We think that it is not. Of what fraud is it evidence? The plaintiffs never combined with Crabtree to induce the defendant to lend her money. They never then knew that she was lending it, and stood by. They can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the plaintiff

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company, and accordingly has no tendency to convict them of fraud. Then comes the inquiry whether the plaintiff company constituted Crabtree their agent to raise money, in which case the defendant might be entitled to priority. The circumstance most favourable to this contention was, in our opinion, the possession by Crabtree of the key, but the defendant has not proved the circumstances attending this fact, or the duties for the performance of which the key may have been essential, with sufficient distinctness to enable us to conclude from the possession of the key that it implied an authority to deal with the securities of the plaintiff company. The cases in which Crabtree did so deal with the securities, when carefully considered, appear to us insufficient to support the authority claimed, and the fact that Crabtree in dealing with the defendant suppressed his mortgage to the company, and dealt with her not as agent of the company having an authority to pledge its securities, but as the unincumbered owner of the property, goes, we think, far to negative the suggested authority. On this point, therefore, we agree with the Vice-Chancellor. One other point was argued, and demands decision. Of the 3500*l.* paid by Mrs. Whipp to Crabtree it appears that 1900*l.* found its way from Crabtree into the banking account of the plaintiff company, but on the evidence we conclude that it was paid to the company on account of and as the money of Crabtree and not of Mrs. Whipp; and, further, that it was paid in part satisfaction of a much larger debt and without notice to the company of the source from whence it was derived. It has been argued that, to the extent of this 1900*l.*, the company should be postponed to Mrs. Whipp, on the ground that the defendant is entitled to follow this money obtained from her by fraud. The proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a *bond fide* debt without notice is, in our judgment, devoid of support from principle or authority. Differing as we do from the learned Vice-Chancellor on the one point on which he decided against the plaintiffs, we conclude that his judgment must be discharged, and that instead of it the court must declare the plaintiffs entitled to priority, and give the usual consequent relief. The plaintiffs must add to their security so much of the costs of the action in the court below as would have been incurred if the action had been a simple action for foreclosure and no question of priority had been raised; and the defendant must pay to the plaintiffs the residue of the plaintiffs' costs in the court below, and the whole of the costs of the appeal.

Solicitors for the plaintiffs, *Parker and Stocks*, Manchester.

Solicitor for the defendant, *J. G. Oppenshaw*, Bury.

March 27, 28, 29, and May 29, 1884.

(Before COTTON, BOWEN, and FRY, L.JJ.)

*Ex parte BARTEE; Ex parte BLACK; Re WALKER.* (a)

*Bankruptcy—Fraud on bankrupt law—Ship-building—Contract—Power for buyer to use contractor's materials in event of contractor's bankruptcy.*

*A contract for the building of a ship, which was to be paid for by instalments, provided that if at any time the builders should cease working on the ship for fourteen days, or should allow the time for completion and delivery of the ship to expire for one month without having it ready for delivery, or in the event of the bankruptcy or insolvency of the builders, it should be lawful for the buyers to enter and take possession of the ship and of all materials prepared or provided, or in the course of preparation for the ship, and to cause the ship to be completed by any persons whom they might see fit to employ, and to use such materials belonging to the builders as should be on their premises, and which should either have been intended to be or be considered fit and applicable for the purpose.*

*Held, that this clause was void against the trustee in bankruptcy of the builders, as being an attempt to control the user after bankruptcy of property vested in the bankrupt at the date of the bankruptcy, and also as depriving the trustee of his right to elect to complete the ship or not, and transferring that right to the buyers.*

*Held also, that, the buyer having, on the filing of a liquidation petition by the builders, acted on the clause, could not justify the user of the builders' goods for the completion of the ship on the ground of a subsequent cesser of work on the ship.*

THESE were two appeals from an order made by Mr. Registrar Pepys, acting as Chief Judge in bankruptcy, on the 10th July 1883.

The facts are fully stated in the judgment of the court.

*Cooper Willis, Q.C. and Creed* for Barter and Co.

*J. E. Linklater* for Block and Drury.

*Winslow, Q.C. and Herbert Reed* for the trustee in bankruptcy.

The following cases were referred to:

*Ex parte Jay*, 42 L. T. Rep. N. S. 600; 14 Ch. Div.

19;

*Brown v. Bateman*, 15 L. T. Rep. N. S. 558; L. Rep.

2 C. P. 272;

*Ex parte Dickin*, 35 L. T. Rep. N. S. 769; 4 Ch. Div.

524;

*Ex parte Voisey*, 47 L. T. Rep. N. S. 363; 21 Ch. Div.

442;

*Re Stockton Iron Furnace Company*, 40 L. T. Rep.

N. S. 19; 10 Ch. Div. 335;

*Reeves v. Barlow*, 50 L. T. Rep. N. S. 782; 12 Q. B.

Div. 426;

*Ex parte Newitt*, 44 L. T. Rep. N. S. 5; 16 Ch. Div.

522;

*Higginbotham v. Holme*, 19 Ves. 88;

*Baldwin v. Cole*, 6 Mod. 212;

*M'Combie v. Davies*, 6 East, 538;

*Burroughes v. Bayne*, 2 L. T. Rep. N. S. 16; 5 H. & N.

296;

*Howes v. Ball*, 7 B. & C. 481;

*Tripp v. Armitage*, 4 M. & W. 697, 699;

*Ex parte Nichols*, 43 L. T. Rep. N. S. 492; 22 Ch.

Div. 783;

*Holroyd v. Marshall*, 7 L. T. Rep. N. S. 172; 10

H. & C. 191;

(a) Reported by W. O. Bins, Esq., Barrister-at-Law.

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*Ex parte* BARTER; *Ex parte* BLACK; *Re* WALKER.

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*Ex parte Williams*, 37 L. T. Rep. N. S. 764; 7 Ch. Div. 133;  
*Ex parte Mackay*, 28 L. T. Rep. N. S. 828; L. Rep. 8 Ch. App. 643;  
*Ex parte Brown*, 40 L. T. Rep. N. S. 402; 11 Ch. Div. 148.

May 29.—The written judgment of the court (Cotton, Bowen, and Fry, L.JJ.) was now read by

FRY, L.J., as follows:—The facts relevant to these appeals are shortly as follows: On the 13th Sept. 1882 a written contract was entered into between Messrs. Walker and Co., who were shipbuilders, of the one part, and a Portuguese steamship company of the other part, in which the former parties were described as the builders and the latter as the buyers. By this contract the builders agreed to build and sell to the buyers an iron screw steamship according to certain signed specifications, to be delivered on the 1st May 1883. The price was to be 12,000*l.*, payable by instalments, viz., 1000*l.* on keel being laid, 1500*l.* when framed, 2000*l.* when plated, 2000*l.* when launched, 1500*l.* when machinery aboard, 4000*l.* on delivery. It was provided that, from and after the payment of the first instalment, the steamship, engines, and all belonging to her or them, or so much thereof as should be then built, or bought, or ordered for her or them, should be and remain the absolute property of the buyers, subject only to the lien of the builders for any of the purchase money that might remain unpaid. This clause of the agreement we shall subsequently refer to as the vesting clause. The agreement then proceeds in the following words: "That, if at any time the said builders shall cease working on the said steamship for the space of fourteen days, or shall allow the time for the completion and delivery of the said steamship to expire for the space of one calendar month without the same having been completed and ready for delivery, or, in the event of the bankruptcy or insolvency of the said builders, it shall be lawful then and thenceforth for the said buyers to cause any person or persons nominated for that purpose by them to enter upon and take possession of the said vessel and of all material, matters, or things prepared or provided, or in the course of preparation for the said steamship, and to cause the said steamship to be completed by any person or persons whom the said buyers may see fit to employ in such completion, or in like manner to contract with some one person or persons for the completion of the work agreed to be done by the said builders, either for an agreed sum or otherwise, and to employ such materials of, and belonging to, the said builders as shall be then on their premises, and which shall either have been intended to be, or be considered fit and applicable for the purpose, and, for this purpose, to use the said yard and premises and all fixed and movable engines, plant, and tools of the said builders, and, for this purpose, these presents shall be construed and operate and enure by way of leave and licence as well as by way of contract. And it shall be lawful for the said buyers to pay such person or persons so to be employed by them as aforesaid, such sum or sums as they may think fit or agree upon in that behalf. And it shall be lawful for the said buyers to deduct such sum or sums as they may so pay from and out of the payments agreed by them to be paid to the said builders. And it is hereby further agreed that, in the event of the amount of such

payment, together with the payments made to the said builders, exceeding in the aggregate the amount of the contract price agreed to be paid to the said builders, the said builders shall, on demand, pay such excesses to the said buyers, together with interest at the rate of 5 per cent. per annum from the date of finishing the said vessel." As it will be frequently necessary to refer to these various clauses, we shall refer to the power to take possession as the seizure clause, and to the power to employ materials as the user clause. We observe, before passing further, that the series of powers which I have just read are all to arise on the happening of any one of four separate events—(1) cesser of work; (2) delay in delivery; (3) bankruptcy; or (4), insolvency; and further, that the words descriptive of the materials are different in what we have, respectively called the vesting, the seizure, and the user clauses of the agreement. In Nov. 1882 the first instalment was paid, and therefore the vesting clause took effect. On the 7th Feb. 1883 Messrs. Walker presented a liquidation petition, and thereby committed an act of bankruptcy. On the 9th Feb. Messrs. Barter and Co., acting as the agents of the Portuguese company, authorised Mr. Smith, in terms of the seizure clause of the agreement, to enter upon and take possession of the steamship and of all material, matters, and things prepared or provided, or in course of preparation, for the said steamship. On the same day, Mr. Smith, acting upon the authority thus conferred upon him, entered and took formal possession of the ship and of certain materials. Mr. Devas was appointed receiver under the liquidation petition, and he went on with the building of the ship, Smith offering no obstacle to the use of the materials of which he had taken possession for the purpose of the ship. This continued till the 28th Feb., when Devas, the receiver, paid off all the men in the yard, and ceased working. Nothing was done to the ship from the 28th Feb. to the 6th or 7th March following. On Mr. Devas's cesser of work Messrs. Barter, acting as agents to the Portuguese company, entered into negotiations with Messrs. Black and Drury, and by a letter of the 5th March these gentlemen offered to complete the ship on certain terms, one of them being expressed in the following words: "We to have the benefit of your right under your agreement with Messrs. Walker and Co. to all material, matters, or things prepared or provided, or in the course of preparation, for the said steamship, and to the employment of such materials of and belonging to Messrs. Walker and Co., or their estate, as are on their premises, and which shall either have been intended to be or be considered fit and applicable for the purpose of completing the said vessel, and for the purpose of so completing to use the yard or any fixed or movable engines, plant, and tools of the said Messrs. Walker and Co. on their estate." On the 6th March Messrs. Barter accepted Messrs. Black and Drury's proposal, and immediately thereafter Messrs. Black and Drury commenced working on the ship, and received from Mr. Smith possession of the goods which had been seized, and they used in the building of the ship certain materials in the yard. On the 14th March Messrs. Walker were adjudicated bankrupts, and on the 10th July the order



now under review was pronounced. By this order the court, in the first place, declared that all the materials belonging to the steamship or engines, or which were bought for her or them, were the property of the purchasers against the trustee, and that the iron plates referred to in the evidence formed part of such property. It was argued by Mr. Winslow, on the cross-appeal of the trustee, that these iron plates which were taken possession of by Smith were not part of the materials belonging to the ship or bought or ordered for her; but, in our opinion, the learned registrar was right in his conclusion that these plates did belong to the ship within the meaning of the contract, and the cross-appeal must accordingly be dismissed. The order under appeal further directed an inquiry to ascertain what of the materials or stock other than the materials belonging to the steamship or engines, or which were bought or ordered for her or them, which on the 7th Feb. 1883 were in or about the dockyard, had been used or disposed of by Messrs. Barter and Messrs. Black and Drury, or either of them, in or about the construction of the steamship or otherwise since the 7th Feb. 1883, and also the value of such materials and stock so used or disposed of; and they, or some or one of them, were ordered to pay to the trustees the value of the materials and stock (other than as aforesaid) so used or disposed of. And also to deliver up to the trustees all materials, stock, and tools which then remained in the said dockyard, unworked or undisposed of, other than those mentioned in the vesting clause of the agreement. These inquiries and the consequent direction for payment in effect charge both Messrs. Barter and Messrs. Black and Drury with the value of all the material which had not passed to the Portuguese company under the contract, and which were used in the completion of the vessel after the date of the liquidation petition. From these inquiries, and from this direction separate appeals have been presented by Messrs. Barter and Co., and by Messrs. Black and Drury. It appears to us to be plain that the learned registrar has carried back the inquiry to too early a date, and that there is no pretence for charging any of the appellants with the value of the material employed before Smith took possession or after Smith took possession, and whilst the receiver continued the work on the ship; in short, that if any inquiry is to be directed it must begin on the 7th March and not on the 7th Feb. The next inquiry is, whether Messrs. Barter and Co. are liable for the conversion of the goods in question. They could not, in our opinion, be held liable simply because they, as agents to the Portuguese company, subrogated Messrs. Black and Drury to all the rights of the Portuguese company in respect of materials, nor can they be held liable for the seizure of any goods if the goods of which they authorised the seizure by Smith were only goods vested in the Portuguese company by the contract. This gives rise to the inquiry whether the words used in the vesting and seizure clauses of the contract have the same force, or whether the latter are greater than the former. The words of the vesting clause are, "all belonging to her or them (vessel or engines), or so much thereof as shall be then built, or bought, or ordered for her or them." In form, the words express an alternative, but if their true force be

alternative, they would seem to give the grantees or buyers an election to take either all belonging to the ship and engines, or a part of such all. But we think that a construction giving a choice between the whole or a part is an unreasonable one, and that the latter words are designed to give distinctness to a portion of the things included under the word "all," so that the vesting clause operates to convey the property in the ship and engines, and in everything built, bought, or ordered for the ship or engines, and all other things, if any, belonging to the ship or engines. Now, turning to the words of the seizure clause, we find they include everything (1) prepared for the ship; (2) provided for the ship; (3) in course of preparation for the ship. Many of these things would, no doubt, come under the description of things bought or ordered for the ship, but all of them would, in our opinion, be things belonging to the ship within the meaning of the contract. The words, therefore, of the seizure clause appears to us either equivalent to those of the vesting clause, or somewhat less extensive. It follows that, in our opinion, the authority given to Smith, which followed the words of the seizure clause, authorised him only to take possession of property already belonging to the Portuguese company. Did Smith in fact seize the property other than that belonging to the Portuguese company? It is true that he appears to have marked some tools with the number 66, which designated the steamship in question, but apparently only to prevent them being removed whilst required for the use of the ship, and he did not, in our opinion, take possession of these tools. It appears also that he took possession of a few materials which were not in fact used for, and perhaps were not required for, the ship, but were intended for her; and our conclusion is, that Smith did not in fact take possession of any property beyond that which was already vested in the Portuguese company, and consequently, that the inquiry and direction for payment cannot be maintained as against Messrs. Barter and Co. Then arises the question whether the inquiry and declaration can be sustained as against Messrs. Black and Drury; and here, again, the first inquiry is one of facts. Did Messrs. Black and Drury use, in the completion of the ship, any materials which, at the date of the bankruptcy, were the property of the builders, and not of the Portuguese company? The evidence is in a very confused condition, and appears to have been elicited with a very vague notion of the real issues before the court. But, having regard to the evidence, especially of Mr. Drury, we think that there is enough evidence to make the inquiry reasonable, if it be right in point of law. If the inquiry of fact shall be answered by finding that Messrs. Black and Drury did use, in the construction of the vessel, some of the property which, after the date of the bankruptcy, was vested in the builders and not in the buyers, then remains the legal question whether Messrs. Black and Drury can be held liable for its value, or whether they can justify its appropriation under the user clause of the agreement, which, unlike the vesting and seizure clauses, deals with the property of the builders, not that which had become the property of the buyer. The bankruptcy of Messrs. Walker was the event on which, in fact, Messrs. Barter put in force the series of powers vested in the buyers by the

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agreement, and on which, therefore, Messrs. Black and Drury must *prima facie* be taken as justifying this exercise of the power given by the user clause. But, in our opinion, a power upon bankruptcy to control the user after bankruptcy of property vested in the bankrupt at bankruptcy is invalid. The general rule on this subject was expressed many years ago by Mr. Swanston (1 Sw. 481, n.) in language which was adopted as accurate by Lord Hatherley in *Whitmore v. Mason* (5 L. T. Rep. N. S. 631; 2 J. & H. 204). "The general distinction," he says, "seems to be that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it, in the event of his own bankruptcy, to the disappointment or delay of his own creditors, the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously described by law." It was strenuously argued before us that the clause in question is clearly for the benefit, and not for the detriment, of the creditors, because it is said that the completion of the ship will lessen the amount for which the Portuguese company might otherwise prove. But the argument appears to us fallacious, because, in the absence of the clause in question, the trustee in bankruptcy would have had the election to complete the ship or not, as might seem best for the creditors; but the presence of this clause has transferred that election to the buyers, and put them in possession of a power to complete the ship when the trustee might abandon it. It has been further argued that Messrs. Black and Drury can justify under the user clause, as arising on the cesser of working for fourteen days, on the ground that the receiver had, in fact, refused to go on, and that, although the fourteen days had not run, there was every reason to believe the work would never be recommenced. But, in our opinion, it is not competent to the buyers, having entered as for the bankruptcy, to rely on a subsequent cesser of working. No doubt an entry may be justified on the ground of any one or more of the stipulated events antecedent to the entry. But we think that a cesser of work after an entry is not a cesser of work within the intent and meaning of the agreement now in question. But, furthermore, the respondents commenced working on the ship within the ten days allowed, and thereby, in our opinion, in fact prevented a resumption of work by the builders or those claiming under them. It was, indeed, suggested that Devas, the receiver, had declared his intention of not further prosecuting the work. But, even if he had authority so to do, there is no satisfactory evidence of his having communicated to the appellants any fixed intentions on his part not to complete the ship. We conclude, therefore, that Messrs. Black and Drury cannot justify their conversion of the property of the bankrupt, if such conversion shall be found to have taken place; in fact, it follows from what we have said that in our opinion the motion must be dismissed, as against Messrs. Barter and Co., with costs here and in the court below, and that, as regards Messrs. Black and Drury, the order of the registrar should be varied, and should, as varied, stand as follows:

This court doth declare that according to the true construction of the agreement of the 13th Sept. 1882, all the materials and things which were built or bought or ordered for the ship and engines and all other things, if any, belonging to the ship and engines, were the property of the Portuguese company as against the trustee, and that the iron plates referred to in the evidence formed part of such property, and belonged to the Portuguese company accordingly. And that an inquiry be directed to ascertain what, if any, of the materials or things, other than as aforesaid, which on the 7th March 1883 were in or about the dockyard, have been used or disposed of by Black and Drury, or their servants or agents, in or about the construction of the ship, and removed from the dockyard since the 7th March 1883. And also the value of such materials and things, if any, so used or disposed of and removed as aforesaid. And the court doth direct that, for the purposes of such inquiry, Black and Drury do, within fourteen days after service of this order, furnish to the trustee an account in writing of all such materials and things so used or disposed of by them, or their servants or agents, and removed as aforesaid, and that Black and Drury do pay to the trustee the value of the said materials and things so used or disposed of or removed, within fourteen days after service of any order, certificate, or report made on the said inquiry. And this court doth order that the trustee do pay to all the respondents the costs of his cross-appeal, and to the appellants, Messrs. Barter and Co., their costs of their appeal, and that the trustee do have his costs of, and incident to, the motion, and the order in the court below and this court out of the estates of the bankrupts, and that the costs of Black and Drury of the motion and order in this court and the court below, and the costs of the trustee, and of Black and Drury of the said inquiry, be reserved to be dealt with by the Court of Bankruptcy.

Solicitors for Barter and Co., *Kearsey, Son, and Haases.*

Solicitors for Black and Drury, *Lowless and Co.*  
Solicitors for the trustee, *Stocken and Jupp.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Wednesday, Dec. 17, 1884.

(Before BACON, V.C.)

O'BRIEN v. TYSSEN. (a)

*Will—Devise of site with existing church—Secret trust—Mortmain Act (9 Geo. 2, c. 36)—Church Building Act (43 Geo. 3, c. 108)—Practice—Demurrer—Rules of Supreme Court 1883, Order XXV., rr. 1, 2, 3.*

*The owner in fee of land, of about one acre in extent, upon which he had built a licensed chapel, devised all his real estate to his wife, and died some years afterwards. The devise was made in pursuance of a secret agreement that after the death of the testator, his wife should hold the property in question upon trust to convey it as a parish or district church in perpetuity.*

(a) Reported by G. MAGAN, Esq., Barrister-at-Law.

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*Held, that the devise was valid under 43 Geo. 3, c. 108, which contemplated the "providing" a church or chapel; and was not rendered illegal by the Mortmain Act (9 Geo. 2, c. 36).*

In this case a point of law was raised by a defendant under the Rules of the Supreme Court 1883, Order XXV., r. 2, as to whether a church *in situ* could be devised under 43 Geo. 3, c. 108.

The plaintiff was the Rev. George Edward O'Brien, and his father, Dr. O'Brien, was the owner in fee simple of land about one acre in extent, at Hove, Brighton, and had erected thereon a private church or chapel called St. Patrick's Church, for the carrying on of worship according to the rites of the Church of England. The building was never consecrated, but had been licensed by the bishop. The pew rents amounted to about 1100*l.* a year, and the value of the land and church was estimated at 1500*l.*

On the 2nd July 1879, Dr. O'Brien made a will by which he gave, devised, and bequeathed all his real and personal estate to his wife Octavia O'Brien absolutely.

On the 8th Jan. 1884, Dr. O'Brien died, and on the 7th March his will was duly proved.

On the 3rd May 1884, Mrs. O'Brien granted the piece of land and the church thereon unto and to the use of the defendant, the Rev. Ridley Daniel Tyssen, subject to a certain power of appointment, which was never exercised by her.

On the 26th May, Mrs. O'Brien died. The plaintiff, as heir-at-law of Dr. O'Brien, instituted the action and claimed the property in question. He alleged in his statement of claim that the devise of the property by Dr. O'Brien to his wife was made in pursuance of a secret agreement, by which she undertook, after the decease of her husband, to hold the land upon trust to convey it as a church or chapel in perpetuity, and that such secret trust was illegal, and contrary to 9 Geo. 2, c. 36. The plaintiff further alleged that the conveyance by Mrs. O'Brien to the defendant was upon the same secret trust, and that, inasmuch as it was void, there was a resulting trust to himself as heir-at-law.

The defendant denied the existence of the secret trust, but maintained that, even if there was such a trust, it was lawful, and covered by the statute 43 Geo. 3, c. 108.

*Marten, Q.C. and J. T. Prior* for the defendant.—The Act of 43 Geo. 3, c. 108, was passed for the purpose of enabling gifts of land to be made with the view of providing churches and chapels in connection with the worship of the United Church of England and Ireland. The 1st section of that Act enacts that it shall be lawful for any person, by his, her, or their last will or testament in writing, duly executed at least three months before the death of such testator, to give and vest in any person or persons all such his, her, or their estate, interest, or property in any lands or tenements, not exceeding five acres, or goods and chattels not exceeding in value 500*l.* "for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel," where the liturgy and rites of the United Church of England and Ireland shall be used and observed. In this case the amount of land is within the five acres; the will was executed several years before the death of the testator; and the fact that the

devise was a general one makes no difference. The Statute of Mortmain (9 Geo. 2, c. 36) is out of the question:

*Fisher v. Brierly*, 2 L. T. Rep. N. S. 474; 1 De G. F. & J. 643; 10 H. of L. Cas. 159;  
*Sinns' v. Herbert*, 26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232.

Upon the construction, therefore, of the Act of Parliament, even assuming the secret agreement between Dr. and Mrs. O'Brien, this is a valid gift.

*Underhill (Hemming, Q.C. with him).*—I take two objections to this devise: (1) In order to come within the terms of the statute 43 Geo. 3, c. 108, the gift must appear upon the face of the will, which it does not in the present case; and (2) That the Act, although it authorises a gift by will, made three months before death, of land not exceeding five acres, or of 500*l.*, yet it does not authorise the devise of a church *in situ*. On the first point, but for the Act of 43 Geo. 3, this trust would clearly have been void under the Mortmain Act, and I submit that the Act of 43 Geo. 3 does not apply, inasmuch as there was only a general residuary devise by Dr. O'Brien, and not a specific devise such as was contemplated by the Act. The testator could not be allowed to impose a secret trust at any time before his death; and there is only verbal evidence from which the court is asked to make out this secret trust. As to the second point, the Act only enables the testator to provide a site for a church. The words of the Act are in the alternative, five acres or 500*l.*, and the subsequent words must be read *reddendo singula singulis*. The only word which could possibly be considered as applying to the present case would be the word "providing." But the church or chapel has been already provided, and the Act does not contemplate the devise of a church such as this worth 1500*l.*

*BACON, V.C.*—I think the question is covered by the Act of Parliament. If I was to adopt Mr. Underhill's argument, I should be repealing the Act of Parliament. I must treat this as if there was plain and positive evidence by some instrument that a secret trust has been declared. The secret trust has been alleged by the plaintiff to be an undertaking on the part of the widow Octavia that she would hold the said piece of land and building upon trust, after the death of Dr. O'Brien, to convey and assure the same by all necessary deeds as and for a parish and district church in perpetuity. If there was actual distinct evidence of that fact—and I must take it on the allegation in these pleadings that there is such distinct evidence—then it seems to me to come very clearly within the words of the Act of Parliament. Now, bearing in mind that under the Statute of Mortmain, the 9 Geo. 2, c. 36, there could be no such disposition made by the testator to his wife, on her undertaking that she should hold upon that secret trust—a trust which is enforceable; there comes this statute, the purport of which is explained in the preamble to be for providing churches where churches are required; and it enables a testator, who would be otherwise incompetent, "to give his estate, interest, or property not exceeding five acres, or goods not exceeding 500*l.* towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel." I cannot conceive that there is any doubt about the meaning of that enactment; and

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of those several words "repairing," "rebuilding," and so on, whatever bearing they may have, if they have any, in this case at any rate the word "providing" is entirely pertinent and applicable. Here a person has got a licensed chapel; that is to say, he has got the bishop's licence to hold services in this building, and there must be taken to be a secret trust that the wife of the testator shall provide a parish church. In my opinion I must decide in favour of what is called the demurrer; and on the question whether the devise contained in the will of the piece of land and building mentioned in the statement of claim was affected by the trust which is alleged, that the premises should be conveyed so as to become a parish or district church, I am of opinion that the same was a valid and lawful trust, having regard to the statute 43 Geo. 3, c. 108; and on the question of whether such devise was rendered illegal by the Statute of Mortmain, I do not hesitate to say that it is not rendered illegal by any provisions of that statute, but is legal under the 43 Geo. 3, c. 108.

*Action dismissed with costs.*

Solicitors: *Norton, Rose, and Norton; Hubbard, Son, and Eve.*

Thursday, Nov. 13, 1884.

(Before KAY, J.)

*Re THE METROPOLITAN (BRUSH) ELECTRIC LIGHT AND POWER COMPANY LIMITED; Ex parte OFFOR. (a)*

*Practice—Witness—Examination before examiner—Adjournment after depositions signed—Power to recall witness—Rules of Court, Order XXXVII., rr. 12, 45.*

*After the examination of a witness had been taken before an examiner of the court, and the depositions had been read over to him and signed, the examiner, on the request of the party at whose instance the examination was taking place, adjourned the further examination sine die. The witness did not consent to such adjournment. A notice recalling the witness was subsequently sent to him, but he objected to attend on the ground that, under Order XXXVII., r. 45, of the Rules of Court of Feb. 1884 (prior to being altered), which gave an examiner power to adjourn the examination with the consent of the "parties," no adjournment could be made without the consent of the witness; and that, as the depositions had been signed and the proceedings thereby concluded, the witness could not be recalled without a fresh summons being taken out. Held, that the objection was not a valid one; that it would be improper in official proceedings not to allow a witness to be recalled; that rule 45 of Order XXXVII. required the consent of the parties, but not of the witnesses, to an adjournment; that the notice which had been duly served upon the witness when he was recalled was a proper and sufficient one; and that the witness must attend at his own expense.*

On the 21st July 1884 George Offor attended to be examined before an examiner of the court, in pursuance of a summons by the official liquidator

of the above-named company, under sect. 115 of the Companies Act 1862.

After the examination of the witness had been taken, and his depositions had been read over to him and signed, the examiner, on the request of the liquidator, adjourned the further examination *sine die*. The witness did not consent to such adjournment.

On the 17th Oct. 1884 a notice recalling the witness was sent to him, stating that he was required to attend on the 22nd Oct. 1884, at the office of the company, in order that his examination might be proceeded with.

The notice was according to Form 54 in the 3rd schedule to the General Order and Rules of Nov. 1862, regulating the mode of proceeding under the Companies Act 1862, with the variations required by circumstances, as allowed by rule 69 of that order.

The witness refused to attend again to be examined, objecting that, under Order XXXVII., r. 45, of the Rules of Court of Feb. 1884 (prior to being altered), no adjournment could be made without the consent of the witness; and also that a witness could not be recalled after his depositions had been completed and signed under Order XXXVII., r. 12, of the Rules of Court 1883, without a fresh summons for his examination being taken out. By Order XXXVII., r. 45, of the Rules of Court of Feb. 1884 (since altered by the Rules of Court of Oct. 1884, which came into operation on the 24th Oct. 1884), it was provided that, in determining the place and time at which on examination shall be taken, the examiner shall have regard to the convenience of the witnesses or persons to be examined, and all the circumstances of the case; and he shall, subject to any adjournment by consent in writing of all parties, proceed *de die in diem* with such examination at the place and time appointed.

The witness having so refused to attend, a motion was now made that he might be ordered to attend at his own expense, and that he might be ordered to pay the costs of the application.

*Graham Hastings, Q.C. and H. Burton Buckley,* for the liquidator, in support of the motion.

*W. Pearson, Q.C. and G. S. Bower,* for the witness, *contra*.

KAY, J.—It seems to me that there is nothing at all in this objection. If it were to prevail it would in some cases lead to the most injurious results that can be imagined. The right to recall a witness is one of the most obvious rights that any examiner or any person desirous of obtaining information has. In this case what was done was this: After the examination of this particular witness had been taken, and his depositions had been read over and they had been signed, the examiner was asked on behalf of the liquidator to adjourn the further examination of that witness. An objection was made at the time to the adjournment of the examination. The adjournment of the examination would be with a view to recalling the particular witness to examine him further. The liquidator wished, before the examination was concluded, to have an opportunity of doing so, and therefore he asked the examiner in point of fact to make an adjournment in order that the witness might understand that his attendance was not entirely dispensed with, but that he might be wanted again. Before rule 45 of Order

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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XXXVII. was altered it required the consent of the "parties," but not of the witnesses, to an adjournment. A witness is not a party. What was done? When the witness was wanted again he was served with this notice: "Take notice, that Mr. J. C. Russell, the examiner duly appointed in this matter, has appointed Wednesday, the 22nd Oct. 1884, at eleven o'clock in the forenoon, at the office of the above-named company, No. 2, Walbrook, in the city of London, to proceed with the examination directed by the judge to be had in this matter, and you are required to attend at the time and place aforesaid, in order that your examination may be then and there proceeded with." Now, supposing the depositions had not been signed, or supposing that the examination had been only partially taken, could there be a doubt that it could have been proceeded with? Not the least. Supposing it had been taken, and the liquidator was not certain whether he wanted to examine the witness again, could he not recall him? I understand that it is not denied that he could recall him if he were served with a new summons. What is the summons? The form of the summons is given in the third schedule to the General Order of Nov. 1862, regulating the mode of proceeding under the Companies Act 1862; and the 69th rule says that the summons shall be in the form "set forth or referred to in the third schedule to these orders, with such variations as the circumstances of each case may require." What variations? Such as the circumstances of the case require. The variations are expressed upon this notice given to the witness, which was a proper notice under the circumstances of the case. Therefore he has been summoned by a form which is, to all intents and purposes, the Form No. 54 in the third schedule to the General Order of Nov. 1862, with the variations according to rule 69, which says that it shall be with such variations as the circumstances of the case may require. I have only now to dispose of the question of costs. This gentleman did not attend when recalled. In my opinion he was entirely wrong, and therefore he must not only attend to be examined at his own expense, but he must pay the costs of this motion.

Solicitors: *Linklater and Co.; Thomas C. Russell.*

Thursday, Nov. 13, 1884.

(Before KAY, J.)

*Re THE METROPOLITAN (BRUSH) ELECTRIC LIGHT AND POWER COMPANY LIMITED; Ex parte LEAVER. (a)*

*Practice—Company—Winding-up—Examination of officer of company—Pending action against him—Irregularity—Companies Act 1862 (25 & 26 Vict. c. 89), s. 115.*

*The pendency of an action against an officer of a company which is in course of being wound-up is not sufficient to justify him in refusing to be examined under sect. 115 of the Companies Act 1862, and it makes no difference whether such action was commenced before or after the winding-up.*

*The official liquidator of a company may properly*

*apply sect. 115 for the purpose of ascertaining whether proceedings should be continued or not against an officer of the company, or against any other person.*

On the 7th March 1884 the voluntary liquidation of the above-named company was ordered to be continued under the supervision of the court.

On the 13th May 1884 an order was made for the appointment of an examiner to take the examinations of witnesses.

An attempt was made in May 1884, but without success, to serve this order on Harry Leaver, a former director of the company.

On the 16th Oct. 1884 a summons was taken out, under sect. 115 of the Companies Act 1862, for the examination of H. Leaver, and the summons was served upon him on the 20th Oct. 1884.

The summons fixed twelve o'clock on the 27th Oct. 1884 as the time for the examination, but there was a notice appended to it that the examiner had adjourned the examination until the 29th Oct. 1884.

On the 25th Oct. 1884 the liquidator issued a writ in an action against H. Leaver and others as defendants.

No order had been made or leave obtained by the liquidator to bring the action.

On the 27th Oct. 1884 H. Leaver's solicitor attended at twelve o'clock, in compliance with the summons, and, after some time, he ascertained that the summons had been called on at 11.30, and disposed of by adjourning the examination until the 29th Oct. 1884.

H. Leaver's solicitor on the same day wrote to the liquidator's solicitors stating what had taken place.

On the 29th Oct. 1884 H. Leaver attended before the examiner and objected to submit to be examined, on the ground of the pendency of the action against him by the liquidator, and also on the ground of the irregularity in the examination proceedings.

A motion was now made by the liquidator that H. Leaver might be ordered to attend at his own expense and be examined, and that he might be ordered to pay the costs of the application.

The question was whether the liquidator was entitled to summon before the examiner a person against whom he had commenced an action, which action was pending, for the purpose of obtaining evidence to support him in his action, or whether he must adopt the ordinary mode of discovery by interrogatories.

*Graham Hastings, Q.C. and H. Burton Buckley,* for the liquidator, in support of the motion, cited *Massey v. Allen*, 9 Ch. Div. 184.

*W. Pearson, Q.C. and G. S. Bower,* for H. Leaver, *contra.*

KAY, J. said that the pendency of an action against an officer of a company was not a sufficient ground to justify him in refusing to be examined under sect. 115 of the Companies Act 1862. It made no difference whether the action was commenced before or after the winding-up. The liquidator might properly apply sect. 115 for the purpose of ascertaining whether proceedings should be continued or not against the officer of the company, or against any other person. The irregularity which had been committed had not

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misled anyone, and was no reason why any other than the usual order should be made, viz., that the witness should attend at his own expense, and pay the costs of the motion.

Solicitors: Linklater and Co.; Thomas C. Russel.

Dec. 13, 16, and 17, 1884.

(Before KAT, J.)

BIDDER v. BRIDGES. (a)

*Practice—Discovery—Interrogatories—Adversary's case.*

An action was brought by two persons on behalf of themselves and all other the proprietors and occupiers of lands or tenements in the parish of M. The claim stated that the inhabitants of M. had from time immemorial had rights of recreation over a portion of M. Common, known as B. Corner, that the owners and occupiers of lands and tenements in M. had an immemorial right of pasture, herbage, and estovers over the whole of M. Common; that the plaintiff B. was seised in fee of a freehold house and 32a. 1r. 13p. of freehold land in the parish of M., now in his own occupation; that the plaintiff N. was seised in fee of a freehold messuage used as a beerhouse, and three freehold cottages in the said parish, now in his occupation or that of his tenants; that the plaintiffs were respectively entitled in respect of their said holdings to the several rights claimed; that the defendant threatened to inclose B. Corner; and it asked for a declaration that B. Corner was part of M. Common, and that the plaintiffs and those on whose behalf they sued were entitled to the rights claimed, and an injunction to restrain the defendant from trespassing upon, or otherwise intermeddling with, the said land.

The defendant's case was that the land in question was not part of M. Common, but of the manor of Wallington, of which he was the lord. In his defence he stated that N.'s beerhouse and cottages had no land attached thereto, and that such rights of common as were claimed could only be enjoyed in respect of land; that the rights of estovers claimed could only be enjoyed in respect of ancient tenements, and he did not admit that the plaintiffs were such; that the rights claimed were uncertain and unreasonable. Otherwise he met the claim with a direct traverse.

The defendant delivered to the plaintiffs interrogatories, which may be classified as follows: (1) Whether the messuages were ancient; (2) Whether any and what lands were held with the beerhouses and cottages; (3) Whether the tenements in question were held of any, and what, manor; (4) Whether there had been any user by the plaintiffs, or their predecessors in title, of the rights over the common.

The plaintiffs declined to answer these interrogatories on the ground that they related exclusively to their title, and the particulars demanded formed part of the evidence they would have to bring in support of their case.

On a summons by the defendant that the plaintiffs might be ordered to file a full and sufficient answer:

Held, that the interrogatories coming under the second head must be answered, as they sought

discovery in support of a substantive case set up by the defendant, viz., that no lands were held with the beerhouse and cottages, but the others need not be answered, as they sought discovery as to facts which the plaintiffs would have to prove at the trial, asking whether they were the facts or not, which was tantamount to asking the evidence by which they meant to prove their case.

#### ADJOURNED SUMMONS.

This was a summons by the defendant Bridges, asking that the plaintiffs might, notwithstanding the objections raised by them, be ordered to make and file a full and sufficient answer to certain interrogatories delivered by the defendant for their examination.

The action was brought by two persons, G. P. Bidder and W. H. Nightingale, on behalf of themselves and all other the proprietors and occupiers of lands or tenements in the parish or village of Mitcham, in the county of Surrey. Their claim was for a declaration that a certain piece of land known as Beddington Corner was part of Mitcham Common, and that the plaintiffs and those on whose behalf they sued were entitled to stock the same with their cattle and other commonable beasts at all times of the year, and that they and the inhabitants of Mitcham were entitled to rights of recreation over the same, and to other valuable rights, easements, and privileges in and over the same.

They also asked for an injunction to restrain the defendants from trespassing on the land, or erecting any buildings or fences thereon; and from otherwise intermeddling therewith, or interfering with the plaintiffs' enjoyment of their rights over the said land.

The statement of claim alleged that the inhabitants of Mitcham had as of right from time immemorial used and enjoyed, and still used and enjoyed, for their lawful recreation, the part of the common called Beddington Corner, as a town green within the meaning of the 12th section of the Inclosure Act 1857, and the 29th section of the Commons Act 1876. That the owners and occupiers of lands and tenements in the said parish had from time immemorial as of right had and enjoyed, and still had and enjoyed, rights of pasture, herbage, and estovers over the whole of Mitcham Common, including Beddington Corner. That the plaintiff G. P. Bidder was seised in fee for an estate of inheritance in possession of a freehold mansion-house, with outbuildings, and 32a. 1r. 13p. of freehold land held therewith, situate in the township of Mitcham, and now in his own occupation. That the plaintiff W. H. Nightingale was seised in fee for an estate of inheritance in possession of a freehold messuage used as a beerhouse, and three freehold cottages near thereto, all situate in the parish of Mitcham, and now in the occupation of Nightingale or his tenants. That the plaintiffs were respectively entitled in respect of their said holdings to the several rights claimed, and that the defendants threatened to inclose, build upon, and appropriate Beddington Corner.

The defendant Bridges contended that the land in dispute was not part of Mitcham Common, but was part of the manor of Wallington, of which he was lord, and that all rights of common over it, if any had ever existed, had been extinguished.

He delivered a statement of defence in which he

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

alleged that Nightingale's beerhouse and cottages had not any land attached thereto, or held therewith respectively, and that such rights of common as were claimed could only be enjoyed in respect of lands, and not tenements.

He also alleged that the rights of estovers claimed could only be enjoyed in respect of ancient tenements, and could not be without stint, and he did not admit that the plaintiffs' were ancient. He also alleged that the rights claimed were uncertain and unreasonable, and not such as could be claimed on behalf of a body of persons such as those for whom they were claimed. Except as stated he met the plaintiffs' case by a traverse.

The other defendants were persons claiming under Bridges.

After the statements of claim and defence had been delivered, Bridges administered (amongst others) the following interrogatories:

1. How long have you George Parker Bidder and William Henry Nightingale been respectively proprietors or occupiers of the lands and premises, respectively called in your statement of claim, "Ravensbury," the "Fountain Beerhouse," and the three cottages, and for what estates or interests, and what is the tenure thereof respectively? Are such respective premises, or were they, or any, and which of them, at heretofore, and when last held, or within the limits of any, and what, actual or reputed manors or manor, or subject to any, and what, quit or chief rents, or services, and to whom payable or rendered? Set forth which of the manors of Ravensbury, Mitcham, Biggin, and Tamworth, or Vauxhall extend, as you allege, over any, and what, parts or part of the land described in your statement of claim as Beddington Corner, and which is in fact Wallington Common, but is hereinafter referred to as Beddington Corner. Are any, and which, of the messuages held by you respectively, ancient messuages, or how otherwise, and when were the same respectively built? Have the said "Fountain" and three cottages respectively any, and what, lands appurtenant thereto, or held therewith?

2. Have you George Parker Bidder and William Henry Nightingale respectively, or your respective predecessors in title, as proprietors or occupiers of any, and what, lands or tenements in the parish of Mitcham, or under any other alleged title, or in any other capacity, ever either placed, kept, or depastured any, and what kind of commonable beasts, or any other, and what, animals in or upon, or out or taken furze or gorse upon or from, or dug or taken gravel, sand, or other materials, upon, or from, or taken part in any, and what, games or sports in or upon either any, and what, parts or part in particular of Mitcham Common (but not including Beddington Corner therein), or in or upon any, and what, part or parts in particular of Beddington Corner respectively?

3. If yes, set forth when, and for how long, and whether or not continuously, or at some and what intervals, and when first, and when last, and where, and under what alleged title, you, or your predecessors in title, respectively so depastured animals, or took away furze, gorse, gravel, sand, or other materials, or took part in games or sports, and whether you or they respectively so depastured animals, or took away gorse, furze, gravel, sand, or other materials, without limit, or subject to any and what limit, or did so by any and what licence, or in consideration of any and what payment or otherwise, and how and for what purposes you or they respectively applied such gorse, furze, or other materials.

The plaintiffs declined to answer these interrogatories on the ground that they related exclusively to their title, and did not tend to support the defendant's case, and that the particulars demanded formed part of the evidence which they would adduce at the hearing in support of their claim.

The defendant Bridges then took out this summons.

*Graham Hastings, Q.C. and Kingdon* for the summons.—The interrogatories ought to be answered, as they relate to matters material to our case, for instance, as to the messuages being ancient; the rights claimed cannot be claimed unless they are:

*Luttrell's case*, 4 Co. Rep. 86 a.

We must not of course ask them what evidence they intend to adduce, but we may ask on what facts they rely to establish their case:

*Eade v. Jacobs*, 37 L. T. Rep. N. S. 621; 3 Ex. Div. 335;

*Lyell v. Kennedy*, 50 L. T. Rep. N. S. 277, 278; 9 App. Cas. 81, 85;

*Attorney-General v. Gaskill*, 46 L. T. Rep. N. S. 180; 20 Ch. Div. 519;

*Lyell v. Kennedy*, 48 L. T. Rep. N. S. 585; 8 App. Cas. 217.

Our interrogatories do no more than this. [KAY, J.—An opponent may be asked what his case is, but not how he makes it out: *Bray on Discovery*, pp. 446 *et seq.*] We can ask, not only to support our own case, but to rebut theirs. There is more licence allowed to a defendant interrogating a plaintiff than to a plaintiff interrogating a defendant. A defendant can ask any question which may tend to destroy the plaintiff's case:

*Lowndes v. Davies*, 6 Sim. 468;

*Hoffmann v. Postill*, 20 L. T. Rep. N. S. 893; L. Rep. 4 Ch. App. 673.

[KAY, J.—Discovery can be used by either the plaintiff or the defendant to support his own case, but no further. He referred to *Ivy v. Kekewich*, 2 Ves. 679.] A party will be made to produce documents referred to in a schedule to his answer, though they may relate to his evidence, unless they are properly privileged communications:

*Storey v. Lord George Lennox*, 1 Keen, 841; 1 Myl. & Cr. 525;

*Lyell v. Kennedy*, 50 L. T. Rep. N. S. 730; 27 Ch. Div. 1.

*Kekewich, Q.C. and P. H. Lawrence*, for the plaintiffs, were called upon only as to why the interrogatory, as to whether any and what land went with the beerhouse and cottages, should not be answered. They admitted that it ought to be.

KAY, J.—This case raises, to my mind, an important question as to the defendant's right to extract from the plaintiff discovery by means of interrogatories. Now, at p. 15 of the second edition of *Wigram on Discovery*, which is the highest authority, there are the following propositions: Proposition II.: "It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." Proposition III.: "The right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the 'plaintiff's case,' and does not extend to a discovery of the manner in which the 'defendant's case' is to be exclusively established, or to evidence which relates exclusively to his case." There are therefore two things as to which the plaintiff may not have discovery, viz., the manner in which, and the evidence by which, the defendant's case is to be



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established. Then at p. 288, placitum 375: "The preceding cases must establish, if authority can establish, the original privilege of a defendant to withhold discovery appertaining to his own case alone; and the absence of all original right in a plaintiff to call for such discovery. And from those cases it will be seen that the privilege of the defendant is the same, whether he is defendant in an original suit in which relief is sought, or is plaintiff in that suit and is made defendant to a cross-bill for the purpose of discovery." Then in a note certain cases are referred to as being cited in the preceding placita. I have examined those cases, and find that they support the proposition stated. The authority of that book stands as high as ever. I have warrant for saying that, because in *Lyell v. Kennedy* (48 L. T. Rep. N. S. 587; 8 App. Cas. 223-225) Lord Selborne says that the right of discovery under the present rules is not in principle more extensive than it formerly was in the Court of Chancery. He there refers to the two propositions in Sir J. Wigram's book which I have just read, and refers to them as being the two cardinal rules in the law of discovery, and quotes from that book as being of the highest authority. Therefore I think that, in the case of a defendant seeking discovery now, the rules are the same as formerly in the case of his seeking discovery by a cross-bill, and those rules are as I have just read from Sir J. Wigram's book. In objection to that view it was stated that there are cases which now establish a difference. Looking, however, to the way in which Sir J. Wigram establishes his proposition, and the authorities he cites, it appears to be plain that, if a defendant meets the case of a plaintiff seeking to establish his title solely by a direct negative, he would not formerly have been entitled to file a cross-bill, and then by means of interrogatories discover how the plaintiff's case was to be established, and what evidence was to be adduced in support of it, and it cannot be said that, because the defendant meets the plaintiff's case with a direct negative, the evidence referring to the plaintiff's case refers to the defendant's case as well, in such a sense as to entitle the defendant to that discovery. Now let us look at the cases from which dicta were cited which were supposed to contradict the rule I have stated. In *Eade v. Jacobs* the action was brought by the administrators of a deceased lessor to recover possession of certain premises for breach of a covenant in the lease. The defendant alleged that the deceased had verbally consented to the breach, and it was held that the plaintiffs could interrogate the defendant as to when the consent was given, and as to the conversation which took place, but not as to the persons in whose presence the consent was given. Clearly that last question would not be within the rule allowing discovery, that would be the case of a plaintiff asking a defendant how he made out his own case; but it is quite plain on what ground the defendant was made to answer what he was made to answer. Cotton, L.J. said: "Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce. I think that the words 'in whose presence' should be struck out; the defendant is not bound to give the

names of the witnesses whom he intends to call at the trial. Then comes the question as to conversations. The old rule of pleading in Chancery was, that conversations when relied upon as admissions must be stated in substance and effect; and this was a wholesome rule to be followed, because it prevented the opposite party from being taken by surprise." No objection can be taken to that; it only means that further particulars must be given if a party does not set out distinctly on what he relies. If the pleadings were properly complete, there would be no place for the interrogatory. But because they are not, the case is one to which the practice as to further and better particulars would apply. Out of that judgment the dictum "that the plaintiff is entitled to a discovery of the facts upon which the defendant relies . . . but not of the evidence" has been selected, and reliance placed upon it; but with the greatest deference I must confess that I am unable to agree with that, for to ask a defendant on what facts he relies, is practically to ask for his evidence. I have authority for saying so, namely, the case of *Ivy v. Kekewick*, which was a claim by a person alleging himself to be heir *ex parte maternâ* against a person in possession, who set up the case that he was heir *ex parte paternâ*, and the plaintiff by amended bill asked that the defendant might set forth in what manner he was heir *ex parte paternâ*, and the particulars of his pedigree, and of the births, baptisms, marriages, deaths or burials of the persons named therein, and the Lord Chancellor said it was a fishing bill to know how a man made out his title as heir, and allowed a demurrer to the bill. There are several other cases consistent with that, such, for instance, as *Ingilby v. Shafto* (8 L. T. Rep. N. S. 785; 33 Beav. 31), where Lord Romilly, in a considered judgment, said that the plaintiff "is entitled to the discovery of everything in the possession of the other party, either of facts, deeds, papers, or documents which will help him in making out his case at law; it is confined to that, and he cannot go beyond that. No doubt in cases praying relief you may do this, you may ask what defence do you make to my case, and on what ground? But that is because the court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise." He then referred to Sir J. Wigram's book, and expressed his concurrence in the observations there made at the 286th and following pages. The same judge in *Commissioners of Sewers of the City of London v. Glass* (28 L. T. Rep. N. S. 433; 11 Rep. 15 Eq. 302) decided that in a suit to establish a right of common the plaintiffs were not bound to answer an interrogatory asking them to set forth any instance in which the right they claimed had been enjoyed. That was a direct question as to matters in support of the plaintiffs' case, but there was not a single question as to the evidence by which their case was to be proved, but only as to the facts upon which they relied, but the facts as to which the plaintiffs were asked were of no moment except as evidence by which the plaintiffs were to make out their own case. There was argument on one side only in that case. It was contended by the counsel who argued that the interrogatories had not been properly answered,

that there was a difference between the case of a plaintiff answering a defendant's interrogatories and a defendant answering a plaintiff's, and in support of that contention reference was made to *Hoffmann v. Postill* and *Lowndes v. Davies*. The last case is referred to at page 289 of Sir J. Wigram's book, where it is suggested that the decision was not in accordance with previous decisions, and elsewhere in the book he refers to the fact that Shadwell, V.C. was always anxious to assist discovery. *Lowndes v. Davies*, so far as I can find, has not been followed except perhaps in *Hoffman v. Postill*. That was a suit for the infringement of a patent, and the defendant filed interrogatories for the examination of the plaintiff with a view to showing that there was no novelty in his patent. The onus was on the defendant to show that, and he could therefore interrogate as to that. Giffard, L.J. in his judgment said: "As regards the case of *Dav v. Eley* (2 H. & M. 725), it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case, and there the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement." As to the first branch of that proposition I have no doubt it was the defendant's—and not the plaintiff's—case to show that there was no novelty in the patent; but to say as a general proposition that in all cases a defendant simply meeting the plaintiff's case by a traverse, and not setting up any substantive case of his own, is entitled to ask all that he can, and thereby upset the plaintiff's case, is, to my mind, contrary to the rule that the questions which each party asks must be such as tend to support his own substantive case, and not such as relate to the evidence by which, or the manner in which, his adversary intends to make out his case. Giffard, L.J. must, I think, be taken not to have meant that defendants as a rule had larger rights of discovery than plaintiffs, but to have been only dealing with the case before him where the defendant was asking as to matters which he himself was bound to prove, and as to which therefore he had a right to search the conscience of the plaintiff. I have only one other case to refer to—*Attorney-General v. Gaskill*. That was an action to restrain the defendant from building across a public footpath, the plaintiffs stating in their amended claim that the defendant had, since the commencement of the action, signed an agreement for settling the action upon certain terms. The defendant denied the existence of a public right of way, and alleged that his signature to the agreement was obtained by threats and pressure after a long conversation, without his having it read and explained to him. The plaintiffs delivered interrogatories as to the existence of a public right of way, and as to what passed at the conversation, and the Court of Appeal held that they must be answered, for the interrogatory as to the right of way was within the rules as to discovery, inasmuch as the plaintiffs were inter-

rogating as to their own case, seeking to obtain an admission that there was a right of way so as to relieve themselves of the necessity of proving it; and that as to the conversation was material to the issue in question. The late Master of the Rolls said in that case that the Judicature Acts do not alter the rules as to discovery, and Cotton, L.J., observing on *Eade v. Jacobs*, says that what he held there was "that the interrogatories ought to some extent to be limited, so as to ask the defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations." That is, the conversation was not pleaded so strictly as it ought to have been, so the defendant must give an answer to the interrogatory to the extent that he ought to have pleaded. Now what is the case here? [His Lordship then stated the facts, and continued:] The questions asked by the interrogatories were properly classified by Mr. Hastings as follows: (1) Are the messuages ancient? (2) Are any, and what, lands held with the beerhouse and cottages? (3) Are the tenements in question held of any, and what, manor? And (4) Has there been any user by the plaintiffs, or their predecessors in title, of the rights over the common? I omit the second class, which must be answered, inasmuch as it relates to a substantive case set up by the defendant, viz., that no land was held with these houses, and that the right claimed could not be claimed except in respect of land. But it is clear that all the others relate to matters which the plaintiffs will have to prove in support of their case. The interrogatories do not ask by what evidence the facts in question are to be proved, but whether they are the facts or not. Of course it is a material advantage to the defendant if he can find out by the admissions of the plaintiffs that they cannot prove these facts, because, if that is so, they will not be able to make out their case. But is it right that he should do so? I think not, and that it is contrary to the rule laid down in Sir J. Wigram's book, for it is not discovery in aid of a substantive case of the defendants, but for the purpose of finding out the facts on which the plaintiffs rely to make out their own case. That I think is, according to the authorities, clearly beyond what a party is entitled to do. It is like looking at his opponent's brief, and asking him what he is going to prove at the hearing. Take, for instance, in this case the interrogatory as to user, that is not material here except as to the mode in which the plaintiffs will make out the rights which they assert. Suppose the question had been, Have you any, and what, evidence to prove acts of user? It is clear that that would not have been admissible. Again, suppose it had been, Have you any evidence . . . ? That too would have been improper, for the adversary has no more right to know whether they have any evidence any more than to know what the evidence is. Then, if he had asked, Have you, or your predecessors in title, ever used . . . ? That is nothing else than asking what their evidence is, which is what was decided in *Ivy v. Keckwick* could not be asked. It is said that is not asking them as to their evidence, but on what facts they rely, which is

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admissible. Of course they cannot be asked as to how and whether they can prove their case; but to ask a man whether facts which are essential to his case are facts or not, is tantamount to asking him whether he can prove them. Take again other parts of these interrogatories, such as whether these tenements are held of any manor; how can the plaintiffs be asked whether they can prove that the land in dispute is not part of the defendant's manor? That is part of the evidence which they will have to bring at the trial. So also the question whether these are ancient messuages; that, too, is part of the plaintiffs' case. These questions are not in support of any substantive case of the defendant's, and are not material to his case at all, except in so far as it is a direct negative of the plaintiffs'. They are, in my opinion, fishing questions to find out how the plaintiffs are going to prove their case at the hearing, and I cannot allow them to be put. I must allow the summons so far as it relates to the interrogatory as to the land held with Nightingale's houses, but so far as it relates to the rest of the interrogatories I dismiss it. Each party must pay the costs of the part in which they fail. The costs may be set off.

Solicitors for the plaintiffs, *Rooke and Sons*.

Solicitors for the defendants, *Bridges, Sawtell, Heywood, Ram, and Dibdin*; and *C. A. Russ*.

#### QUEEN'S BENCH DIVISION.

Aug. 8 and 9, 1884.

(Before POLLOCK, B. and LOPES, J.)

M'ILWRAITH AND OTHERS v. GREEN. (a)

*Practice—Payment into court—Denial of liability—Acceptance of sum by plaintiffs in satisfaction of cause of action—Motion for judgment—Taxation of costs.*

*In an action for breach of contract the plaintiffs alleged two distinct breaches, and the defendant denied generally his liability in respect of them, but in the alternative paid a sum of money into court in respect of one of the alleged breaches. The plaintiffs thereupon gave notice that they accepted the sum so paid into court in satisfaction of the whole cause of action.*

*Held, that the plaintiffs were entitled to proceed to the taxation of their costs, and the mere denial of liability on the part of the defendant did not compel them to proceed to judgment to entitle them to their costs.*

THIS was an appeal from an order of Smith, J. at chambers, refusing leave to the plaintiffs to tax their costs under the following circumstances.

In an action for alleged breaches of contract on the part of the defendant in respect of the building of certain barges, the plaintiffs in their statement of claim alleged, first, that the barges were not built in accordance with the specification, and that materials and workmanship of an inferior quality were used; secondly, the defendants failed properly to pack the first of the barges for shipment, and delivered the sections and materials for its construction in such a damaged and insecure condition as to occasion damage in transit. They claimed 3500*l.* as damages.

(a) Reported by W. P. EVERSOLEY, Esq., Barrister-at-Law.

The defendants by their defence denied altogether the breaches alleged, but in the alternative they said that, if the barges or either of them had been constructed of iron plates thinner than had been required by the contract or specification, which they denied, the plaintiffs had not been damaged in consequence thereof to an extent exceeding 175*l.*, which sum the defendants brought into court and said that it was sufficient to satisfy so much of the plaintiffs' claim as was therein pleaded to.

The plaintiffs took the 175*l.* out of court, and gave written notice that they accepted the same in full satisfaction of the causes of action in the statement of claim mentioned. They then applied at chambers for an order for taxation of their costs, which the judge at chambers refused.

The plaintiffs appealed.

By Order XXII., r. 6:

When the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court has been made is denied in the defence, the following rules shall apply:

(a) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided, notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim or cause of action, except as to costs, shall be stayed; or the plaintiff may refuse to accept the money in satisfaction, and reply accordingly, in which case the money shall remain in court subject to the provisions hereinafter mentioned.

(b) If the plaintiff accepts the money so paid in, he shall after service of such notice in the form No. 4 in Appendix B., as in rule 7 mentioned, or after delivery of a reply accepting the money, be entitled to have the money paid out to himself on request, unless the court or a judge shall otherwise order.

Rule 7:

The plaintiff, when payment into court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is so signified in a defence, may before reply accept in satisfaction of the claim or cause of action in respect of which such payment has been made, the sum so paid in, in which case he shall give notice to the defendant in the form No. 4 in Appendix B., and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the court or a judge shall otherwise order; and in case of nonpayment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

Form No. 4, Appendix B.:

Take notice that the plaintiff accepts the sum of *l.*, paid by you into court in satisfaction of the claim in respect of which it is paid in.

*Moulton* for the plaintiffs.—I must admit that the case of *Croeland v. Routledge* (W. N. 1883, p. 228) is in point and against me. That was a decision of Field, J. at chambers. It was an action by an indorsee of a bill of exchange against the acceptors, in which the defendants denied their liability, alleging fraud and other matters, but brought into court the amount of the bill and interest. The plaintiff gave notice in the prescribed form that he accepted the sum so paid in in satisfaction of his claim, and applied to tax his costs, but the learned judge held that the denial of liability by the defendant did not satisfy the words "in case the entire claim or cause of action is thereby satisfied" in Order XXII., r. 7, and that the plaintiff must

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proceed to action to determine his title to costs. I submit that the plaintiffs in the present case having agreed by their notice to accept the sum paid in in full satisfaction of the causes of action, the entire claim is satisfied within the meaning of the order, and that they are at liberty to tax their costs without signing judgment. The mere denial of liability on the part of the defendant cannot deprive a plaintiff of his right to do so, especially when it is remembered that in many instances the words are only inserted by the pleader by way of caution. Rule 6 (a) and rule 7 must be read together. My contention is strengthened by the fact that rule 7 only provides for the necessity of signing judgment where costs have been taxed and not paid, showing that the plaintiff need not sign judgment before taxation; otherwise the defendant might escape his liability to pay costs by merely denying his liability.

*Bucknill* (Finlay, Q.C. with him) for the defendant.—In this case there are two points to be considered. First, there cannot be taxation without judgment. The defendant here has denied his liability altogether as to one of the alleged breaches of contract, and as long as that exists, though the plaintiff may take the money out of court paid in respect of the other alleged breach, it cannot be said that the entire claim or cause of action has been satisfied so as to entitle him to tax his costs without judgment. Rule 6 (a) provides for payment into court, with a denial of liability, and leaves the right to costs outstanding. Secondly, the plaintiffs can only recover their costs by going on with the action. They may move for judgment on the defence, and if they obtain it they then may proceed to tax their costs.

*Moulton* in reply.

*POLLOCK, B.*—I confess I should not have had much doubt on this point if it had not been for the case of *Crosland v. Routledge* (W. N. 1883, p. 228) decided at chambers by my brother Field. The question here is whether the plaintiff is entitled to tax his costs without further trouble. Order XXII., r. 7, of the Rules of 1883 is not new, but the provisions of rule 6 (a) and (b) are new, and these provide that the defendant may pay money into court while denying his liability, and the plaintiff may accept it in satisfaction and take the money out of court; and if he does not accept it, it is to remain in court. Now, according to the natural equity of the thing, it would seem that where a plaintiff has brought his action for various causes, and money has been paid into court in respect of the action, and he has accepted it, he ought to have his costs, and it would be contrary to notions prevalent on the subject of costs if he were not to have them. Does it, or ought it, to make any difference that the defendant while paying money into court denies his liability in respect of the cause of action? The answer is only that it ought not, for in most instances it is a denial inserted by way of caution by the pleader, of which he will be able to reap the advantage if the case proceeds to trial. The words in rule 6 (a), that in the event of the plaintiff accepting the money in satisfaction of the claim in respect of which it is paid, he shall be entitled to have the money paid out to him "as hereinafter provided," refer to the provision in

rule 7. Mr. Bucknill, for the defendant, has referred us to the words in rule 6 (a): "All further proceedings, in respect of such claim or cause of action, except as to costs, shall be stayed," and contends that they mean that the plaintiff must move for judgment. I think then this case comes within the words of rule 7, and that, as the plaintiffs gave the defendant proper notice under Form 4, Appendix B., they are entitled to tax their costs under the rule, after the usual period; and that the appeal ought to be allowed.

*LOPES, J.*—I am of the same opinion. I cannot help saying that I feel it is difficult to put a construction upon these rules, but I think they were framed for the purpose of saving unnecessary expense. Here the plaintiffs bring their action against the defendant, who does what he is permitted to do, that is, he denies his liability, and pays a certain sum of money into court, saying, in effect, Though I deny my liability to you, you may take my money out of court. The plaintiffs determine to accept the money in satisfaction of their causes of action. It would seem strange, under such circumstances, that further costs should be incurred in respect of a liability not really relied upon, but pleaded only by way of caution. The defendant says that the plaintiffs are not entitled to have their costs taxed without further inquiry. With that I do not agree, but think the decision of Smith, J. at chambers should be reversed. Field, J., on whose decision my brother Smith relied, perhaps had not the like opportunities of argument laid before him as we have had.

*Appeal allowed without costs.*

Solicitors for plaintiffs, *Davidson and Morris.*  
Solicitors for defendant, *Stokes, Saunders, and Stokes.*

Tuesday, Dec. 9, 1884.

(Before HAWKINS and SMITH, JJ.)

THE BOURNEMOUTH COMMISSIONERS v. WATTS. (a)  
*Public Health Act 1875* (38 & 39 Vict. c. 55), ss. 150, 174, 257—*Severing private street—Cost exceeding 50l.—Contract not under seal—Recovery of amount apportioned from the frontagers.*

*Sect. 174 of the Public Health Act 1875 provides that every contract made by an urban authority, whereof the value or amount exceeds fifty pounds, shall be in writing and sealed with the common seal of such authority.*

*Where an urban authority employs a contractor to sewer a street under sect. 150 of the Public Health Act 1875, at a cost exceeding 50l., and pays the contractor for the work, and apportions the amount amongst the various frontagers, it is no defence, in an action by the urban authority against a frontager to recover the amount apportioned against him, to show that the contract for the work was not in writing under the seal of the urban authority.*

THIS was a case stated on appeal from the County Court of Hampshire holden at Bournemouth.

The action was brought to recover the sum of 7l. 16s., being the proportion alleged to be due from the defendant for the cost of making good and sewerage the Heathpoult-road, Bournemouth,

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

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the following being the particulars of the plaintiffs' claim annexed to the summons:

The plaintiffs demand payment of the following:	
Proportion in respect of Manley Lodge, of the cost of making good and sewerage the Heathpoult-road under sect. 150 of the Public Health Act 1875, as by the surveyor's apportionment	7 13 0
Interest 5 per cent. per annum from the 17th Aug. 1883	0 3 10
	£7 16 10

The case was tried on the 26th March 1884, when it was proved that the defendant was the owner of premises abutting on the Heathpoult-road, Bournemouth, which is a street (not being a highway repairable by the inhabitants at large) within the district of the plaintiffs, as the urban sanitary authority, that was not sewered, levelled, paved, &c., to the satisfaction of the plaintiffs, and that notice pursuant to the Public Health Act 1875, sect. 150, had been served on the defendant, among others, to sewer, level, pave, &c., the said road. It was also proved that all the requirements of the section had been complied with by the plaintiffs, and that the work was not done by the defendant, but had been done by the plaintiffs pursuant to the 150th section.

The work was done partly by the staff of labourers and workmen in the regular permanent employ of the plaintiffs, and partly by contractors. The total cost of the work was 101*l.* 5*s.*, of which 75*l.* 14*s.* 4*d.* was the amount paid to such contractors. The sum of 101*l.* 5*s.*, being the expenses incurred by the plaintiffs in executing the work, was apportioned by the surveyor of the plaintiffs amongst the different owners fronting and abutting on the said road, amongst whom was the defendant, and he was served with notice of such apportionment, and did not appeal against it, the amount apportioned to him being the above-named sum of 7*l.* 13*s.*

No contract in writing under the seal of the plaintiffs for the work was entered into, and it was admitted that the plaintiffs had not complied with any of the provisions of sect. 174 of the Public Health Act 1875.

The defendant contended that the plaintiffs were not entitled to recover unless they proved that the requirements of the 174th section of the Public Health Act 1875 had been complied with by them, such section having been enacted for the benefit of the ratepayers and owners of property to protect them from improvident contracts on the part of the plaintiffs as the urban authority.

The learned judge reserved judgment, and on the 23rd April 1884 gave judgment for the plaintiffs, holding that the provisions of sect. 174 were directory only, and that the non-compliance therewith by the urban authority was no answer to the plaintiffs' claim.

The question for the court was whether the non-compliance with the provisions of sect. 174 by the urban authority was an answer to the plaintiffs' claim.

Public Health Act 1875:

Sect. 150: Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting

on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good or to provide proper means for lighting the same within a time to be specified in such notice. . . . It such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

Sect. 174: With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely: (1) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority.

*Macaskie* for the defendant.—There was here no written contract under seal with the contractors who executed the works, and so the plaintiffs had no power to bind the rates for this work; they can only bind the rates in the manner pointed out by sect. 174. The plaintiffs, therefore, were bound to refuse to pay the contractors, and, as they have paid them wrongfully, they cannot recover from the defendant. The urban authority are trustees for the ratepayers, and can only bind the rates by contract in the manner which the Act prescribes. This is laid down by Page Wood, V.C., in *Frend v. Dennett* (5 L. T. Rep. N. S. 73); and this case was quoted with approval in the House of Lords in *Young v. The Mayor of Leamington* (49 L. T. Rep. N. S., at p. 3; 8 App. Cas., at p. 522). The observations of the judges in *Novell v. The Mayor of Worcester* (23 L. J. 139, Ex.) are to the same effect. No doubt, all these cases were actions by contractors against the local authority, but the principle involved in that class of case is the same as in the present. It may be said that the case of *Reg. v. The Mayor of Norwich* (32 W. R. 752) is an authority against me, but there the court were dealing with a discretionary power as to whether they should grant a *certiorari* to bring up and quash a resolution to pay certain sums, each over 50*l.*, to contractors for the cost of executing certain works, as no contracts had been entered into under seal, under sect. 174 of the Public Health Act 1875, the statute 7 Will. 4 1 Vict. c. 78, s. 44, after reciting that it was expedient to give all persons interested in the borough fund of any borough a more direct and easy remedy for any misapplication of such fund, enacting that any order of the council of any borough for payment of money out of the borough fund may be removed by *certiorari*. The granting of a writ of *certiorari* is purely discretionary, but in this case the provisions of sect. 174 are obligatory. [HAWKINS, J.—Your sole point is that, though the urban authority have paid the contractors, and the prices charged are reasonable, yet, because the plaintiffs have not put the contract into writing under their seal, they cannot recover the apportionment from the defendant. Is this payment such a misapplication of the funds that the court would bring it up by *certiorari* and quash it? If not, how can the defendant complain? It seems to me a legal payment.] Sect. 174 is imperative, and the plaintiff cannot go behind it. [SMITH, J.—You are in

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effect trying to dispute the apportionment; how can you do this now in the face of sect. 257? That section only makes the apportionment conclusive after the lapse of three months, but the liability to pay at all is not touched:

*Hesketh v. Altherton Local Board*, 29 L. T. Rep. N. S. 530; L. Rep. 9 Q. B. 4.

*Tindal Atkinson*, for the plaintiffs, was not called upon.

HAWKINS, J.—The case states that the action was brought to recover the sum of 7l. 16s., being the proportion alleged to be due from the defendant for the cost of making good and sewerage a certain road. Now, there can be no doubt that, if the contract for doing this work had been under seal, the liability of the defendant would have been clear. But the objection is taken that part of the work was done under a contract not under seal, the work having been done partly by the staff of labourers and workmen in the regular permanent employ of the plaintiffs, and partly by contractors, there being no contract under seal for the work done by the contractors. The cost of the work done by the contractors was 75l. 14s. 4d. out of the total cost of 101l. 5s., the cost of the work done by the plaintiffs themselves being 25l. 10s. 8d.; hence the whole of the work was not required to be done by contract under seal. The County Court judge gave judgment for the plaintiffs, on the ground that the non-compliance with sect. 174 by the urban authority was no answer to the plaintiffs' claim, and the question he has left to us is, whether that judgment is right. Now the plaintiffs' claim was for one undivided sum of 7l. 16s. It is clear that no objection could have been raised if the claim was in respect of an apportioned part of 25l. 10s. 8d. the cost of the work executed by the plaintiffs themselves. Taking then the question as submitted to us, our answer is, that under no circumstances could the objection be an answer to a claim in respect of that portion of the expenses, and so the answer must be in the negative. But apart from that technical view of the case, if the whole of that 7l. 16s. had been apportioned in respect of the work that was done by the contractors under this contract not under seal, I am still of opinion that the objection would be no answer. The contractors have done the work, and the amount charged for it is admitted to be a reasonable amount, and the only objection is that the contract was not under seal. I think that, although sect. 174 may have afforded to the urban authority a right to set up the defence that the contract was not under seal, yet they were not bound to do so. So long ago as 1850 the case of *Reg. v. Prest* (16 Q. B. 32) was decided, in which it was sought to quash an order of the town council of the borough of Halifax, allowing certain payments to their town clerk for professional charges as a solicitor, on the ground that there was no retainer under the corporation seal. Lord Campbell in his judgment says: "I think that, as the business was done fairly and *bonâ fide* for the benefit of the ratepayers, and the sums have been *bonâ fide* paid to the town clerk, the question as to the form of the retainer is not material, and we have no authority to interfere and order the sums to be refunded." It is true that the court there were dealing with a discretionary power vested in them, but the judgments proceed upon

the ground that there was no misapplication of the borough fund. That decision was followed in the case of *Reg. v. Mayor of Norwich* (30 W. R. 752). These authorities warrant us in coming to the conclusion that, though the urban authority might have resisted payment of the sum to the contractors, yet they were not bound to set up the defence that the contract was not under seal, and not having done so, and having paid for the work, they can charge the defendant with his proportion.

SMITH, J.—This is an action by the urban sanitary authority of Bournemouth, to recover the sum of 7l. 13s. with interest thereon, being the amount apportioned to the defendant for the cost of making good and sewerage a road in which he was a frontager. The total cost of the work was 101l. 5s., and of this sum one component part, 25l. 10s. 8d., was in respect of work done by the urban sanitary authority themselves, and the other component part, 75l. 14s. 4d., was in respect of contractors' work executed under a contract that was not under seal. The question arises upon sect. 150 of the Public Health Act 1875, which provides that, if the frontagers do not execute the work they are required to do by that section, the urban authority may execute the works; that is, the urban authority may do the works by contract. In this case the urban authority, having executed part of the works by contract, have apportioned to the defendant the amount due from him. The defendant objects that the urban authority ought not to have paid for this work, because they ought to have set up as a defence to the claim of the contractors that the contract was not under seal. This, no doubt, would have been a good defence if the urban authority had chosen to dispute the contractors' claim: (*Hunt v. Wimbledon Local Board*, 40 L. T. Rep. N. S. 115; 4 C. P. Div. 48; *Young v. Mayor of Leamington*, 49 L. T. Rep. N. S. 1; 8 App. Cas. 517.) But, in my judgment, it is not incumbent on the urban authority to set up this defence. There is no law compelling them to set it up as a defence; they may do so, but here they have not chosen to do so. In my judgment, therefore, the money paid by the plaintiffs to the contractors was expenses incurred by them within sect. 150, and so is recoverable from the frontagers. I am fortified in this opinion by the judgments of my brothers Grove and Lopes, in the case of *Reg. v. The Mayor of Norwich* (*ubi sup.*). But, if I am wrong on the above point, there is another objection equally fatal to the defendant. What the defendant is really trying to do here is to re-open the apportionment, because he says that of the sum of 101l. 5s. the plaintiffs had no right to apportion to him anything in respect of the sum of 75l. 14s. 4d. for work executed by the contractors. If that is so, sect. 257 of the Public Health Act 1875 is fatal to him, for it provides that, where such expenses have been settled and apportioned by the surveyor of the local authority, such apportionment shall be binding and conclusive, unless within three months from service of notice of the amount so apportioned the owner of the premises shall by written notice dispute the same. The defendant, in reality, by saying that out of the total sum of 101l. 5s. the plaintiffs ought not to have apportioned to him anything in respect of the sum of 75l. 14s. 4d., is trying to re-open the apportionment, which he is



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too late to do now. On both grounds this appeal fails.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Lovell, Son, and Pittfield*, for *James Druiitt*, Bournemouth.

Solicitors for the defendant, *Nodder and Gates*, Salisbury.

Dec. 4 and 5, 1884.

(Before HAWKINS and SMITH, JJ.)

WOODGATE v. GREAT WESTERN RAILWAY COMPANY. (a)

*Contract between railway company and passenger—Delay—Wilful misconduct—Liability of railway company.*

Plaintiff took a return first-class ticket from Paddington to Bridgnorth, a station on a branch of the defendants' main line, intending to travel by a train advertised to run through without interruption. There were printed on the face of the return half of the ticket the words "See back," and on the back of each half the words, "Issued subject to the conditions stated on the company's time-bills." The time-bills were published monthly in a book of about one hundred pages, and on the first or outside page was a notice, headed "Train bills," that the company would not be accountable for injury which might arise from delays, unless in consequence of the wilful misconduct of the company's servants.

On the day of the plaintiff's journey, being Christmas Eve, there was an unusually large number of persons travelling on the defendants' lines. The weather was foggy, and some five hours earlier there had been a collision between two trains on the main line. The advertised train was divided into two parts, and the plaintiff was put into the second part, which started thirteen minutes late; it was also delayed by the fog and the excessive traffic on the journey. In consequence the plaintiff missed the train which was advertised to run along the branch in connection with the main line train. He was detained at the junction, where there was but little accommodation, and being refused a special train, proceeded at his own request in a carriage attached to a goods train. This carriage was second-class, the station-master at the junction having no first-class carriage available. The plaintiff's journey took about ten hours instead of six hours as advertised.

In a County Court action, on proof of these facts and the evidence of a letter from the defendants to another passenger by the same train, forwarding a sum of money demanded for compensation, the judge awarded the plaintiff 1*l.* damages for the delay and inconvenience he suffered.

Held, upon a special case, that the conditions on the time-bills were incorporated in the plaintiff's contract with the company; that there was no evidence under the circumstances of the defendants' wilful misconduct, or of their liability; and that the County Court judge was wrong.

This was a special case stated by H. J. Stonor, Esq., judge of the Marylebone County Court as follows:

1. This is a plaint in the Marylebone County Court, entered on the 22nd Dec. 1883, and tried

before Henry James Stonor, Esq., the judge of the said court on the 5th and 19th Feb. and the 28th April 1884.

2. The plaintiff's claim was for breach of contract, and he gave the following particulars of his claim:

The nature of the contract broken was to carry the plaintiff from Paddington to Bridgnorth, on the 24th Dec. 1881, by the 10 a.m. train; and the damages claimed are for personal inconvenience, suffering annoyance, and loss of time.

3. The plaintiff is, and was, at the time of the accruing of the alleged causes of action, a barrister practising on the Oxford Circuit, and the defendants are a company incorporated and empowered by statutes to make and maintain (among others) a railway with a double line of rails from London *via* Oxford and Worcester to Wolverhampton (hereinafter called the Wolverhampton line) and a branch railway with a single line of rails from a junction with the said Wolverhampton line at Hartlebury to Shrewsbury *via* Bewdley (hereinafter called the Severn Valley line).

4. The defendants provide engines and carriages for the conveyance of passengers and goods over their several lines of railway, and they publish from time to time a printed book containing train-bills or time-tables and other matters having reference principally to the carriage of passengers. The book so published by the defendants for the month of Dec. 1881, a copy of which was put in evidence by the plaintiff, contained on the outer sheet the following paragraph, *viz.*:

Train bills. The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start from them before the appointed time; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention, unless upon proof that such loss, inconvenience, injury, delay, or detention arose in consequence of the wilful misconduct of the company's servants. The granting of through tickets to places off the company's lines is an arrangement made for the greater convenience of the public, but the company will not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over other lines or companies, nor for the arrival of the company's own trains in time for the nominally corresponding trains of any other company. Passengers booking at intermediate stations can only do so conditionally upon there being room in the train.

5. On Saturday, the 24th Dec. 1881, the plaintiff being desirous of travelling from Paddington to Bridgnorth, a station on the Severn Valley line, by the train service shown in the said book of tables as intended to leave Paddington at 10 a.m., went to Paddington station before 10 a.m. and obtained a first-class ticket containing the words following on the face thereof:

Great Western Railway, 24th Dec. 1881. Bridgnorth to Paddington *via* Bewdley and Worcester, first-class. Paddington to Bridgnorth *via* Worcester and Bewdley, first-class. See back.

And on the back of one half of the said ticket the words following:

Issued subject to the conditions stated on the company's time-bills.

(a) Reported by M. W. McKILLAR, Esq., Barrister-at-Law.



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The said ticket was put in evidence by the plaintiff.

6. The plaintiff had travelled on previous occasions upon the defendants' said railways, and when he purchased the ticket above mentioned he was in possession of a copy of the book of time-tables hereinbefore referred to.

7. The usual means provided at that period by the defendants for the conveyance of passengers from Paddington to stations on the Severn Valley line were as follows: By the 10 a.m. train service from Paddington passengers were carried by a train destined for Wolverhampton as far as Hartlebury, and thence they proceeded, after waiting nine minutes, by another train on the Severn Valley line, being the train indicated in the said time-tables as timed to arrive at Bridgnorth at 3.38 p.m. (By a train service at 2.15 p.m. from Paddington there was a through carriage which was detached from the Wolverhampton train at Hartlebury, and connected to a train on the Severn Valley line. Until within three years of the alleged causes of action a through carriage for the Severn Valley line had also been attached to the said 10 a.m. train from Paddington.)

8. On the day in question, in consequence of the unusually large number of passengers desiring to travel, the train service on the greater portion of the defendants' system of railways was doubled, and it was found necessary to divide the 10 a.m. train from Paddington into two parts, and to run two trains as and for the said 10 a.m. train (as far as Worcester). The plaintiff was directed to and did travel in the second of such trains, which was despatched from Paddington at thirteen minutes past ten. At Westbourne Park station a delay of three minutes over and above the time usually allowed for stopping there was caused by the large number of passengers and great amount of luggage to be placed in the train. After leaving Westbourne Park station the said train (instead of proceeding on to Reading at the rate and with the uninterrupted progress indicated by the said tables) travelled less rapidly than is therein indicated, and was brought to a standstill at several different places between Westbourne Park and Slough, causing in the aggregate a delay of thirty-one minutes. Owing to the prevalence of a fog the said train was stopped at Slough to detach a carriage which in the ordinary course would have been slipped from the train while in motion, and a further loss of eight minutes was thus caused, making the said train fifty-five minutes late on leaving Slough station as compared with the timing of the 10 a.m. train as indicated by the said time-tables.

9. It was proved that there was nothing amiss with the said train itself; that all the stoppages and the reduction of speed were made in obedience to signals, and that a fog was prevailing at the time. There was evidence that some at least of the delay of thirty-one minutes was caused by the fog, and as to the rest there was no further direct evidence of the cause than is hereinbefore stated; but, the guard of the train being called as a witness for the defendants, stated on cross-examination that he had been told during the journey that there had been a collision between a newspaper train and a coal train at Slough station at six o'clock that morning in a thick fog, and that the line had in consequence been blocked for

some time by a coal truck, and that there was a congestion of traffic on the line.

The chief clerk of the superintendent's office at Paddington (being called as a witness with reference to the regulations as to special trains) also stated, in answer to the learned judge, that he had heard that there had been a collision at Slough on the morning in question in consequence of a coal train coming off the relief line.

10. After leaving Slough the said train by which the plaintiff travelled lost a few minutes time at various stations, owing to the large number of passengers travelling, and arrived at Hartlebury junction at 4 p.m., being ninety minutes after the time indicated by the time-table.

11. On arriving at Hartlebury junction the plaintiff found that the train referred to in the 7th paragraph as usually conveying passengers from Hartlebury to stations on the Severn Valley line, in connection with the said 10 a.m. train from Paddington, had been despatched from Hartlebury at 3.13 p.m. This was necessarily done by the station-master at Hartlebury, in order to accommodate a large number of passengers travelling on the Severn Valley line, and to avoid disarrangement of the traffic on the said lines and on lines connected therewith. There was no passenger train due to leave Hartlebury for Bridgnorth until 6.50 p.m., but at the suggestion of the plaintiff the said station-master attached a second-class carriage (no first-class carriage being available) to a goods train which left Hartlebury at 4.35 p.m., and the plaintiff travelled by the said goods train in the second-class carriage, and thereby arrived at Bridgnorth at 7.20 p.m. The said goods train occupied on the journey from Hartlebury to Bridgnorth one hour and forty-five minutes longer than the period indicated by the time-tables for the transit of the 2.40 p.m. passenger train between the same places.

12. It was the custom for the defendants' servants to inspect the tickets of passengers at Worcester, where there was an excellent station, with a covered platform and first-class refreshment and waiting room. The train by which the plaintiff travelled from London to Hartlebury was at the said station at Worcester from 3.16 p.m. to 3.36 p.m., but before continuing his journey the plaintiff was not informed by the defendants' servants that the Severn Valley train had already been despatched from Hartlebury as mentioned in the last preceding paragraph. The accommodation for passengers at Hartlebury was very inferior to that at Worcester. The platform was uncovered, and the only waiting-room was a general apartment, which served also as a booking office, and contained a refreshment stall, where confectionery and non-alcoholic drinks could be obtained.

13. It was contended by the plaintiff at the hearing that it was the duty of the defendants to have provided a special train from Hartlebury to Bridgnorth on the day in question in connection with the train by which he travelled from London to Hartlebury. The defendants' witnesses admitted that it would have been physically possible to have sent a special train from Worcester to proceed from Hartlebury at 4.10 along the Severn Valley line, but that this could not have been done without violating a standing

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order of the company that no special train is to be sent along a single line unless written notice of the intention to send such a train shall have been previously sent to each station on the route, and the receipt of such notice shall have been acknowledged in writing by each station-master respectively. Assuming that this regulation had not been observed, and that notice had been given by telegraph instead of in writing, a special train might have been despatched from Worcester at 3.45 p.m., and from Hartlebury at 4.10 p.m., but such special train could not, without disarranging other traffic, have proceeded beyond Bewdley until 6.25 p.m., or have arrived at Bridgnorth until 7.5 p.m. There is no place where trains can pass each other between Bewdley and Bridgnorth, and from 4.10 until 6.20 p.m. the line between these two places was required for the transit of three ordinary up trains, one for passengers and two for goods coming from Shrewsbury to Worcester. By arranging that the said passenger train should (if punctual) be detained at Bridgnorth for thirty-five minutes, and that one of the said goods trains should be detained there for one hour and five minutes, the special train might have proceeded from Bewdley at 4.30 p.m. and have arrived at Bridgnorth at 5.10 p.m. The said passenger train started thirty minutes late from Shrewsbury, and did not in fact leave Bridgnorth until 5.8 p.m.

14. There were about ten or twelve other passengers for the Severn Valley line, who arrived at Hartlebury by the same train as the plaintiff. One of the said passengers, Mr. Thos. Kemp, was called as a witness for the plaintiff, and produced a correspondence between himself and the defendants' superintendent at Paddington which was put in evidence by the plaintiff as an alleged admission of liability on the part of the defendants in respect of the plaintiff's claim in this action.

This correspondence consisted of a letter to the general manager containing a description of the unpunctuality and delays mentioned in this case, and concluding as follows:

By this irregularity I was put to great inconvenience and considerable expense, and, unless some satisfactory explanation can be given, I shall expect the G.W.E. Company to forward me the sum of 1l. 1s., the minimum extra cost entailed on me through the company's bad faith.

To this letter was an answer of the superintendent of the line expressing regret, and inclosing a post-office order for the guinea demanded.

15. At the close of the plaintiff's case the defendants' counsel applied for a nonsuit on the grounds that there was no evidence of any breach of contract or of duty on the part of the defendants, or of actionable damage sustained by the plaintiff, and that the plaintiff was received as a passenger by the defendants subject to the paragraph and conditions on the said book of time-tables set out in the 4th paragraph of this case, and had given no evidence that the delay and detention in respect of which he sued had arisen in consequence of the wilful misconduct of the defendants' servants. The learned judge refused to nonsuit, and held that the said notice and conditions were inapplicable to the present case, and that it was for the defendants to show that the delay and detention of which the plaintiff complained were owing to no

neglect or want of due care and effort on their part.

16. The defendants thereupon gave the evidence as to the management of the 10 a.m. train which is set out in paragraphs 8, 9, and 10 of this case. After hearing such evidence the judge decided that it was for the defendants also to show that they could not have sent a special train to Hartlebury to convey the plaintiff from thence on his arrival there at 4 p.m. to Bridgnorth, and he adjourned the case to enable the defendants to produce such evidence. At the adjourned hearing the defendants gave the evidence with reference to the provision of a special train which is stated in the 13th paragraph; and at the conclusion of the whole of the evidence the defendants' counsel again submitted that there was no evidence of liability on the part of the defendants to support a finding for the plaintiff.

17. The learned judge took time to consider his judgment, and on the 28th April last gave judgment for the plaintiff with 1l. damages apportioned as follows: viz. 10s. for the physical inconvenience and discomfort occasioned to the plaintiff by his detention at Hartlebury, and 10s. for the inferior accommodation and delay on the journey from Hartlebury to Bridgnorth. His Honour held that the paragraph and conditions referred to on the ticket and time-tables respectively did not affect the case, that the defendants were bound to show a valid excuse for the unpunctuality complained of, that they were not liable for so much of the delay as was caused by excess of passengers or by fog, but that there was evidence that delay was caused by a collision at Slough, and that, in the absence of proof that such collision was the result of inevitable accident, the same must be deemed to have been caused by the wilful misconduct of the defendants' servants, and rendered the defendants liable to the plaintiff for the damages he had sustained as above mentioned. The learned judge also stated (in case there should be an appeal) that in his opinion it was the duty of the defendants, under the circumstances set forth in this case, to have provided a special train, and therein to have carried the plaintiff on from Hartlebury to Bridgnorth without delay.

18. The learned judge gave the defendants leave to appeal by special case on their undertaking to forego their costs in the County Court in the event of the judgment being reversed; and the defendants, being dissatisfied with the determination of the said judge in point of law, gave notice of appeal, with the grounds thereof, as required by the statute.

The question for the opinion of the High Court of Justice is, whether there is any evidence of liability on the part of the defendants to entitle the plaintiff to judgment for all or for any part of the damages awarded.

If the court should be of opinion in the affirmative as to the whole judgment, then the verdict and judgment to stand; and if the court should be of opinion in the affirmative as to part only of the judgment, the verdict and judgment to be amended accordingly; but if the court should be of opinion in the negative, then the verdict and judgment to be set aside, and a nonsuit entered.

This special case was signed by the County

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Court judge, with a note by him in the following words:

I think it right to add that the statement of the guard as to the collision referred to in paragraph 9 was objected to by the counsel for the defendants as being hearsay evidence, but that the subsequent statement of the chief clerk of the inspector's department as to such collision was not objected to; and that I was under the impression that the fact of the collision was admitted, and that if either party had applied for an adjournment to produce further evidence as to such collision I should have granted it.

*Dec. 4.—Wightman Wood for the Great Western Railway Company, the appellants.*—The first point which the County Court judge decided against the defendants was, that the contract with the plaintiff was not governed by the condition contained in the time-tables and set out in paragraph 4 of the special case; and the second point was, that even upon that condition there was evidence to justify his finding that the plaintiff's inconvenience and detention arose in consequence of the wilful misconduct of the company's servants. The appellants desire to contend further that, even if the judge were right on these two points, the damages ought to have been nominal only, and not the substantial sum of 1l. assessed by him. The case of *Le Blanche v. London and North-Western Railway Company* (1 C. P. Div. 286; 34 L. T. Rep. N. S. 25 and 667) raised almost every point involved in this case, but the condition there was in these words: "Every attention will be paid to insure punctuality as far as is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." The Courts of Common Pleas and Appeal were divided as to whether under the circumstances every practicable attention was paid to insure punctuality; but the judges all agreed that the only duty of the company under this condition was as to the management of the particular train in which the plaintiff travelled, and that there was no duty on the company's part to show that they had not been negligent in the management of other trains which caused delay. Here the further limitation of wilful misconduct renders the decision of *Le Blanche v. London and North-Western Railway Company* of great weight with respect to the present case in favour of the railway company. The effect of contracts between passengers and carriers has been considered in the following cases:

*Peak v. North Staffordshire Railway Company*, 8 L. T. Rep. N. S. 768; 10 H. L. Cas. 473;  
*Henderson v. Stevenson*, 32 L. T. Rep. N. S. 700;  
 L. Rep. 2 Se. App. 470;  
*Haigh v. Royal Mail Steam Packet Company*, 48 L. T. Rep. N. S. 267; and 49 Ib. 803;  
*Watkins v. Rymer*, 48 L. T. Rep. N. S. 426; L. Rep. 10 Q. B. 178.

On the second point there is nothing in the facts found here which constitutes wilful misconduct according to the definition contained in the cases on the subject:

*Great Western Railway Company v. Glenister*, 29 L. T. Rep. N. S. 423;  
*Lewis v. Great Western Railway Company*, 37 L. T. Rep. N. S. 774; 3 Q. B. Div. 195.

*Woodgate*, the plaintiff, in person.—It was held in *Parker v. South-Eastern Railway Company* (1 C. P. Div. 618) that *prima facie*, unless

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expressly brought to a passenger's notice, he is not bound by conditions at the back of a ticket. Here the words "see back" are only on one half of the ticket; and, if severed immediately on purchase, there would be nothing on the half ticket for the outward journey referring to the notice at the back. Again, even if the passenger's attention reach the notice at the back, the words "conditions stated on the company's time-bills" convey no reference to the words in small print on the outside of this book of more than one hundred pages, which are headed "train bills," and not "conditions of passenger's contracts," as they ought to be. It may be said that the actual contract was a question of fact, and, if so, the County Court judge, by finding the conditions inapplicable, has decided that they were no part of the contract. At all events, it was unreasonable to expect a passenger immediately upon the purchase of a ticket to be bound by the whole contents of this book of 100 pages. But, even if this condition be part of the contract, the whole of it should be read together; and, by expressly providing for the connection with trains on other lines, the meaning must be that the company admit their duty to connect the trains on their own branches with the main-line trains, and this is confirmed by the absence in the time-table of any notice of a break of trains or change of carriages at the Hartlebury junction. The condition, therefore, does not apply to the circumstances of this case at all. It is not for loss, inconvenience, or injury arising from delays or detention for which the action is brought, but for a breach of contract to convey by an advertised train through from Paddington to Bridgnorth. It is not necessary in proving such a breach to show wilful misconduct by the company's servants. Again, assuming that the defendants' liability exists for no contract at all, unless the breach be due to their servants' wilful misconduct, it may well be contended that the facts justify the County Court judge's finding on that subject. Even if the collision were due to inevitable accident, the fact of its having occurred must have been known all along the line by ten o'clock, and it must have been within the knowledge of some one at Paddington that probably the effect would be to prevent the junction of the train with the branch train at Hartlebury. The issue, therefore, of a through ticket without notice to the purchaser was a fraud or wilful misconduct of the booking clerk. So also the impossibility of conjunction with the branch train must certainly have been known at Worcester, but no choice was given to the passengers to avail themselves of the superior waiting accommodation at that station; and the omission to provide a special train at Hartlebury was another instance of wilful misconduct. Lastly, the correspondence between Mr. Thomas Kemp and the superintendent of the defendants' line is an admission of all the points for which I have contended. Mr. Kemp alleges that the time-tables advertise the main line and branch trains as running in connection, and charges the company with bad faith. The answer expresses regret and pays the money demanded as compensation for the inconvenience occasioned, thereby admitting both the breach of contract and the bad faith or wilful misconduct. The following cases also support the defendants' liability:

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*Gabell v. South-Eastern Railway Company*, 36 L. T. Rep. N. S. 540; 2 C. P. Div. 416;  
*Watson v. London, Brighton, and South Coast Railway Company*, 40 L. T. Rep. N. S. 183; 4 C. P. Div. 118.

Dec. 5.—Wood in reply.—The case of *Parker v. South-Eastern Railway Company* (34 L. T. Rep. N. S. 654) is the only authority for saying that a passenger's attention must be expressly called to the conditions in the time-tables, and that case was reversed in the Appeal Court (36 L. T. Rep. N. S. 540). There is overwhelming authority that, under circumstances of this kind, the time-tables are the basis of the contract:

*Huret v. Great Western Railway Company*, 19 C. B. N. S. 310;

*Burke v. South-Eastern Railway Company*, 41 L. T. Rep. N. S. 554; 5 C. P. Div. 1.

HAWKINS, J.—I think we have sufficiently arrived at the facts to enable us to give judgment in this matter. I am of opinion that the County Court judge was wrong. [His Lordship stated the facts and proceeded:] Now, the plaintiffs first contention is, that there was an absolute contract on the part of the company that he should be carried by the train starting at ten o'clock in the morning as a through train on to Bridgnorth. He complains that he has not been carried by the through train on to Bridgnorth, but that he was obliged to wait at Hartlebury where there was no corresponding train to meet the one by which he had travelled from Paddington, and therefore he says the contract was broken in that respect. He complains further that the company did not do the best for the purposes of accommodating him and the other passengers, who, like himself, had to proceed to Bridgnorth, because the station-master did not send from Hartlebury a special train, and he says if a special train had been sent on they would have arrived at the end of their journey much earlier. He complains that they ought to have done that. The company say: "We are not bound to carry you absolutely through by the train; there is no absolute contract to that effect. We were not bound to furnish a special train for the purpose of taking you from Hartlebury to Bridgnorth, because by the terms of the contract which you must be considered as having entered into at the time your ticket was taken—and you must be taken to have assented to and agreed to the contract—there is to be no liability on the part of the company by reason of any delay or any inconvenience you may suffer, unless such delay or inconvenience is occasioned by the wilful misconduct of the railway company or of their servants." It has been said that such a contract as that was unreasonable. All I can say is that I am not myself of that opinion. I think the contract was perfectly good in point of law, if the contract in point of fact was made, and that is the question to which I shall proceed to direct my attention. Over and over again contracts of this description have been held to be good, and the last case that I know upon the subject is a case that was decided in reference to a steam navigation company. That was the case of *Haigh v. Royal Mail Steam Packet Company* (48 L. T. Rep. N. S. 267). No doubt that is a decision in which a contract of this sort has been recognised, and indeed it has been recognised in a variety of authorities to which I do not think it necessary to refer in detail. In

the case of *Le Blanche v. London and North-Western Railway Company* there was one of these contracts, but that turned, to my mind, upon the construction of the condition, and not upon the power of the company to attach the condition to the contract they made with their passengers. Now let us see what the contract was, or what was the condition that was said to be embodied in the contract, and I read now from the case itself: "The defendants provide engines and carriages for the conveyance of passengers and goods over their several lines of railway, and they publish from time to time a printed book, containing train time-tables and other matters having reference principally to the carriage of passengers. The book so published by the defendants for the month of Dec. 1881 was put in evidence by the plaintiff. It contains on the outer sheet the following paragraph, viz., 'Train bills.' This is on the very first page of the outer sheet, and the words are set out in paragraph 4 of the special case. How is that notice embodied in the contract between the parties? The ticket which was issued was a return ticket from Paddington to Bridgnorth. It is a return ticket, and it was all on one card. The ticket was issued as a whole, although when the passenger arrived at Bridgnorth he would have to tear it in half, giving up one half and retaining the other. It is true the words "See back" are placed only under the return half of the ticket from Bridgnorth to Paddington, but it is impossible for anybody having that ticket in his hands, and looking at it for a single moment, even for the purpose of seeing he has the right ticket and the right class of carriage, to fail to see the words "See back," for they are printed in almost as large a type as "Paddington" and "return ticket." On the back of the ticket I find this: "Issued subject to the conditions stated in the company's time-bills." I think that when this ticket was handed over to the plaintiff having this notice "See back," and a notice at the back saying the ticket was issued subject only to the conditions stated in the company's time-bills, the conditions stated on the time-bills must be taken and treated as being incorporated into and forming part of the contract. Now, I do not think it necessary to discuss here the question of what evidence is absolutely necessary for the purpose of inducing or justifying the court in coming to the conclusion that a condition like this is incorporated in the contract; and I think it is not necessary for this reason: The whole of the law upon this subject underwent consideration in the case of *Watkins v. Rymill* (48 L. T. Rep. N. S. 426), which was argued on the 16th Jan. in last year before my brother Stephen, my brother Watkin Williams, and myself, and after hearing a very full argument in that case, we delivered a written judgment, in pursuance of which I am here satisfied, as far as I can be satisfied of anything, that the handing over of a paper with the reference in large type to the back and the reference on the back of the ticket to the conditions of the time-table, stating that the company only undertook to issue their tickets and to carry their passengers upon those conditions, was taking reasonable means to bring to the notice of an intending passenger the terms upon which he would be carried, and I think therefore that this condition must be taken to be, and was, incorporated in the con-

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tract which was made by the plaintiff with the Great Western Railway Company. That being so, it seems to me, unless Mr. Woodgate can make out this loss or inconvenience—call it what you will—was occasioned by the wilful misconduct of the company's servants, he must fail in this action. Now, just let us see what the evidence is that the inconvenience and loss was occasioned by the misconduct of the company's servants. [His Lordship came to the conclusion that there was no evidence of such misconduct.] Then it is said there is an admission of liability, and it is said that evidence is to be found in the letters which passed between a Mr. Thomas Kemp, who happened to be a passenger by the same train as Mr. Woodgate, and the railway company. All I can say is, that I do not believe any judge or any jury would or could act upon that, as an admission of liability to the plaintiff. If they did I think they would be utterly wrong, for I look upon that correspondence as nothing more than as a complaint made by a constant passenger. He says, "You did not take me to my destination. I was much disappointed and inconvenienced, and I look upon it as a want of good faith on your part. I have been put to money expense to the amount of one guinea, and you must send me that. I have travelled the same distance many times and found no difficulty." If a man who is a good customer to the company says that, I am not surprised at their saying, "If you have, in consequence of this, been put to that expense, we do not want to give you any further trouble in the matter, and there is your guinea." But, as to being an admission of liability on the part of the company, or of wilful misconduct on the part of their officers, all I can say is I do not think it is a particle of evidence, and I think it ought not to have been offered in evidence against the company. Now, this being so, I am very clearly of opinion that there was no wilful misconduct shown on the part of the railway company, or of their servants. Now, let me see what the learned County Court judge really has found. He says: "At the close of the plaintiff's case the defendants' counsel applied for a nonsuit on the grounds that there was no evidence of any breach of contract or of duty on the part of the defendants, or of actionable damage sustained by the plaintiff, and that the plaintiff was received as a passenger by the defendants subject to the paragraph and conditions in the said book of time-tables set out in the fourth paragraph of this case, and had given no evidence that the delay and detention in respect of which he had sued had arisen in consequence of the wilful misconduct of the defendants' servants. The learned judge refused to nonsuit, and held that the said notice and conditions were inapplicable to the present case." I am at a loss to understand what he means by that. There is delay in the journey, there is inconvenience suffered, and if these conditions are not applicable I do not know to what they are applicable. Then, "And that it was for the defendants to show that the delay and detention of which the plaintiff complained were owing to no neglect or want of due care and effort on their part." I differ from the learned County Court judge entirely there. If the action were one against the company for negligence—that is to say, if they were liable for negligence in spite of the special condition—I

should have thought, and I have always been taught to believe, that those who sue either a company or a private individual for negligence are bound to establish the negligence, and if the plaintiff starts by saying, "I have suffered inconvenience and delay; you must prove that it was not caused by your negligence," it is a new doctrine to me that such a statement is sufficient. We have then the learned County Court judge taking time to consider his judgment, and he gave judgment for 12. "His Honour held that the paragraph and conditions referred to on the ticket and time-tables respectively did not affect the case; that the defendants were bound to show a valid excuse for the unpunctuality complained of; that they were not liable for so much of the delay as was caused by excess of passengers or by fog," which he says occasioned the delay, "but that there was evidence that the delay was caused by a collision at Slough," not saying he finds that it was caused by a collision at Slough, but that there was evidence of it, "and that in the absence of proof that such collision was the result of inevitable accident, the same must be deemed to have been caused by the wilful misconduct of the defendants' servants." I confess I do not understand the process of reasoning by which he arrived at that. Because there was a block upon the line he says there was evidence that the delay was caused by a collision at Slough, not that he finds it was occasioned by the collision at Slough, and in the absence of proof that it was the result of inevitable accident, he finds it must be deemed to have been caused by wilful misconduct. I cannot understand the process of reasoning by which he arrived at that finding of fact.

SMITH, J.—This is an action brought against the Great Western Railway Company to recover compensation in damages for not having carried the plaintiff on the day before Christmas-day in the year 1881 with that despatch which he says he was entitled to according to the contract which bound the Great Western Railway Company to carry him; and I agree with Mr. Woodgate when he says, as he practically does, that he suffered very vexatious delay on the day in question, because, if this ten o'clock train from Paddington had gone in due course to Bridgnorth, the point of destination, according to the time-table, it should have arrived at 3.38 p.m. Instead of that Mr. Woodgate did not arrive till 7.20; therefore upon this not necessarily very long journey he is detained by the Great Western Railway Company some four hours longer than he should have been. Now Mr. Woodgate brings his action, and the question for us to decide is, whether he is entitled to recover for this delay. The first question which arises is as to the contract Mr. Woodgate made with the railway company. He says he is not bound by the conditions contained in the time-table; but, after reading the judgment of Mellish, L.J. in *Parker v. South-Eastern Railway*, and the judgment of the Divisional Court in the last case upon this subject, that of *Watkins v. Rymill*, which my brother Hawkins has referred to, it seems to me impossible to say a gentleman, taking a ticket under the circumstances Mr. Woodgate did, is not bound by the conditions on the company's time-tables. This case of *Parker v. South-Eastern Railway Company* is the most favourable decision Mr. Woodgate can find, because Lord Bramwell went further than

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Mellish, L.J. did, and said the man who took the ticket, whether he read it or not, would be bound by it; but Mellish, L.J. said, "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions." There is no finding that Mr. Woodgate did not know of the condition, and it is a most remarkable fact, when Mr. Woodgate comes here to argue he did not know of the condition, that he gave no evidence of that sort before the learned County Court judge. It is found in the case that when he took the ticket he had a copy of this book. He takes a ticket with these words on it, "See back," and upon the back is stated, "Issued subject to the conditions stated in the company's time-tables." Therefore I hold, in accordance with the decision in the case of *Le Blanche v. The London and North-Western Railway Company*, that the taking the ticket, the time-table, and the conditions formed the contract under which the Great Western Railway Company undertook to carry Mr. Woodgate. Then, that being my opinion, the question arises, what is the meaning of the contract? and we have been pressed by the interpretation the court put upon a contract somewhat similar to this in that case of *Le Blanche*; but I wish for myself to say I entirely appreciate the dictum of the late Master of the Rolls in the case of *Southwell v. Bowditch* (35 L. T. Rep. N. S. 196; 1 C. P. Div. 374), that nothing can be more vicious than to decide that because contract A. which is before the court has some conditions similar to those in contract B. which has been before the court in another case, that therefore you are to say contract A. is governed by contract B. and is to be taken to mean the same. I refuse in this case to be bound in any way by the interpretation put upon the *Le Blanche* contract, and for this reason: that case was decided in 1876, and I have very little doubt that this condition which is printed on the Great Western time-table was altered or printed for the purpose of getting out of that decision. There was this condition, "Every endeavour will be made to insure punctuality," which is omitted from the case now before us; and, what is more, they have put in this important addition, "unless upon proof that such loss, inconvenience, injury, delay, or detention arose in consequence of the wilful misconduct of the company's servants." I therefore have, as it seems to me, unfettered by decisions, to ask myself what is the meaning of the condition printed outside the time-table. I think no man can read this clause without coming to one conclusion. It does not say, "We will be liable in no case," but it simply says this: "If you, as a passenger, have incurred any loss, inconvenience, or injury, by reason of delay or detention, we will compensate you if you prove it is by the wilful misconduct of our servants, but otherwise not." It seems to me perfectly manifest what is the meaning of that contract. But it is said by Mr. Woodgate that cannot be the meaning of it, because afterwards, upon this same condition, it goes on dealing with the granting of through tickets, and in that there is a clause that the company will not be responsible for the arrival of the company's own trains in time for the nominally corresponding trains of any other company. Inasmuch as that clause is left out of the one dealing with trains over their own line, it is said the con-

struction I put upon this is not correct. I do not agree with Mr. Woodgate. I am clearly of opinion that there is this limitation put upon the contract by the company, and nobody suggests this limitation could not be put, and it could not be argued. If this had been a contract as regards the carriage of goods, the Railway and Canal Traffic Act might have come in, and the question might have been raised whether it was a reasonable condition. I think this contract has been made beyond all question, and therefore Mr. Woodgate is not entitled to recover for the delay and detention, which he undoubtedly has sustained, unless he can prove that the same arose in consequence of the wilful misconduct of the company's servants. Mr. Woodgate says, "Assuming I am wrong, and assuming this contract binds me, I have given evidence that this delay and detention occurred by reason of the wilful misconduct of the company." The first answer is one which seems to me sufficient, and it is this. It is purely a question of fact whether there has been wilful misconduct. The learned County Court judge has stated the sole fact he finds to be wilful misconduct on the part of the company's servants. What is it? The County Court judge says, on this foggy morning, the 24th Dec., there was a collision at Slough. That caused some delay at Slough, and inasmuch as the company do not clearly prove that the accident at Slough was inevitable, therefore he says, "I find as a fact there has been wilful misconduct on the part of the company's servants." I cannot follow him, but that is what he states. It seems to me that is unreasonable, and it seems to me to answer this part of the case, because the learned County Court judge finds facts which do not amount to wilful misconduct. But Mr. Woodgate says: "I have direct facts, which show wilful misconduct. First of all, the company concealed from me at Paddington there was this block at Slough, and let me take my ticket without telling me." It seems to me there are two answers to that. It is not stated in the case that anybody at Paddington knew it; but secondly, there is this to be said, that even if they did know it, how did that cause the delay and detention? because these delays and detentions arise on the journey. That is why I think this last paragraph is rather inartistically drawn. I think the only true way in which it can be read is this: "Nor will they be accountable for any loss, inconvenience, or injury which may arise from detention or delay." That is clear enough. If you suffer any loss, injury, inconvenience from delay or detention that is one thing. It ought to read like this: "Unless upon proof that such delay occasioning such loss, injury, or inconvenience arose from the wilful misconduct of the company's servants." Assuming that the clerk at Paddington knew there was this block at Slough, how could that occasion this detention or delay in the journey? It does not seem to me it did, and the same observation would apply to the non-communication which Mr. Woodgate complains of on the journey down this line. Then Mr. Woodgate says Mr. Kemp's letter is an admission of liability. I do not think it is so in any shape or way. First of all, the letter has not been answered. If a man says, "You have stolen my pocket-handkerchief," and I do not answer him, is that any evidence I have done it? None



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whatever. Mr. Kemp in no shape or way puts it upon the company's wilful misconduct, but he says, "By this irregularity I have been put to great inconvenience," upon which the company write back and say, "As you often travel upon the line, and you have been put to the expense of it, here it is." How is that evidence of wilful misconduct? It seems to me there is none. Then Mr. Woodgate says there was wilful misconduct because they did not supply a special train from Hartlebury. I agree entirely with what my brother Hawkins has said. It seems to me, if the station-master had thought fit to run a special train from Hartlebury to Bridgnorth, and to break through the company's regulations, which seem to me very reasonable, namely, that before starting a special train on a single line you shall communicate in writing, and have an acknowledgment, I go so far as to say if that station-master had in wilful violation of those orders started a special train from Hartlebury to Bridgnorth and death had ensued, he would have been in great danger if he had been indicted for manslaughter. To say the company were guilty of wilful misconduct because they did not run a special train seems to me preposterous. I cannot say there has been an absolute refusal by the company to perform their contract to carry the plaintiff. What they have been guilty of is delay in not carrying him, and that delay they are exempt from, as I have said, by the conditions. Upon these grounds I am sorry to say Mr. Woodgate is not able to teach the company manners in this case, although he has done his best to do so.

*Judgment for appellants, the defendants.*

The Court refused the plaintiff's application for leave to appeal.

Solicitor for appellants, *R. R. Nelson.*

### House of Lords.

*March 31, April 1, and May 16, 1884.*

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

FOAKES v. BEER. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Accord and satisfaction—Debt—Agreement to accept less than full amount due—Failure of consideration.*

*Payment by a debtor of part of a debt payable immediately is not a sufficient consideration to support a parol agreement by the creditor not to take any proceedings for the residue.*

*The respondent brought an action against the appellant, and obtained judgment for a specific sum; an agreement in writing was then made between the parties, by which, in consideration that the appellant would pay part of the sum on the signing of the agreement, and the remainder by equal half-yearly instalments, the respondent undertook not to take any proceedings on the judgment.*

*The appellant duly paid all the instalments, and on payment of the last the respondent made a claim for interest from the date of the judgment.*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

*Held (affirming the judgment of the court below), that whether or not the true construction of the agreement was that interest on the judgment debt was abandoned, there was no consideration for it, and the respondent was not bound by it, and was entitled to issue execution for the interest due.*

*Pinnel's case (5 Rep. 117 a) and Cumber v. Wane (1 Str. 426) followed.*

This was a case stated under the provisions of the Appellate Jurisdiction Act 1876, on appeal from a decision of Her Majesty's Court of Appeal, ordering that an appeal from an order of the Queen's Bench Division of the High Court of Justice, dated the 2nd May 1883, be allowed, and that judgment be entered for the respondent for 302*l.* 19*s.* 6*d.* for interest with costs, including the costs of the Divisional Court and the costs of the trial.

The respondent, on the 11th Aug. 1875, recovered judgment against the appellant in the late Court of Exchequer of Pleas for the sum of 2077*l.* 17*s.* 2*d.* for debt and 13*l.* 1*s.* 10*d.* for costs in an action wherein the respondent was plaintiff and the appellant defendant, and judgment was entered for the sum of 2090*l.* 19*s.*

On the 21st Dec. 1876 an agreement in writing was entered into between the respondent and the appellant, as follows:

Memorandum of agreement made this twenty-first day of December one thousand eight hundred and seventy-six, between Julia Beer, of Douglas-villas, High-road, Lee, in the county of Kent, widow, of the one part, and John Weston Foakes, of No. 10, South-street, Grosvenor-square, in the county of Middlesex, M.D., of the other part. Whereas the said John Weston Foakes is indebted to the said Julia Beer and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of 2090*l.* 19*s.* And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that, in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of 500*l.*, the receipt whereof she doth hereby acknowledge, in part satisfaction of the said judgment debt of 2090*l.* 19*s.*, and on condition of his paying to her, or her executors, administrators, assigns, or nominees, the sum of 150*l.* on the first day of July and the first day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied, the first of such payments to be made on the first day of July next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators, or assigns, will not take any proceedings whatever on the said judgment. As witness the hands of the said parties.—John W. Foakes. Julia Beer.

At the time of entering into the said agreement the appellant paid to the respondent the sum of 500*l.*, and subsequently paid various other sums, which amounted to the sum of 2090*l.* 19*s.*

The respondent, on the 1st July 1882, applied to the master at chambers, under Order XLII., rule 19, of the then Rules of the Supreme Court, for leave to issue execution against the appellant for the balance alleged by the respondent to be still due for interest in respect of the said judgment debt of 2090*l.* 19*s.*, which alleged balance the appellant refused to pay.

Upon the hearing of the application, it was ordered by the master that an issue be tried between the respondent and the appellant, and that the question to be therein tried should be, "Whether any and what amount is now due upon the said judgment, signed on the 11th Aug. 1875



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in the late Court of Exchequer of Pleas, for the sum of 2090*l.* 19*s.*"

The issue came on for trial before Cave, J. and a common jury, in Middlesex, on the 22nd Feb. 1883.

At the trial Mr. Mackreth, the respondent's solicitor, was called as a witness for the respondent, and he produced a certified copy of the judgment of the 11th Aug. 1875, and an account in writing, showing the balance alleged to be due from the appellant to the respondent. The certified copy of the judgment and the account were put in evidence on behalf of the respondent.

In order to explain the account, and to prove the correctness of the same, the agreement of the 21st Dec. 1876 was put in and referred to by counsel on behalf of the respondent, who also read, although he did not formally put in evidence, the two following letters:

1, Farnival's-inn, Holborn, E.C., 19th May 1882.  
Dear Sir,—Foakes and Beer. I shall be obliged by your furnishing me the promised statement of the balance requisite to discharge Dr. Foakes of his liability to your client, Mrs. Beer. I am, dear Sir, Yours faithfully, W. H. HUDSON.—H. W. Mackreth, Esq.

Dashwood House, 9, New Broad-street, 25th May 1882.  
Dear Sir,—Beer and Foakes. I beg to inclose an account showing a balance of 44*l.* 12*s.* 2*d.* due to Mrs. Beer. I shall be glad to hear you find the dates of payments and figures correct, and presume you will pay the balance in July next. Yours truly, H. W. WILLIAMS MACKRETH.—W. H. HUDSON, Esq., 1, Farnival's-inn, E. C.

It was admitted that all the instalments mentioned in the said agreement, and amounting to 2000*l.*, were paid up to Jan. 1882 inclusive.

It was also admitted that after the 25th May 1882, and before the 1st July 1882, the appellant paid to the respondent a further sum of 90*l.* 19*s.*

The learned judge thereupon directed the jury to find that the appellant had paid all the sums which by the said agreement of the 21st Dec. 1876 he undertook to pay and within the times therein specified; and stated that he was of opinion that, whether the judgment was satisfied or not, the respondent was not entitled to issue execution on the said judgment against the appellant.

On the 2nd March 1883 counsel for the respondent moved for and obtained a rule *nisi* for a new trial of the said issue.

On the 2nd May 1883 the rule came on for argument in the Queen's Bench Division, before Watkin Williams and Mathew, JJ., who discharged the same.

The respondent gave notice of appeal to the Court of Appeal, and on the 23rd June 1883 the appeal came on for argument before Brett, M.R., Lindley and Fry, L.JJ., when the order now appealed from was made: (11 Q. B. Div. 221.)

Holl, Q.C. and Winch appeared for the appellant, and contended that, apart from the doctrine of *Cumber v. Wane* (1 Str. 426), there was no reason why the agreement should not be valid, and the creditor prevented from enforcing her judgment. *Cumber v. Wane* was doubted by Jessel, M.R. in *Couldery v. Bartrum* (19 Ch. Div. 394; 45 L. T. Rep. N. S. 689), and disapproved by J. W. Smith in his note on the case (1 Sm. L. C.), which has been retained by all his subsequent editors. It is there described as "founded upon vicious reasoning, and false views of the office of a court of law." See also

*Reynolds v. Pinhouse*, Cro. Eliz. 429;  
*Wilkinson v. Byers*, 1 A. & E. 111;

*Sibree v. Tripp*, 15 M. & W. 28;  
*Curlewis v. Clark*, 3 Ex. 375;  
*Goddard v. O'Brien*, 9 Q. B. Div. 37; 46 L. T. Rep. N. S. 306;

in all of which cases the doctrine has been modified. *Pinnel's case* (5 Rep. 117 a) was decided on a point of pleading. The dictum is *obiter*. *Heathcote v. Crookshanks* (2 T. E. 24) and *Thomas v. Heathorn* (2 B. & C. 477) are inconsistent with the later authorities, and *Fitch v. Sutton* (5 East, 230) is wrong. The doctrine is unreasonable, for such an agreement as this was for the benefit of both parties. It was not in fact *nudum pactum*, for there was a consideration. The appellant went to the expense of preparing the agreement, and was relieved by it, on its true construction, from the obligation to pay the interest, and got time to pay the principal. On the other hand, the respondent got her money, which she would not have realised by an execution.

*Bompas, Q.C.* and *A. B. P. Gaskell*, for the respondent, argued that, on the true construction of the agreement, there was no intention to give up the interest, for "the said sum" means the judgment debt, which carries interest by statute. But even if, this be not so, there is a strong current of authority for saying that what the law imposes as a duty is no consideration, and therefore, when a debt is due, the payment of part of it is no consideration for giving up the residue, and the agreement is void. See

*Dixon v. Adams*, Cro. Eliz. 533;  
*Richards v. Bartlet*, 1 Leon. 19;  
*Goring v. Goring*, Yelv. 10;  
*Geang v. Swaine*, 1 Lutw. C. P. 464  
*Fitch v. Sutton*, 5 East, 230;  
*Adams v. Tapling*, 4 Mod. 88;  
*Down v. Hatcher*, 10 A. & E. 121;  
*Evans v. Powis*, 1 Ex. 601;  
*McManus v. Bark*, L. Rep. 5 Ex. 65; 21 L. T. Rep. N. S. 676.

*Cumber v. Wane* itself followed the older authority in Co. Litt. 212 b., and the cases referred to on the other side, in which it has been departed from, all admit the general rule but distinguish the particular facts. *Goddard v. O'Brien* (*ubi sup.*) was wrong. [The LORD CHANCELLOR.—The ground of the decision in that case was, that a negotiable instrument was given.] It is contrary to public policy to make the performance of a legal duty a good consideration for a fresh agreement. See the cases of sailors' wages:

*Stilk v. Myrick*, 2 Camp. 317;  
*Harris v. Watson*, 1 Peake, 102;  
*Newman v. Walters*, 3 B. & P. 612;  
*Clutterbuck v. Coffin*, 4 Soott N. R. 509;  
*Harris v. Carter*, 3 E. & B. 556.

The law has never been doubted, and such cases as *Lovelace v. Cocket* (1 Br. & Gold. 47) and *Haves v. Birch* (1 Br. & Gold. 71) have gone still further. In such a state of authority the House will not overrule well-established cases:

*Danford v. McNulty*, 8 App. Cas. 456; 49 L. T. Rep. N. S. 207.

*Holl, Q.C.* in reply.—The cases of sailors' wages depend on questions of public policy which have no application here. Several of the other cases referred to have been doubted, or depend on questions of pleading. See

*Cooper v. Parker*, 15 C. B. 822.

At the conclusion of the arguments their Lordships took time to consider their judgment.

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May 16.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: Upon the construction of the agreement of the 21st Dec. 1876, I cannot differ from the conclusion in which both the courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable, whether for principal or interest under the judgment. But the agreement of the judgment creditor which follows the recitals is, that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of 150*l.* in every half year, "until the whole of the said sum of 2090*l.* 1*s.*," the aggregate amount of the principal debt and costs, for which judgment had been entered, "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due or future interest. Whatever was meant to be payable at all under this agreement was clearly to be payable by half-yearly instalments of 150*l.* each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of 2090*l.* 1*s.* "and interest thereon" should have been fully paid and satisfied, would be to introduce very important words into the agreement which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may, as indeed I do, very much doubt whether the effect of the agreement as a conditional waiver of the interest to which by law she was entitled under the judgment was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced. But the question remains whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed except a present payment of 500*l.* on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of 150*l.* each at the times therein mentioned; much less did he give any new security in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of 150*l.* each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt, if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs could not, in my opinion, be a consideration for the relinquishment of interest and

discharge of the judgment, unless the payment of the 500*l.* at the time of signing the agreement was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction so long as any future instalment remained payable; and I do not see how any new payments on account could operate in law as a satisfaction *ad interim* conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything in fact done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her. The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule as contrary to law the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's case* (5 Rep. 117 a) in 1602, and repeated in his note to Littleton (Co. Litt. 212 b), but to treat a prospective agreement, not under seal, for satisfaction of a debt by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor agreed to *inter se* by several creditors. I prefer so to state the question instead of treating it, as it was put at the bar, as depending on the authority of the case of *Cumber v. Wane* (1 Str. 426; 1 Sm. L. C.), decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber v. Wane*, and yet that the doctrine itself may be law, rightly recognised in *Cumber v. Wane*, and not really contradicted by any later authorities; and this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary, I think it has always, since the 16th century, been accepted as law. If so, I cannot think that your Lordships would do right if you were now to reverse as erroneous a judgment of the Court of Appeal proceeding upon a doctrine which has been accepted as part of the law of England for 280 years. The doctrine, as stated in *Pinnel's case*, is "that payment of a lesser sum on the day"—it would of course be the same after the day—"in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke on Littleton, 212 b, it is, "where the condition is for payment of 20*l.*, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater," adding, what is beyond controversy, that an acquittance under seal, in full satisfaction of the whole, would, under like circumstances, be valid and binding. The distinction between the effect of a deed under seal and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but is established in our law; nor is it really unreasonable or prac-

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tically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be, as in the actual state of the law I think it is, whether consideration is or is not given in a case of this kind by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be, and indeed I think it would be, an improvement in our law, if a release or acquittance of the whole debt on payment of any sum which the creditor might be content to receive by way of accord and satisfaction, though less than the whole, were held to be generally binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement like the present, in writing, though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to *Cumber v. Wane* (*ubi sup.*) which were relied upon by the appellant, such as *Sibree v. Tripp* (15 M. & W. 23), *Curleris v. Clark* (3 Ex. 375), and *Goddard v. O'Brien* (9 Q. B. Div. 37; 46 L. T. Rep. N. S. 306), have proceeded upon the distinction that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds upon which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane* (1 Sm. L. C.), is not, as I conceive, that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which in law might be a good and valuable consideration for any other sort of agreement not under seal. My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed with costs, and I so move your Lordships.

**LORD BLACKBURN.**—My Lords: The first question raised is as to what was the true construction of the memorandum of agreement made on the 21st Dec. 1876. What was it that the parties by that writing agreed to? The appellant contends that they meant that, on payment down of 500*l.*, and payment within a month after 1st July and 1st Jan. in each ensuing year of 150*l.* until the sum of 2090*l.* 19*s.* was paid, the judgment for that sum and interest should be satisfied; for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of 150*l.* there should be a further payment of 90*l.* 19*s.* made within the next six months. This is the construction which all the courts below have put upon the memorandum. The respondent contends that the true construction is, that time was to be given on

those conditions for the five years, the judgment being, in default of any one payment, enforceable for whatever was still unpaid with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all. If this is the true construction of the agreement, the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am of opinion, however, that the courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed in unmistakable words that, on payment down of 500*l.*, and punctual payment at the rate of 300*l.* a year till 2090*l.* 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on them at the time; but I think the words "till the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied;" nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest. I think, therefore, that it is necessary to consider the ground on which the Court of Appeal based their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking 500*l.* in satisfaction of the whole 2090*l.* 19*s.*, subject to the condition that, unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If instead of 500*l.* in money it had been a horse valued at 500*l.*, or a promissory note for 500*l.*, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money. This is a question, I think, of difficulty. Lord Coke says (Co. Litt. 212 b): "Where the condition is for payment of 20*l.*, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. . . . If the obligor or feoffor pay a lesser sum, either before the day or at another place than is limited by the conditions, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's case* (*ubi sup.*). That was an action on a bond for 16*l.*, conditional for the payment of 8*l.* 10*s.* on the 11th Nov. 1600. Plea, that defendant, at plaintiff's request, before the said day, to wit, on the 1st Oct., paid to the plaintiff 5*l.* 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the 8*l.* 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas, "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, a hawk, or a robe, &c., in satisfaction is good, for it shall be intended that

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a horse, hawk, or robe might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay 5*l.* at the day at York, and you will accept it in full satisfaction for the whole 10*l.*, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction." There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction, it was his own fault; and that payment before the day might be more beneficial, and consequently that the plea was in substance good; and this must have been decided in the case. There is a second point stated to have been resolved, namely, "that payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but, though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch v. Sutton* (5 East, 230), as to which I shall make some remarks later, and in *Down v. Hatcher* (10 A. & E. 121), as to which Parke, B., in *Cooper v. Parker* (15 C. B. 828) said, "Whenever the question may arise as to whether *Down v. Hatcher* is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's case* as good law. For instance, in *Sibree v. Tripp* (*ubi sup.*), Parke, B. says: "It is clear that if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B. in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain but two, viz., payment of part, and an agreement without consideration to give up the residue. The courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a court of first instance would be justifi-

fied in treating the question as open. But, as this has very seldom, if at all, been the ground of the decision, even in a court of first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open to your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges. I will first examine the authorities. If a defendant pleaded the general issue the plaintiff could join issue at once, and, if the case was not defended, get his verdict at the next assizes; but by pleading a special plea the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that, if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way, by a sham plea that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat (*Young v. Budd*, 5 Mod. 86) or a pipe of wine. All this is now antiquated. But while it continued to be the practice, pleas founded on the first part of the resolution in *Pinnel's case* were very common, and that law was perfectly trite. No one supposed for a moment that a beaver hat was really given and accepted, but everyone knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in *Pinnel's case*, on what I have ventured to call the dictum, were certainly not common. I doubt whether a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by payment of a smaller sum the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might perhaps, as suggested by Holroyd, J. in *Thomas v. Heathorn* (2 B. & C. 482), find that the circumstances were such that the legal effect was to be as if the whole was paid down, and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House. For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from *Pinnel's case* down to *Cumber v. Wane* (*ubi sup.*) in 5 Geo. 1, a period of 115 years. In *Adams v. Tapling* (4 Mod. 88), where the plea was bad for many other reasons, it is reported to have been said by the court that, "in covenant, where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there accord and satisfaction is a good plea." No doubt this is one of the cases which Parke, B. would have cited in support of his opinion that *Down v. Hatcher* (*ubi sup.*) was not good law. The court are said to

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have gone on to recognise the dictum in *Pinnel's case* (*ubi sup.*), or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea. Some doubt has been made as to what the pleadings in *Cumber v. Wane* (*ubi sup.*) really were. I have obtained the record. The plea is, that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note' manu propria ipsius Georgii subscript pr. solucōn eidem Edwardo Cumber vel ordini quique librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises. The replication is, that "the said George did not give to him Edward any note in writing called a promissory note with the hand of him George subscribed for the payment to him Edward or his order of 5*l.* fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law." The reporter, oddly enough, says that there was "an immaterial replication." The effect of the replication is to put in issue the substance of the defence, namely the giving in satisfaction (*Young v. Rudd, ubi sup.*), and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt, C.J. prefers to base the judgment, affirming that of the Common Pleas, on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given in satisfaction, was a negotiable note; and therefore this case is in direct conflict with *Sibree v. Tripp* (*ubi sup.*). Two cases require to be carefully considered. The first is *Heathcote v. Crookshanks* (2 T. R. 24). The plea there pleaded would, I think, now be held perfectly good (see *Norman v. Thompson*, 4 Ex. 755), but Buller, J. seems to have thought otherwise. He says: "Thirdly it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a *nudum pactum* unless they had afterwards accepted it. In the case in which *Cumber v. Wane* was denied to be law (*Hardcastle v. Howard*, 26 Geo. 3, B. R.) the party actually accepted. But, as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad." That decision goes entirely on the ground that accord without satisfaction is not a good plea. I do not think it can be fairly said that Buller, J. meant, by saying "that is a *nudum pactum* unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expressed no opinion the other way. In *Fitch v. Sutton* (*ubi sup.*) not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all unless the defendant

promised to pay him the balance when of ability, and the defendant assented, and made the promise required; so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman v. Magnus* (11 East, 390) it was pretty well admitted by Lord Ellenborough, C.J. that the decision in *Fitch v. Sutton* would have been the other way if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch v. Sutton*, still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say: "It is impossible to contend that acceptance of 17*l.* 10*s.* is an extinguishment of a debt of 50*l.* There must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane* that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater; and though that case was said by me in argument in *Heathcote v. Crookshanks* (*ubi sup.*) to have been denied to be law, and in confirmation of that Buller, J. afterwards referred to a case stated to be *Hardcastle v. Howard* (H. 26 Geo. 3), yet I cannot find any case of that sort, and none has been now referred to; on the contrary, the decision in *Cumber v. Wane* is directly supported by the authority of *Pinnel's case*, which never appears to have been questioned." I must observe that, whether *Cumber v. Wane* was or was not denied to be law in *Hardcastle v. Howard*, it certainly was denied to be law in *Sibree v. Tripp* (*ubi sup.*); and that though it is quite true that *Pinnel's case*, as far as regards the point actually raised in the case, has not only never been questioned, but often assented to, I am not aware that in any case before *Fitch v. Sutton* (*ubi sup.*), unless it be *Cumber v. Wane*, has that part of it which I venture to call the dictum ever been acted upon; and, as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch v. Sutton*, whether the dictum in *Pinnel's case* was right or wrong. Still this is an authority, and I have no doubt that it was on the ground of this authority, and the adhesion of Bayley, J. to it in *Thomas v. Heathorn* (*ubi sup.*), that Parke and Alderson, BB. expressed themselves as they did in the passages which I have cited from *Sibree v. Tripp*. And I think that their expressions justify Mr. J. W. Smith in laying it down, as he does in his note to *Cumber v. Wane* (1 Sm. L. C.), that "a liquidated and undisputed money demand, of which the day of payment is passed, not founded upon a bill of exchange or promissory note, cannot, even with the consent of the creditor, be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

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What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but, as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them. I assent to the judgment proposed, though it is not that which I had originally thought proper.

LORD WATSON.—My Lords: I am of opinion that the judgment of the Court of Appeal ought to be affirmed. I regret that I have been unable to adopt that construction of the memorandum of agreement which has commended itself to your Lordships as well as to the judges of the Court of Appeal. It appears to me that the respondent did not intend to pass, and did not pass, from her legal claim for interest on the judgment debt due to her from the appellant. She undertakes not to take proceedings on the judgment provided the stipulated termly instalments are regularly paid, "until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied." But these words, "the said sum," ought, in my opinion, to be construed as referring to the sum of 2090*l.* 19*s.* previously described as being contained in a judgment of Her Majesty's High Court of Justice, and therefore bearing interest *ex lege*. The whole context of the memorandum appears to me to be consistent with this view, and to point strongly to the inference that there was no agreement, or even proposal, that the respondent should make any abatement of her legal claims, or do more than give her debtor time, on the conditions expressed, "to pay such judgment." I must assume, however, that I have wrongly construed the memorandum of agreement, and that its language imports that the respondent was to abstain from taking proceedings on the judgment if and when instalments to the amount of 2090*l.* 19*s.* had been duly and regularly paid. Upon that assumption I am still of opinion that the respondent ought to prevail, on the simple ground that on that view of the memorandum her agreement to abate part of her claim was *nudum pactum*, for which the appellant gave no legal consideration, I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine of *Cumber v. Wane* (*ubi sup.*) and *Pinnel's case* (*ubi sup.*), because I am not prepared to disturb that doctrine. Nor do I think it necessary to occupy the time of the House with a detailed explanation of the considerations which have led me to that result, seeing that I concur in the judgment of the Lord Chancellor, and also in the opinion about to be delivered by Lord Fitzgerald, which I have had the advantage of reading.

LORD FITZGERALD.—My Lords: The first question is as to the true construction of the

memorandum of agreement of the 21st Dec. 1876, and I express my opinion upon it with the greatest diffidence. My excuse for expressing my opinion upon it is, that I feel rather strongly on the point. The memorandum is, it may be observed, unilateral, for Dr. Foakes by it assumes no obligation. The first recital is that Mrs. Beer had obtained a judgment against Dr. Foakes for a sum of 2090*l.* 19*s.* The judgment would not at common law *per se* entitle the plaintiff to interest, but the statute 1 & 2 Vict. c. 110, s. 17, provides, "That every judgment debt shall carry interest at 4 per cent. from the time of entering up until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." This right to interest is different from interest arising on contract, or which a jury may give as damages, or may withhold. It is a clear statutory right, arising immediately on entering up the judgment, and continuing until the judgment debt is fully paid. The position of the parties at the date of the agreement then was, that Dr. Foakes owed Mrs. Beer the principal sum of 2090*l.* 19*s.* recovered by a judgment which carried interest at 4 per cent., arising *de die in diem* as a statutory right, and then—that is, at the time of the agreement—amounting to 113*l.* 16*s.* 2*d.* The agreement then contains this recital: "And whereas the said J. W. Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions." He does not ask for any remission of any portion of his obligation, he solicits only time for payment, and she agrees to give him that time and no more. It seems to me clear and free from doubt that "such judgment" in this recital would, if there was no more to guide us, mean the judgment debt with its statutable interest at 4 per cent. The language of the recital and of the whole agreement seems to be that of Mr. Smith, the defendant's solicitor, as we find in Mackreth's evidence this statement: "The agreement was prepared by Smith and sent to me, and I approved of it on behalf of Mrs. Beer." Returning to the language of the agreement, it is remarkable that Dr. Foakes undertakes by it no obligation whatever; he does not bind himself to pay any instalment to her or to her "nominee," and it was not necessary that he should, for I can entertain no doubt that, if what is called the "condition" for payment of the instalments had not been fulfilled, then Mrs. Beer could have enforced the whole residue of her demand for principal and the interest which had accrued, by execution on the judgment. Dr. Foakes enters into no obligation to pay to her "nominee," and this seems to displace in fact the foundation of the judgment of the Divisional Court, where Williams, J. said: "The doctrine is that an agreement to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, 'You owe me a large sum of money, I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense,' as it would be, 'and you shall pay the money to me or to any person I may name, at my election,' that is enough I



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think to make this agreement not a *nudum pactum*." There is no such thing in the agreement here. And Mathew, J. adds: "It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security." It would seem, to me at least, that the terms of the agreement had never been properly conveyed to the minds of the judges, for in fact Dr. Foakes assumed no greater obligation than the law imposed on him in respect of the judgment. The expressed condition is the payment to Mrs. Beer "of the sum of 500*l.* in part satisfaction of the said judgment debt of 2090*l.* 19*s.*;" and again I should repeat here that the last words would mean the debt and the right to interest which it carried, if there is nothing subsequent to impose a different meaning. The term "satisfaction" is specially applicable to a judgment. You could not in former times simply plead payment to a *scire facias* on a judgment; the plea should show satisfaction. The judgment would not be satisfied on the payment of the 2090*l.* 19*s.*, but only on payment of that sum and the interest. The agreement then provides as a condition for the payment of the instalments of 150*l.* "until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied." The whole difficulty arises on this passage. If in place of using the word "sum" it had used "judgment" or "judgment debt," in my opinion there could have been but one construction, namely, that "judgment" or "judgment debt" meant the principal sum of 2090*l.* 19*s.*, with interest at 4 per cent. Now, having regard to what the parties were at, why should we not read "the said sum of 2090*l.* 19*s.*" by the light of the antecedent parts of the same agreement as meaning "the said judgment for 2090*l.* 19*s.*," and thus do full and complete justice, and not deprive Mrs. Beer of about 350*l.* as justly due to her as the 2090*l.* 19*s.*, and which it is to me manifest she never intended, and was never asked, to relinquish? There is a special recital indicating what the parties intended, namely, "time on certain conditions," but without a word as to relinquishing any part of the plaintiff's demand, and if the subsequent words are more general, we shall limit and qualify them by the special language of the recital. Dr. Foakes did not ask for any remission; he asked for time, and for time alone, and we ought to assume that, when his solicitor prepared and furnished the memorandum of agreement, he did not intend by its language that any part of Mrs. Beer's demand was to be released. Mackreth says that in the course of negotiations "interest was never mentioned at all in reference to that agreement." She adopted the language of the memorandum, and it became hers, but was it such as to lead Dr. Foakes to understand that Mrs. Beer agreed, on performance of the condition, to give up her claim to interest? I think we ought not to adopt such a conclusion. There are many authorities for the proposition that you may limit the general words of release by the antecedent recitals, so as to effectuate that alone which was within the intention of the parties. I might refer to a number of cases; for example, *Thorpe v. Thorpe* (1 *Ld. Raym.* 235), where it was said, "where there are general words only in a release they shall be taken most

strongly against the releasor, but where there is a particular recital and general words follow, there the general words shall be qualified by the special words." Applying that rule to the present case, you may limit the general words at the conclusion of the memorandum to the giving of time alone; that is to say, if "judgment debt of 2090*l.* 19*s.*" means the sum of 2090*l.* 19*s.* and nothing more, then that Mrs. Beer agrees to give time for the payment of the principal debt of 2090*l.* 19*s.* by the instalments and at the time indicated, and that pending that arrangement she would "not take any proceedings whatever on the said judgment." This would give effect to every word and leave the interest untouched, which, if the principal is to be paid by instalments, could not well be ascertained until the time had been reached for the payment of the last instalment. There is nothing in the memorandum, it should be observed, to prevent Dr. Foakes from coming in at any time and discharging the whole principal before the instalments became payable. Upon the construction of the memorandum I am of opinion that the judgment of the Court of Appeal should be affirmed. The second question now presents itself, but with my views on the first it is not actually necessary for me to express any opinion upon it, but it seems more satisfactory that I should do so. Assuming that I have fallen into error in interpreting the agreement, and that it is to be read that if Dr. Foakes should pay the actual sum of 2090*l.* 19*s.* by instalments according to the condition she would relinquish her statutable debt for interest and not issue execution on the judgment to recover it, is such an agreement *nudum pactum*, and incapable, therefore, of being enforced? I have listened with much interest to the judgment of Lord Blackburn, who has gone, as usual to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by Lord Coke in *Pinnel's case* (*ubi sup.*), or in expunging from the books the infinitesimal remains of *Cumber v. Wane* (*ubi sup.*). It seems to me doubtful whether the question arises which he has presented, namely, whether payment of part of a debt ascertained by judgment can be a satisfaction of the whole? In the case before us the whole of the 2090*l.* 19*s.*, the principal of the judgment, has been paid to the last farthing. The interpretation put by the judges of the courts below, and adopted by the Lord Chancellor and Lord Blackburn, on the memorandum, seems to me to divide it, in effect, into two stipulations, the first being that, if Dr. Foakes should pay down 500*l.* and the remainder of the actual sum of 2090*l.* 19*s.* in the manner prescribed, Mrs. Beer would so accept it, and pending the payments would take no proceedings on the judgment; and the second being that, if the 2090*l.* 19*s.* should be paid in the manner indicated, she would relinquish her claim for interest, and would not take any proceedings whatever on the judgment to enforce that interest. The question is, whether there is any sufficient legal consideration for the relinquishment of the debt for interest. I am clearly of opinion that there is not. Lord Blackburn has shown us very clearly that the resolution in *Pinnel's case* was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made



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the foundation of any subsequent decision of the Exchequer Chamber or of this House; and further, that some of the distinctions which have been engrafted on it make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of those distinctions, emanating from the anxiety of judges to limit the operation of a rule which they considered often worked injustice. That resolution in *Pinnel's case* has never been overruled; for 282 years it seems to have been adopted by our judges. During the whole of that period it seems to have been understood and taken to be part of our law that the payment of part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every judge in this country who has had occasion to deal with the proposition states the law to be so. And in the sister country it has always been so received, and in the case of the *Corporation of Drogheda v. Fairlough* (8 Ir. C. L. Rep. 98) Lefroy, C.J. thus expresses himself, and I may say that his language is entitled to very considerable weight. That very learned judge thus states the law: "There is also a failure of evidence of the consideration for the contract to remove the rule of the common law that payment of a less sum cannot be a satisfaction of a greater liquidated sum, unless there is some further advantage accompanying the payment." And in another part of his judgment he puts the proposition thus: "The payment merely of a less sum, not being in pursuance of any contract by deed, cannot by the common law be deemed to be a satisfaction of a greater liquidated sum, but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small, to the creditor attending the transaction." The question did arise directly in that case, but the plea failed in other points, and it was not necessary, therefore, actually to decide it. I refer to it as showing how a judge of great experience considered the law to stand. I am not aware of any decision that controverts this position, and the text-books uniformly present it thus: that "the payment of part of a liquidated and ascertained sum is in law no satisfaction of the whole." The proposition itself is but a part of a rule of our law which governs many of the daily relations of life, *Nuda pactio obligationem non parit*. And again the law says that *Nudum pactum est ubi nulla subest causa præter conventionem*. I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's case* had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of other creditors. We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it. The short question then is, in relation to a judgment debt payable immediately, and on which the creditor is entitled to

have execution, is the payment by the debtor of a part a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not; and I think, therefore, that the judgment of the Court of Appeal should be affirmed.

*Order appealed from affirmed, and appeal dismissed with costs.*

Solicitor for the appellant, W. H. Hudson.  
Solicitors for the respondent, Mackreth, Bramall, and White.

## Supreme Court of Judicature.

### COURT OF APPEAL.

May 29 and 30, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

Re WEST DEVON GREAT CONSOLS MINE. (a)

*Cost-book mine—Stannaries Court—Winding-up petition—Inspection of books—18 & 19 Vict. c. 32, s. 22.*

*The mere fact that a winding-up petition has been presented does not justify an order for the inspection of the books of the company, but, if special grounds are shown, the petition may be ordered to stand over for a petitioning shareholder to enforce his right to inspection, and the practice of the Stannaries Court is the same as that of the High Court of Justice in this respect.*

*The right of inspection under sect. 22 of the Stannaries Act is peculiar to the shareholder, and does not extend to his solicitors or agents.*

This was an appeal from the Vice-Warden of the Stannaries Court.

A petition was presented by T. W. Mulloney, one of the shareholders, for the winding-up of the West Devon Great Consols Mine, on the ground that the mine was being worked at a loss, and that under all the circumstances it was just and equitable that it should be wound-up. The mine was managed on the cost-book principle.

The petition was opposed by the purser and several of the shareholders.

The petitioner and his solicitor filed affidavits in support of the petition, and the petitioner put in evidence a letter from the purser dated the 24th Nov. 1833, in which he said: "As to what may be done at the mine it rests entirely with the shareholders, and they are against going on; at least the majority are of that opinion, and I think they are right." He also deposed that he had a conversation with the purser, in which he told him that the lodes which were worked became poorer and gradually narrower, until they were not thicker than one's hand; that the mine was worthless, and that thousands of shares had been relinquished, and he advised the petitioner to relinquish his shares if he desired to avoid any further loss.

The petition was heard on the 5th March 1884, and the purser attended for cross-examination, but the Vice-Warden made an order adjourning the hearing of the petition in order, as was stated,

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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that the petitioner might have the opportunity of making an application for an inspection of the books of the company under sect. 22 of the Stannaries Act 1855 (18 & 19 Vict. c. 32), which provides that:

In all cases of like mines and partnerships it shall be lawful for the vice-warden, upon application of any adventurer or shareholder founded on sufficient grounds and affidavit, and although no suit be then pending, to make a rule or order for production of the cost-books of the mine, list of adventurers, and such other books and documents relating to the mine and management thereof as the vice-warden shall think proper, for inspection of such applicant, and to enforce such rule or order by attachment within the Stannaries, or by causing the same to be made a rule or order of one of the Superior Courts at Westminster, under the statute in such case made and provided.

On the 25th March the petitioner made the application, and the petition was heard at the same time. The Vice-Warden then ordered the pursuer to produce to the petitioner, or his agent, the cost-books, share ledger, minute-book, and all other books and vouchers belonging to the mine; and that the hearing of the petition for winding-up should be adjourned.

The company appealed.

*Northmore Lawrence* for the appellants.—It was contrary to the settled practice to adjourn the hearing of the petition in order that the books might be inspected by the petitioner to enable him to support his petition, when the pursuer was in attendance, in order that he might be cross-examined if the petitioner thought proper, and had the books with him:

*Re Emma Silver Mining Company*, 31 L. T. Rep. N. S. 816; L. Rep. 10 Ch. App. 194.

It was an abuse of the right to order an inspection for the purpose of wrecking the company.

*Grosvenor Woods* for the petitioner.—The petitioner had a right to an order for inspection on showing good grounds for it. The only question is whether a petition for the winding-up of the company having been presented, that right was suspended, but there is no authority for such contention. The petition was not an attempt to wreck the company. The letter and statements of the pursuer show there was a reason for inspecting the books, and on the special circumstances of the case the vice-warden granted the application. He had a discretion in the matter, and the court will not interfere with it:

*Re Credit Company*, 11 Ch. Div. 256.

*Northmore Lawrence* in reply.

BAGGALLAY, L.J.—The petition for winding-up in this case was presented in Feb. 1884, and was heard on the 5th March, when the vice-warden made an order for adjourning the petition. The order was simply for adjournment, but it is stated that it was understood that the petitioner would present a petition under the 22nd section of the Stannaries Act 1855, for inspection of the books of the company, and that the petition was adjourned for that purpose. An application was accordingly made under that section, and the matter came on to be heard with the adjourned petition on the 25th March, and then the vice-warden made an order for inspection, and ordered the petition again to be adjourned. An appeal is brought from both these orders. The 22nd section of the Stannaries Act 1855, under which the order for inspection was made, is as follows: [his

Lordship read the section.] It is observable that the application must be made on sufficient ground on affidavit or otherwise. Therefore the vice-warden had a judicial discretion as to making or refusing the order. I was disposed at first to think that an error had been committed in adjourning the petition on the 5th March, because at that time there was no petition pending for inspection. But, although there had been no petition presented, it appears that an affidavit had been put in on which the subsequent application was made, and this affidavit was before the vice-warden, and there were also statements and a letter from the pursuer to the petitioner with reference to the condition of the mine, putting it before him that on that account it was not desirable to proceed with the petition. In that state of circumstances the vice-warden considered that, though there was no pending application for inspection, there was material which would support one, and he therefore adjourned the petition that such an application might be made. Then, on the 25th March, the application for inspection came before the vice-warden, and the order for inspection was made. It appears to me that it was a matter for the exercise of his judicial discretion, and that he has exercised a discretion in a way which cannot be complained of. There were a great many members who supported the petition, and there were *prima facie* grounds for the petition. The order for inspection was not a mere roving order. The question of the condition of the company had been actually raised, and the vice-warden having exercised his discretion to make an order for inspection, I see no reason to differ from him. The appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. There are two questions before us: First, whether the petition for winding-up ought to have been ordered to stand over; secondly, whether the vice-warden was right in making the order for inspection. The second question depends on the 22nd section of the Stannaries Act, and we have to decide whether discovery ought to have been ordered under that section in aid of a winding-up petition. I do not encourage the idea that a petitioner for a winding-up order has a right to have discovery to support his case—to fish out, in fact, something that may help him. But here the question is whether the power of ordering inspection under the 22nd section ought not to have been exercised because a winding-up petition was pending. It is clear from the section that the vice-warden must have sufficient grounds for making the order. The suggestion that the statements in the petition might be proved by the books would not be sufficient ground; but independently of that there were, in my opinion, sufficient grounds. These were the letter and statements of the pursuer, and the petitioner had a reasonable ground for asking for inspection to see if these statements and letter were well founded. I think therefore there were sufficient grounds for the order for inspection, and that independently of the winding-up petition the vice-warden had full jurisdiction to make it. The next question is, was the power to make the order taken away by the pendency of the winding-up petition? If the vice-warden had thought that it was a mere wrecking petition to ruin a going concern there would have been good reason for refusing the application; but, as the evidence

showed a *prima facie* ground for presenting the petition, I do not think that the mere pendency of the petition was any reason for refusing the application. It is a most ordinary thing, if there is a possibility of a company going on, to let the petition for winding-up stand over in order to ascertain what the condition of the company really is. In my opinion the order made by the vice-warden was right. There is one point, however, to which I wish to allude. I think the order for inspection of the books should be expressed to be for the petitioner himself, not for his solicitor or agent. I think the right of inspection is peculiar to the shareholder, and does not extend to his solicitor or agent.

LINDLEY, L.J.—I am of the same opinion. I will add no more than this, that I hope it will not be understood that we think there is any difference between the practice in the Stannaries Court and in the High Court of Justice in cases of winding-up petitions. The fact that a petition for winding-up has been presented is not sufficient ground for ordering inspection of the books of the company. In the present case there were sufficient grounds for the order independently of the winding-up petition.

Solicitors: Kerly and Co.; A. S. Ramskill.

Wednesday, June 11, 1884.

(Before BAGGALLAT, COTTON, and LINDLEY, L.JJ.)

PRIESTMAN v. THOMAS. (a)

**Estoppel—Action in Probate Division—Compromise—Forgery—Judgment in Chancery Division—Revocation of probate—Jurisdiction.**

*An action in the Probate Division in which T. and G. propounded an earlier, and P. a later, will, was compromised, and by consent verdict and judgment were taken establishing the earlier will.*

*An action was afterwards commenced by P. in the Chancery Division, to which T. and G. were parties, to set aside the compromise on the ground that the earlier will was a forgery. A jury returned a verdict that it was a forgery, and the compromise was set aside.*

*In another action in the Probate Division for revocation of the probate of the earlier will:*

*Held (affirming the decision of Sir J. Hannen, 9 P. Div. 70), that T. and G. were estopped from denying the forgery.*

*Seemingly, the Chancery Division has no jurisdiction to revoke the probate of a will.*

THIS was an action to revoke the probate of an alleged will of James Whalley, deceased, bearing date the 21st March 1881, on the ground that the alleged will was a forgery.

The plaintiff sued as the executor of an alleged will of the said James Whalley, bearing date in or about April 1881. The defendants were sued as the only persons claiming to be interested under the will which was sought to be revoked. The plaintiff alleged in his statement of claim that a former action brought by him in the Probate Division to establish the will of April 1881 was put an end to by virtue of an agreement of compromise between himself and the present defendants, and that, in pursuance of that compromise, the court by its judgment, bearing date

the 10th June 1882, pronounced for the force and validity of the alleged will of the 21st March 1881; that the plaintiff afterwards discovered that the said alleged will was a forgery; that he thereupon commenced an action in the Chancery Division between the now plaintiff as plaintiff and the now defendants as defendants, wherein he claimed to have the agreement of compromise in consequence of which the judgment in favour of the will of the 21st March 1881 was pronounced, set aside on the ground that it was procured by the fraudulent misrepresentation of the defendant Thomas that the alleged will of the 21st March 1881 was genuine, whereas, in fact, this alleged will was a forgery, and that the defendant Thomas was party or privy to such forgery; that the said action came on for trial before Manisty, J. and a special jury on the 16th Nov. 1883, when the jury found that the compromise, as far as the same related to the interest which the defendant Charles Thomas took under it—namely, 17,000*l.* and costs—was procured by the fraud of the said Charles Thomas, that the said alleged will of the 21st March was a forgery, and that the said Charles Thomas was a party or privy to the said forgery; that the court thereupon gave judgment declaring the said agreement of compromise, so far as it related to any interest which the defendant Thomas took under it, was obtained by his fraud, and that the same was invalid and void, and it was ordered that the said agreement of compromise, as regards the said Charles Thomas, be set aside. It was further averred that no application had been made to set aside the said verdict and judgment, and that the same remained binding and valid.

Upon these facts the plaintiff contended that the defendants Thomas and Gunnell were estopped from denying that the said agreement of compromise was obtained by the fraud of Thomas, or that the alleged will of the 21st March 1881 was a forgery, or that the defendant Thomas was party or privy to such forgery.

The defendants Thomas and Gunnell in their statement of defence did not deny that the verdict and judgment in the action tried before Manisty, J. were given as alleged by the plaintiff, or that they remained binding and valid; but they said that they desired to have the question whether or not the said alleged will was a forgery submitted to another jury, and they denied that in this action they were estopped from denying that the agreement of compromise was obtained by fraud, or that the said will was a forgery.

Upon these pleadings the plaintiff applied that the points of law raised whether or not the defendants Thomas and Gunnell were estopped from denying that the compromise was obtained by fraud, or that the alleged will of March 1881 was a forgery, should be heard and disposed of before the trial, under Order XXV., r. 3, and Sir J. Hannen made an order to this effect.

Charles Russell, Q.C. and Middleton for the plaintiff. — The defendants are estopped from denying the forgery. The compromise was set aside by the Chancery Division on the ground of forgery, and that was the question decided by the verdict:

*Robinson v. Dulcep Singh*, 39 L. T. Rep. N. S. 313; 11 Ch. Div. 798;  
*Atison's case*, 29 L. T. Rep. N. S. 524; L. Rep. 9 Ch. App. 25;

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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PRIESTMAN v. THOMAS.

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*Moss v. Anglo-Egyptian Navigation Company, L. Rep. 1 Ch. App. 108;*  
*Flitters v. Alfrey, 31 L. T. Rep. N. S. 878; L. Rep. 10 C. P. 29;*  
*Needham v. Bremner, 14 L. T. Rep. N. S. 437; L. Rep. 1 C. P. 583.*

The Chancery Division had no jurisdiction to revoke the probate:

*Spencer v. Williams, L. Rep. 2 P. & D. 230;*  
*Parton v. Johnson, 18 L. T. Rep. N. S. 923; L. Rep. 1 P. & D. 549;*  
*Flower v. Lloyd, 37 L. T. Rep. N. S. 419; 6 Ch. Div. 297;*  
*Barrs v. Jackson, 1 Y. & C. Ch. Cas. 535.*

Anderson for the defendants.

Searle for other parties.

*Cur. adv. vult.*

April 1.—Sir J. HANNEN, President, after stating the facts as above, continued:—The main question in the present action is whether the probate already granted of the alleged will of the 21st March 1881 shall be revoked on the ground that it is a forgery. If the defendants Thomas and Gunnell are estopped from denying that it is a forgery, they are not in a position to contend that the probate should not be revoked. Are they so estopped? For the defendants Thomas and Gunnell it was argued that the action tried before Manisty, J. was for a different purpose to that for which this action is brought, and that the finding that the will was a forgery was merely collateral to the issue there raised, and so that no estoppel arises. I am of opinion, however, that the conclusive effect of the verdict and judgment in the action tried before Manisty, J. is not confined to the bare issue whether the agreement of compromise was obtained by fraud, but extends to that which it was necessary in that action to decide, and which was, in fact, decided as the basis of the decision. In the case of *Flitters v. Alfrey* the ruling of Lord Coleridge to this effect was upheld by the present Master of the Rolls and Grove, J. In that case a landlord sued his tenant in the County Court for 29s., alleged to be due for twenty-nine weeks' rent of a cottage at 1s. a week. The County Court judge held that the plaintiff was not entitled to recover, on the ground that the tenancy was a yearly one. The tenant then brought an action for breaking and entering his dwelling-house and evicting him. This had, in fact, been done under a warrant and order for his eviction made by magistrates, under 1 & 2 Vict. c. 74. The jury found, contrary to the finding of the County Court judge, that the holding was a weekly one, but Lord Coleridge held that the matter was concluded by the finding and judgment of the County Court judge, and the plaintiff recovered 5l. damages. This ruling was upheld by the Divisional Court. The cases on the subject are there fully gone into, and none were cited in the argument before me which affect the authority of that decision. In the notes to Smith's Leading Cases (*Duchess of Kingston's case*) it is said it is not necessary that the point on which it is sought to estop should have been the only one in issue on the previous occasion. It is enough if it be one which must have been decided. In the present case it is clear that the jury must have decided that the will of the 21st March 1881 was a forgery, not merely because they did in fact so find, but because it was the specific allegation of fraud on

which they found that the compromise was obtained by the fraud of Thomas. It was further contended for the defendants Thomas and Gunnell that the plaintiff, if entitled to have the probate of the will of the 21st March 1881 revoked, ought to have claimed it in the action in the Chancery Division. But I am of opinion that he could not properly have done so, as the granting or revoking of probates was within the exclusive cognisance of the Court of Probate, and is therefore now assigned to this division.

From this judgment the defendants appealed.

Anderson for the appellants.—The action in the Chancery Division was for the purpose of setting aside the compromise on the ground of fraud; this action is to revoke the probate. The fact of the forgery was only found by the jury as a collateral matter. A judge of the Chancery Division had no power to revoke the probate, and the parties to the two actions are not necessarily the same. The doctrine of estoppel does not therefore apply. He referred to

*King v. Rhodes, 1 Str. 670;*  
*Cutto v. Gilbert, 9 Moo. P. C. C. 132;*  
*Pianey v. Hunt, 6 Ch. Div. 96;*  
*Allen v. Macpherson, 1 H. L. C. 191, 216;*  
*Flitters v. Alfrey, 31 L. T. Rep. N. S. 878; L. Rep. 10 C. P. 29;*  
*Melhuish v. Milton, 35 L. T. Rep. N. S. 82; 3 Ch. Div. 27;*  
*Reg. v. Hutchins, 44 L. T. Rep. N. S. 364; 6 Q. B. Div. 300;*  
*Hunter v. Stewart, 5 L. T. Rep. N. S. 471; 31 L. J. 346, Ch.;*  
*Nelson v. Couch, 8 L. T. Rep. N. S. 577; 15 C. B. N. S. 99;*  
*Duchess of Kingston's case, Sm. L. C. 8th edit. vol. 2, 784, 808;*  
*Marriott v. Marriott, 1 Str. 666.*

C. Russell, Q.C. and Middleton, for the plaintiff, were not called on.

BAGGALLAY, L.J.—This is an appeal from a decision of the President of the Probate Division under circumstances which are somewhat singular. The present defendants put forth a will dated in March 1881, as to which it was alleged by the plaintiff that it had been obtained by undue influence. An action in the Probate Division was commenced with reference to it, but a compromise was entered into by all the parties interested under the will, and the will was admitted to probate. It was subsequently discovered that the will was not simply obtained improperly, but that it was a forgery, and an action in the Chancery Division was commenced to set aside the compromise. That action was tried by a judge of the Queen's Bench Division before a jury, and a verdict taken that the compromise was obtained by the fraud of Thomas, that the will was a forgery, and that Thomas was a party or privy to the forgery. A few days afterwards the judge of the Chancery Division declared the compromise to be invalid, and set it aside, no application having been made for a new trial. Now a fresh action has been brought in the Probate Division for the purpose of propounding a subsequent will, and revoking the probate of the will of March 1881, and the plaintiff seeks that the defendants Thomas and Gunnell may be declared to be estopped from denying the forgery. The question of estoppel has been set down to be argued under Order XXV., which provides a method of deciding

points of law which were formerly heard on demurrer. The only question, therefore, before the president was whether the two defendants were estopped from denying the will to be a forgery, and he was of opinion that they were estopped. The counsel for the defendants has addressed an able argument to the court, and has referred to numerous authorities; but I am of opinion that the president came to a right conclusion. No doubt the action in the Chancery Division and this action were brought for different purposes; it was not the object of the action in the Chancery Division to set aside the probate which had been granted by the Probate Division, but the court was asked to set aside the compromise, and it could not do that except upon the ground that the will was a forgery. That fact was necessary to be determined before the court could give its judgment. I agree with what the president says in his judgment: "The conclusive effect of the verdict and judgment in the action tried before Manisty, J., is not confined to the bare issue whether the agreement of compromise was obtained by fraud, but extends to that which it was necessary in that action to decide, and which was in fact decided as the basis of the decision." It was argued that an estoppel can only arise as to a matter which can be properly dealt with by the court, and that the question whether the will was valid was not one which could be properly dealt with by the Chancery Division. There may be cases in which that argument might prevail, but it cannot apply to a case like the present, where all the parties interested in the question whether the will was valid were parties to the action in the Chancery Division, and were bound by the judgment in that action. If the parties had been different it might have led to a different conclusion. But that is not the case here. The appeal must be dismissed.

CORRON, L.J.—The question in this case is whether the defendants are estopped from denying that the will is a forgery. I am of opinion that this case does not come within the rule that parties are not estopped by a decision which is only incidentally involved in the judgment in a previous action. The forgery was the question in issue in the Chancery action. The object for which it was brought was to declare that the will was a forgery, and that Thomas was a party or privy to the forgery, and that with knowledge of that fact he entered into the compromise. The jury found that it was so, and the court gave judgment in accordance with their verdict, and gave consequential relief and set aside the compromise on that very ground. But it is contended that the action in the Chancery Division was brought for a different object to that sought by the present action, and that the purpose for which the present action is brought is not within the jurisdiction of the Chancery Division. That is so, but the action was between the same parties, and when the very point has been decided in one action it would be wrong to allow the same parties to litigate it over again in a different court, when all parties interested in contending that the will was a forgery were present before the court in the former action. Although the Chancery Division has no jurisdiction to revoke the probate of the will, it has full jurisdiction to decide that it was a forgery. It is not necessary

to go into the authorities on this subject. It is clear to me that the question of forgery was not decided incidentally. The case of *Reg. v. Hutchins* (44 L. T. Rep. N. S. 364; 6 Q. B. Div. 300) explains the meaning of the term "incidentally arising." In that case it was held that the magistrates had no power to decide whether a certain street was a highway against parties who were not before them, although they could decide it between the overseers and the parties applying. As against absent parties, the point only arose incidentally. That seems to have been the principal reason given in the judgment. Lord Selborne says: "The justices, before whom the complaint of the urban authority came on the 7th May 1874 had no jurisdiction to adjudicate directly or immediately between those parties (or between any parties whatever) on the question whether Mill-street was or was not a highway repairable by the inhabitants of Bradford at large. That was at the most a matter 'incidentally cognisable' by them. No conclusion which they might form upon it could establish (in the one case) or disprove (in the other) any such liability as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money then claimed as the defendant's statutable quota of certain expenses at that time incurred by the urban authority." But here whether the will was a forgery was the real question which was to be decided as against all parties to the action. It was not, therefore, a question arising incidentally. I am of opinion that the president was right in holding that the defendants were estopped.

LINDLEY, L.J.—I am of the same opinion. It appears to me that the principle established in the *Duchess of Kingston's case* (Sm. L. C. 8th edit. vol. 2, p. 784) is clear enough, but the difficulty lies in applying it to each particular case. Let us look at the facts in this case. The relief sought in the action in the Chancery Division depended entirely upon the question whether the will was a forgery. That was the real issue in the action; it did not arise merely incidentally, and, when we apply the principle of the *Duchess of Kingston's case*, it seems clear that it is within that authority. Mr. Anderson contended that, inasmuch as a judge of the Chancery Division could not have decided that the will ought not to be admitted to probate, the defendants are not estopped in this action. But the action in the Chancery Division had to be decided on the ground that the will was, or that it was not, a forgery. Therefore, that was the issue in the action. That being so, I think the defendants are estopped from now denying that it was a forgery.

Solicitors for plaintiff, *Torr, Janeway, Gribble, and Oddie*.

Solicitors for defendants, *Bell, Steward, and Steward*.

[Ct. of App.]

HUTCHESON v. EATON.

[Ct. of App.]

June 27 and Aug. 8, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

HUTCHESON v. EATON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Sale of goods—Signature by broker—Arbitration clause—Dispute arising on contract—Jurisdiction of arbitrator—Question as to existence of custom.*

Defendants sold a cargo to plaintiffs by a contract signed by defendants in their own name with the addition of the word "brokers." Plaintiffs knew that defendants were acting for a principal, but did not know who the principal was until afterwards. The contract provided for the settlement by arbitration of "any dispute arising on this contract." Plaintiffs having made a claim in respect of short delivery and inferior quality, defendants procured the appointment of arbitrators, who awarded that, in consequence of a custom, which they found to exist, defendants were not liable. Plaintiffs brought an action, and the jury found that the alleged custom did not exist.

Held, by Brett, M.R. and Bowen, L.J. (Fry, L.J. dissenting), that the dispute as to the existence of the custom was not a dispute arising on the contract within the meaning of the arbitration clause, and therefore the arbitrators had exceeded their jurisdiction, and plaintiffs were not bound by the award, and were entitled to recover.

Judgment of Hawkins, J. reversed.

THIS was an action brought to recover a sum of 293l. 17s. 8d. alleged to be due from the defendants to the plaintiffs in respect of short delivery and inferiority in the quality of a cargo of cotton seed cake, which the plaintiffs had bought from the defendants, and for which the plaintiffs had paid.

The facts, so far as they are material to the point of law decided by the Court of Appeal, were as follows:

The plaintiffs were commission merchants in Aberdeen, and the defendants were general brokers and merchants in Liverpool. On the 5th Feb. 1883 the defendants forwarded to the plaintiffs a written contract in the following terms:

Peter's-buildings, Liverpool, 5th Feb. 1883.—Messrs. Hutcheson and Co., Aberdeen.—We have this day sold to you the following goods: The cargo of five hundred (500) tons more or less (in bags) American decorticated cotton seed cake, "Hanauer Oil Works" brand, or equal thereto, at 6d. 12s. 6d. per ton, now shipped or shipping per *Mentor* at New Orleans. Quality guaranteed, fair average of this season's shipment. To be invoiced at shipped weights on cost, freight, and insurance terms to Aberdeen direct. Tare two pounds per bag. Out turn guaranteed within one per cent. of weight invoiced. Vessel lost, contract void. Payment to be made by cash against documents on presentation, or on arrival of vessel (at seller's option), less rebate of interest at usual rate for unexpired portion of 72 days from date of last bill of lading. Should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration here in accordance with the printed rules of the Liverpool General Brokers' Association. Brokerage per cent.—Yours respectfully, FRANCIS J. EATON and SON, Brokers.

The defendants were acting for a firm at Leith, and the plaintiffs, although aware that the defen-

dants were acting for other persons, did not know who the defendants' principals were until the 22nd March. The plaintiffs refused to recognise any other persons except the defendants as parties to the contract.

The defendants, relying upon the arbitration clause in the above contract, applied for and obtained from the Liverpool General Brokers' Association the appointment of two arbitrators. The plaintiffs declined to attend the arbitration.

The arbitrators awarded that the defendants were not responsible as principals for any damages which might be recoverable by the plaintiffs against the sellers under the contract. The award was based on a custom, which the arbitrators found to exist at Liverpool, to the effect that if brokers disclosed the names of their principals the brokers were not liable on the contract.

At the trial before Hawkins, J. the jury found that the alleged custom did not exist.

Judgment was given for the defendants, and the plaintiffs appealed.

*Bigbam, Q.C. and Barnes* for the plaintiffs.—The defendants are bound by their signature to the contract. The word "brokers" is merely description, and signing as this contract is signed is different from signing "as brokers." The arbitrators had no jurisdiction to decide that the alleged custom existed, for their authority was confined to "any dispute arising on this contract." They have in fact sought to give themselves jurisdiction by finding that a custom exists, which is clearly shown by the verdict of the jury to have no existence.

*R. Henn Collins, Q.C. and French* for the defendants.—The word "brokers" coming after the signature must have some meaning. It shows that the defendants were contracting as agents, and did not intend to make themselves liable as principals. The arbitrators had jurisdiction to find as they did. The question whether the contract was made subject to the custom was a dispute arising on the contract within the meaning of the arbitration clause, and in order to settle this question it was necessary first to ascertain whether the custom existed or not. This being a question for the arbitrators, the finding of the jury is immaterial, and the plaintiffs are bound by the award.

*Barnes* replied.

The following cases were cited:

*Southwell v. Bowditch*, 35 L. T. Rep. N. S. 196; 1 C. P. Div. 374;  
*Gadd v. Houghton*, 35 L. T. Rep. N. S. 222; 1 Ex. Div. 357;  
*Fleet v. Merton*, 26 L. T. Rep. N. S. 18; L. Rep. 7 Q. B. 126;  
*Griesell v. Bristolow*, 19 L. T. Rep. N. S. 390; L. Rep. 4 C. P. 36;  
*Masted v. Paine*, 24 L. T. Rep. N. S. 149; L. Rep. 6 Ex. 132.

*Our. adr. null.*

*Friday, Aug. 8.*—The following judgments were delivered:—

BRETT, M.R.—This case was tried before Hawkins, J., who gave judgment for the defendants. The action was brought for an alleged breach of a contract, relating to the purchase and sale of certain produce. The defendants had, in fact, made the contract, but they were in reality brokers, and they signed in this form,

(a) Reported by F. B. HUTCHINS, Esq., Barrister-at-Law.

"Francis J. Eaton and Son, brokers." The first point taken on behalf of the defendants was that upon the contract, having signed as brokers, they were not personally liable. But, as I understand the authorities, where a contract is drawn up in this way, and is signed in the name of the persons making it, with the word "brokers" added, and the contract is not signed "as brokers," they are personally bound, for it is held to be a signature on their own behalf, and the word "brokers" is only a description. At the trial the defendants set up the defence that, although they had signed the document so as to make themselves on the face of it personally liable, yet there was a custom of the trade applicable to such a contract as this, that if they disclosed the names of their principals they were no longer liable. I do not propose to enter into the question whether that evidence was admissible or not. The jury found against the alleged custom, which settles the matter, even if it were a question for the jury. But then the defendants set up an award made by arbitrators, to the effect that they were not personally liable. It was stated, and it was not denied, that the arbitrators had not entered upon any inquiry as to the quality of the goods, or as to whether the goods were equal to the contract. They had not decided any point of that kind; but either upon the evidence produced before them, or upon their own knowledge—it does not appear which—they came to the conclusion that the custom existed, which the jury on the contrary found did not exist. The arbitrators decided upon the custom, and upon that alone, that the defendants were not liable. Now, the arbitration took place under what is called the arbitration clause in the contract, which is to the effect that if any of the goods should turn out not to be equal to the quality specified, they were to be taken at an allowance, which allowance, together with any dispute arising on the contract, was to be settled by arbitration. It was contended on the one side that those words gave the arbitrators jurisdiction and authority to decide the question as to whether the alleged custom was part of the contract. Upon the other side it was urged that the arbitrators could not enter upon that question, that the question of the existence of the custom really went to their jurisdiction, that it was not a question whether the terms of the contract included any particular quality of goods, but whether something which was not expressed in the contract could be added to it; in fact, whether a custom could be added to the contract. Now, the question is, whether they had any jurisdiction to inquire into the question of the existence of that custom. Can a question, whether a custom is to be added to a written contract, and thus to control the meaning of the contract, be held to be "a dispute arising upon this contract?" It seems to me that it cannot. Then if it cannot, what have the arbitrators done? They have assumed to decide, and have decided that which they had no authority to decide, and they have wholly refused to consider, or to decide, that which was within their jurisdiction. If this be a true proposition, it seems to me that they have decided without jurisdiction, and therefore, as they have declined to exercise the only jurisdiction which they had, the award cannot be supported on any ground, and is a mere nullity as between the parties in this case.

It is not like a case where an arbitrator has assumed to decide something that is within his jurisdiction, and is alleged to have decided it wrongly; nor is it a case where an arbitrator has assumed to decide something within his jurisdiction, and is alleged to have misconducted himself with reference to it. I apprehend that in such cases as those the award would be binding, and that, if the plaintiffs objected to the award on either of the grounds which I have mentioned, they must have moved to set it aside, and could not dispute its validity when it was relied upon as a defence to an action. But in a case where an arbitrator has assumed to decide something over which he has no jurisdiction, and has absolutely declined to decide the only thing over which he has jurisdiction, it seems to me that the award is an absolute nullity, and cannot be successfully relied upon as a defence to an action. It seems to me, therefore, that the question with which the arbitrators have dealt has not been any question as to the application of the written contract as to the goods delivered in alleged pursuance of the contract: they have not dealt with the contract, as contained in the paper on which it was written, but they have dealt with another matter, which other matter was not a "dispute arising out of the contract," but a dispute as to what the contract was. The only matter which the arbitrators had authority to decide was any question arising on the contract itself, but they have taken on themselves to decide what the contract was, in order to give themselves jurisdiction to decide as to the rights of the parties. As far as I am aware, no case has ever decided that an arbitrator who has authority to decide a dispute arising on such a contract as this, which is specified and described, has also authority to say what the contract is, in the sense that he has a right to add something to the contract which is not expressed in it. I think he cannot do that. What the arbitrators have done in the present case is by their own decision to attempt to give themselves a jurisdiction which otherwise they had not. I think there is no evidence here of any such custom as set up by the defendants, and therefore that, upon that issue which the jury have found for the plaintiffs, the plaintiffs are entitled to succeed.

BOWEN, L.J.—I am of the same opinion. As to the point whether upon such a contract as this, signed by parties describing themselves as brokers, the persons signing are bound as principals, I have nothing to add to what has been said by the Master of the Rolls. But the defendants have set up this curious defence, that there was an arbitration clause in this commercial contract, and that there has been an arbitration and an award under that clause. There certainly has been a professed arbitration, and there has also been an apparent award, which decided in favour of the defendants as to the question of liability; upon this ground, that there was a custom to the effect that, if the defendants who bound themselves by the contract disclosed the names of their principals, there was to be a novation, so to speak, of the contract, whereby the defendants were to be relieved from liability, and there was to be a substitution of others as principal debtors. The arbitrators decided that such a custom as I have mentioned existed, and that the custom was to be read into the contract, and therefore they



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discharged the defendants from all claim. It is contended on behalf of the plaintiffs that the arbitrators had no jurisdiction to decide that question. The question is whether a dispute as to the existence of the custom is a dispute "arising on the contract." First of all, be it observed, no such custom exists at all; that has been decided by the jury. What, therefore, the defendants must maintain is this, that the arbitrators had power to read into the contract a non-existing custom, on the ground that they thought it did exist, and then on the faith of that supposed custom to discharge the defendants from liability under the contract. Is that a decision of any dispute or question "arising on the contract?" Now in dealing with the arbitration clause and interpreting it in as liberal a sense as we can, bearing in mind at the same time that it is a clause which seeks to oust the jurisdiction of the courts of law, it is to be observed that the dispute arising on the contract "is mentioned *uno flatu* with other specific matters of dispute, which do clearly arise on the contract. I am not quite sure whether or not the character of the dispute really intended to be referred was not a dispute as to the performance or the carrying out of the contract, and not such a dispute as would operate to put an end to the contract altogether. But the parties to a dispute may (and commercial men often do) refer questions of construction of documents, which are matters of law and not matters of fact, so I will assume that the interpretation of this clause would not exclude disputes as to the interpretation of the contract; nevertheless the question arises whether this is a dispute on the interpretation of the contract in such a sense as to be the subject of the arbitration clause. It might be reasonable to say that it was such a dispute, if there were an existing custom in the market, and the question were whether that custom should be incorporated into the contract or not. But how can it be said that this clause is to be interpreted so as to read into the contract a wholly non-existent custom? If the arbitrators might decide that, I do not know why they might not read anything into a contract, in order to give themselves jurisdiction, and by that means they might decide anything on the ground that there was a custom which governed the matter, although in fact there was none. The question comes to this, whether an arbitrator can find a custom which does not exist, in order to give himself jurisdiction, and to discharge parties who have entered into the contract on the assumption that no such custom is to be read into it. This is not a question as to the construction of the contract, but a question of altering the contract and even construing it after it has been violently altered. On these grounds, although I feel great reluctance to interfere with the decision of Hawkins, J., I cannot help coming to the conclusion that the defendants here cannot successfully set up this award as a defence.

FRY, L.J.—On the material question in this case I have the misfortune to differ from my learned brethren. The defendants allege that the contract in question was affected by a custom, and which was, that if a broker, acting as broker but contracting as principal, discloses the name of the principal before the time of performance arrives, the broker is relieved from personal liability on the contract, and the real

principal alone becomes liable. Such a custom has been found by the arbitrators to exist, and to have furnished a ground of discharge for the defendants. The jury have negatived the existence of the custom; but I do not feel myself at liberty to regard their decision as overruling the decision of the arbitrators, because, in the view which I take, the arbitrators were the persons chosen by the contracting parties to decide that question; and therefore it appears to me, with great deference, that to approach that question by asserting that the custom did not exist, and therefore the arbitrators could have no jurisdiction, is to beg the question, because, if the arbitrators had authority, the matter was for them and not for the jury. Therefore I think the question must be asked in this manner: Is a dispute with regard to a custom such as is here alleged a "dispute arising upon this contract" within the meaning of the words of the contract? Now it appears to me that, before the arbitrators could determine a dispute upon the contract, they must be able to determine what the contract is, for otherwise it would be impossible to determine the rights of the parties on the contract. Therefore, in my judgment, the first matter for decision by the arbitrators must be, what is the contract. In every case in which the contract is coloured by custom, it must be necessary for the arbitrator to determine what the custom is which so affects the contract, and therefore it must be competent for him, whenever the dispute arises upon the contract, to ascertain the true interpretation of the contract, having regard to all the surrounding circumstances, and having regard to all customs, if any, which affect the construction of the contract. In the present case the custom set up does affect the terms of the contract. It appears to me that the dispute arises upon the contract as affected by the custom, and the question is whether that is a "dispute arising upon the contract?" To my mind, the words "dispute arising upon the contract" plainly embrace such a dispute as has arisen in the present case, namely a dispute as to whether the defendants are or are not, under existing circumstances, liable upon the contract. It has been suggested that those words may be limited in application by reason of the context, and that because they occur together with the word "allowance," they must be taken as *ejusdem generis* with that word. Now, I think that that doctrine of cutting down the plain meaning of words because they happen to occur in connection with others is a doctrine to which recourse should not be had too freely. In the present case it does not appear to me that the doctrine applies at all. On the contrary, I rather think that by the terms which follow the word "allowances" in the contract, it was intended to indicate that disputes of a much wider description than those which had already been mentioned were to be referred to arbitration. I need not say that, differing as I do from the Master of the Rolls and Bowen, L.J., I have a strong conviction that I must be wrong, but at the same time, as my opinion is that which I have expressed, I consider it my duty to express that difference of opinion.

*Appeal allowed, judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Field, Roscoe, and Co.*, for *Bateson, Bright, and Warr*, Liverpool.  
Solicitor for the defendants, *W. W. Wynne*, for *H. Forshaw and Hawkins*, Liverpool.

July 25 and 28, 1884.

(Before BRETT, M.R., BOWEN and FRY, L.JJ.)

## THE PONTIDA. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Bottomry bond—Authority of master—Owners of cargo—Necessity—Registrar and merchants.*

*The authority of a master to raise money on bottomry is limited as against the owners of cargo to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced by a person who is not the ship's agent, and has no interest in the repairs effected on the ship, and honestly believes from inquiries made that the money is necessary, he cannot recover as against the cargo owner anything in respect of items other than those which are in fact necessary. Fry, L.J., dubitante.*

*The registrar and merchants have a discretionary power to reduce the items claimed under a bottomry bond, should they deem them unnecessary or exorbitant, and the court will not interfere with this discretion unless it be shown that the registrar and merchants have exercised it on an erroneous principle.*

*The Prince of Saxe-Coburg (3 Moo. P. C. 1) explained.*

THIS was an appeal from a decision of Butt, J. in a bottomry action instituted by the Comptoir d'Escompte de Paris, as holders of a bottomry bond given at St. Michael on the Italian ship *Pontida*, her cargo and freight.

The ship *Pontida*, being at the island of St. Michael, laden with a cargo of wheat, and her master being without funds or credit, a bottomry bond was executed between the master and Messrs. Bensande and Co., bankers, who tendered in answer to advertisements. These bankers were not the ship's agents.

The bond was entered into on the 2nd April 1883, before the Italian consul, with the formalities required by Italian law, the sum borrowed on the bond being 91,375-76 francs, which, together with a bottomry premium of 20 per cent., amounted in all to 109,650-91 francs.

On the 19th June 1883 judgment was pronounced for the validity of the bond against the *Pontida* and her freight, and subsequently the owners of cargo admitted the validity of the bond as regards the cargo, subject to a reference to the registrar and merchants. The amount claimed by the bondholders at the agreed rate of exchange was 4386l. 0s. 8d.

The claim came before the registrar and merchants on the 12th July 1883, and included repairs effected under the recommendation of the surveyors at St. Michael, 5 per cent. commission in respect of the ship's agent's charges upon disbursements, 2½ per cent. commission on the value of the cargo discharged, and the bottomry premium of 20 per cent. on the total amount advanced.

On the 21st July 1883 the registrar made his report, and found that the sum of 3685l. 3s. 4d. was due to the plaintiffs upon the bottomry bond, reduction having been made in the amount of a bill for new metal, felt, and nails; in the com-

missions of 5 per cent. and 2½ per cent. by the ship's agent; and in the bottomry premium of 20 per cent.

On the 19th Nov. 1883 the plaintiffs filed a petition in objection to the registrar's report. The case came on for hearing upon the petition on the 1st April before Butt, J., and on the 29th April the learned judge upheld the report, with costs.

From this decision the plaintiffs now appealed. The further facts of the case, and the full arguments, appear in the report of the case below (51 L. T. Rep. N. S. 268; 5 Asp. Mar. Law Cas. 284; 9 P. Div. 102).

July 25.—Dr. Phillimore and J. P. Aspinall for the appellants.—It having been proved that the lender made reasonable inquiries as to the necessity of the repairs, and that the lender was not the ship's agent, the registrar has no power to reduce the bondholder's claim. It is to be remembered that there is no imputation of fraud, and that the bond was entered into before the Italian consul with all due formalities. [BRETT, M.R.—Has the duty of the lender to make inquiries anything to do with it? Is it not entirely a question of the authority of the master to bind the owners of ship and cargo?] The fact that the lender has made inquiries seems to have influenced the courts in previous decisions. [BRETT, M.R.—What authority has the master to incur expenses which are not necessary?] By reason of the initial necessity of something being requisite to enable the ship to carry the cargo to its port of destination, the master is held out as the agent of the ship and the cargo owners for carrying out that purpose. If he, being so held out, incurs more expense than is afterwards decided to be necessary, it seems unreasonable that an innocent person who *bonâ fide* lends money on the faith of the agency, should be made to suffer in consequence of the wrongful acts of the agent, and that the agent's principals should escape all liability. The following authorities support the appellants' contention:

*The Prince of Saxe-Coburg*, 3 Moo. P. C. 1; 3 Hagg. 387;

*The Jane*, 1 Dod. 464, 465;

*The Vibia*, 1 W. Rob. 1, 10;

*The Orelia*, 3 Hagg. 75, 84;

*The Royal Stuart*, 2 Spinks, 260;

*The Cognac*, 2 Hagg. 377;

*The Glenmanna*, Lush. 115.

The following cases were also referred to:

*The Zodiac*, 1 Hagg. 320;

*The Lord Cochrane*, 2 Rob. 336;

*Gunn v. Roberts*, L. Rep. 9 C. P. 331;

*The Rhoderick Dhu*, Swa. 177.

*Barnes* (with him *Bigham*, Q.C.), for the respondents, was not called upon.

BRETT, M.R.—In this case the plaintiff brought a suit in the Admiralty Court against the owners of the *Pontida* and her cargo on a bottomry bond by which the captain at a foreign port made the ship, freight, and cargo liable to bottomry. The defence put forward by the owners of cargo is, that the circumstances with regard to three items, viz., charges for metal and felt supplied to the *Pontida*, agent's commission, and the premium on the bond, did not give the captain authority to bind the owners to a bottomry bond beyond a certain amount, and that that amount has been exceeded. Now, when a suit is brought in the Admiralty Court upon a bottomry bond, the first

(a) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

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question is whether the Court of Admiralty will decree in favour of the bond at all? It will not decree in favour of the bond, against either the shipowner or the owner of cargo, merely from the fact that the bond is in existence. The preliminary inquiry is whether the bottomry bond, as a whole, was entered into under circumstances which gave the captain authority to bind the owners at all. The matter is one of the most extreme importance for the protection of the owners of ships and the owners of cargoes. That which is done is done as a matter of fact, entirely without their authority, and without their having the means of exercising any control whatever. These things are done in a foreign port. A long series of decisions in the Admiralty Court has shown the necessity of looking strictly into these bonds, and it has been stated over and over again that, if there were any laxity whatever exercised in the Admiralty Court as to this power of captains to bind the owner of the ship, or the owner of the cargo, by ordering large repairs in these foreign ports, the shipowner and the owner of cargo would be practically helpless to an indefinite extent. A ship is taken into some small foreign port, which has little or no trade of its own, and if the ship came in and they could do what they liked with it, it would be like the ships that were wrecked on the coasts of England and Scotland in olden days. It would be a subject of thankfulness in every church in the place. It has been seen and known that there is little or no protection for the shipowner, or for the owner of cargo. People, one cannot say properly, but, as one knows, not unnaturally, are very likely (I am not saying this of every foreign port) to combine together to get as much out of the ship as they can in what they would say is all in the fair way of trade. They say, "Let us charge the highest prices we can; let us refit this ship from top to bottom, and the more business we do upon the ship, and the better prices we get, the more profit we will make." And therefore the court has found that, if it rested merely upon the survey of a surveyor in one of these small ports, and upon the evidence of the shipwright who has to do the work, and upon the allowances of the consul who has lived so long with the people of the place that he has got to take their view instead of considering the interests of strangers—if the court rested upon such evidence as this it would rest upon a rotten reed, and the owners of ship and cargo, who are not present, would have no protection against being practically robbed. Therefore, with regard to this preliminary question of whether the court will decree in favour of the bond at all, the court always insists upon looking strictly into the matter, and does not uphold the validity of the bond unless it is shown that the bond was entered into in good faith. Hence, when a person comes into court and says, "I have advanced money on a bottomry bond," the first question which is asked in the Admiralty Court is, "Have you done that in good faith?" Upon such a question as that the question of whether he has made any inquiry at all is very material, because, if the things supplied are proved to be absolutely necessary, there is very little more to be said; but upon the assumption that the amount of the bottomry bond is large, the very first question which presents itself as to the good faith of the lender is this: "How came

you to lend such a large sum on bottomry on this ship without making any inquiry at all? That is evidence (if you have made none) of want of good faith, and if I find that the bottomry bond"—the Court of Admiralty always says—"is an extravagant bond in fact, and if I find that you, the lender on bottomry, have made no inquiries at all, I shall decree against you, as judge of fact, that you have not entered into this bottomry bond in good faith, and I will not declare for the bottomry bond at all. I set it aside absolutely and altogether." There is then no need for a reference to the registrar and merchants, for the bottomry bond is gone. Then what is the law which authorises the captain to enter into a bottomry bond at all? I confess that, amongst the many novel arguments which I hear in this court, I have been astonished to hear of this, to me, new doctrine, that, assuming the things to be in fact unnecessary, the mere fact that the lender on bottomry has made reasonable inquiries as to whether they are necessary or not, the bond is to be upheld for its whole amount, although in fact nothing in it was necessary at all. Let us illustrate the case in this way: Suppose that all the things done to the ship, such as carpentering, &c., are as a matter of fact necessary in order that the ship may prosecute her voyage, and suppose that the price of the materials supplied and repairs effected to have been reasonable, and suppose there was an agent of the shipowner in the port whose duty it was to pay for these things on behalf of the owners; that is, to pay the prices without any bottomry commission at all. But suppose that notwithstanding that the captain has entered into a bottomry bond. That is not an imaginary case. It is in the books and has occurred: (*Gunn v. Roberts*, 2 Asp. Mar. Law Cas. 250; 30 L. T. Rep. N. S. 424; L. Rep. 9 C. P. 331.) In that case it was declared by the court that the bottomry bond could not be enforced; the declaration was against the bottomry bond, and it was held to be wholly void. Why? Because, although the things were necessary as a matter of carpentering to carry the ship to the end of her voyage, yet they were not necessary in the whole sense of the word, because there was an agent of the shipowner in the port who would have advanced the money on other terms than bottomry, and whose duty it was to do so. Therefore, although the bottomry lender had lent his money, he could not recover any of it as upon a bottomry bond. Now supposing, in this case of *Gunn v. Roberts* (*ubi sup.*), it had been asserted, "This is quite true, but I did not know there was an agent of the ship in the port. How should I know there was an agent? I went about amongst my friends and asked them, 'Do you know whether there is an agent?' and they said, 'No, there is no agent that I know of.'" Supposing he had then gone to the captain and the captain had said, "No, there is not an agent." How came it that in the case referred to no allusion is made to this theory of "reasonable inquiries?" No such doctrine was even broached, and the bottomry bond was declared against upon the ground that there was no authority in the captain to enter into it under the circumstances. Now, let us take this case. Supposing a ship is in one of these foreign ports, and she requires a certain amount of sheathing or coppering, and other repairs, to

take her to the end of the voyage, but the captain thinks it will be for the benefit of his owners that she should be repaired not only sufficiently to carry her to the end of the voyage, but also to re-class her, and make her as good as she was before; that is, about five times more repairs and more coppering and sheathing than would be necessary to take her to the end of the voyage. Supposing the surveyors in terms say that those are the things which are required to take her to England, or to the end of her voyage. The man lends his money on the bottomry bond on the faith of that. According to the argument here, if he does not suspect the honesty of the people, it would be said, "There are reasonable inquiries; he has reasonable grounds; there are the surveys; there is the consul's acquiescence in the surveys." There is not a case in the books in which, under such circumstances, where it has been shown that the repairs done were not merely the repairs necessary for the completion of the voyage, but were repairs necessary to re-class the ship, the bottomry bond has been allowed to the full extent. In a case in which unnecessary repairs were done two questions would arise: First, whether the court would declare for the bond at all. On that point the court would inquire whether the lender on bottomry had made the advance *bonâ fide*. If he knew that the repairs which were done were unnecessary, and that there was an attempt to impose upon the owners (in which case the question of reasonable inquiries comes in so as to enable us to see whether he has entered into the bottomry bond *bonâ fide* or whether he has been a party in an attempt to impose upon the owners), although part of his money had been spent in necessary repairs, the whole bond is declared against. But supposing he has not, and has *bonâ fide* made the advances, then the bond would be declared for; but then it would go to the registrar and merchants to say how much of these repairs were necessary to take this ship to the end of her voyage. The bond being declared for as an honest bond, you have then to consider how much was authorised by the position of the captain, that is, how much was necessary. Therefore, when a bottomry bond is declared for as an honest bond, the lenders have to go into this, that it is a good bond for each and every item of it which is necessary, and it is a bad bond for each and every item that was beyond necessity. It is therefore for the registrar and merchants, after the bond has been declared to be a valid bond as a whole, to inquire as to each item in it, whether the captain had authority to go to the extent of the particular item. That depends upon whether the item was necessary or not, or how much of it was necessary. Each item that was necessary is allowed, and each item that was wholly unnecessary is struck out. Each item that goes beyond necessity is cut down. That is the duty of the registrar and merchants after the bond is declared for. There is, I venture to say, no trace in the books of anything ever having been referred to the registrar and merchants with regard to a bottomry bond except the questions I have now stated, which are referred to them not to enable the Admiralty Court to decree whether the bottomry bond is good or not as a whole, but after the court has declared it is good in order to see how much of it can be allowed. If the "reasonable inquiries" were to go to the whole

amount of the bond, it would be a matter to be inquired into by the court in order to see whether it would decree for the validity of the bond or not. If the reasonable inquiry would do as to any particular item it might be that, after having decreed for the bond, the question whether reasonable inquiries were made as to one particular item, if it would be a matter of inquiry all, might be for the registrar and merchants as to that point: that I will not say. It is enough for me to say that the question of reasonable inquiries has never been a test at all of what amount was to be allowed, but only whether the bond was to be allowed, or declared against. With great deference, the language of the Privy Council in the case which has been cited, and which has raised some difficulty, it is not to my mind so accurate as the learned Lords would have used if they had been dissecting the case. In my opinion that language was meant to apply to that part of the case which I have endeavoured to explain and to enunciate, namely, whether the bond was a *bonâ fide* bond and was to be allowed at all, or not, because, as I say, even assuming that part of the expenses is for that which is absolutely necessary, yet, if the bond is an extravagant bond, and has been entered into by the lender either with gross carelessness as to the necessities of the ship, or if he has been a party to an attempt to impose upon the shipowner, there is a want of good faith which will at once put an end to the bond, and there would be nothing to go to the registrar and merchants at all. The whole principle is founded upon the fundamental doctrine that by the law of England the master of a ship, when away from his owners, and in a foreign port, has no authority to bind the shipowners to anything except in case of necessity. With regard to the cargo owner the case is still stronger, if possible, because the master is never the agent of the cargo owner. When he takes the cargo on board he does not take them on board as agent for the cargo owner. I should have thought the whole thing so simple that no one could have even argued upon it. The master takes the goods on board as agent of the shipowner, and not as agent of the cargo owner. Nothing can make him agent of the cargo owner from beginning to end, except a necessity arising during the voyage. Therefore to say that without that necessity existing he has authority to bind the cargo owner whose agent he is not because the person who lends him money has made reasonable inquiries whether the thing were necessary or not, is to cut away the whole ground upon which he can bind the cargo owner at all. To say that, although he was not the agent of the cargo owner, although necessity has not put him into the position of being agent, yet without being his agent at all he can bind him through the result of reasonable inquiries, seems to me to be a contradiction of what has always been held in this country. Therefore I myself come to the conclusion that no such doctrine as urged by Dr. Phillimore has ever been known or countenanced by the law of England, either in the Admiralty Court or elsewhere. Having regard to a doubt which exists in the mind of my learned brother Fry, in which doubt I do not myself participate, I also think that this appeal must fail, on the ground that there is no evidence of any reasonable inquiries having been made. However, I do not base my decision upon

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that ground, but upon the greater ground that the master had no authority with regard to these items to bind the owners of cargo beyond what is clearly necessary. The necessity with regard to the items in dispute has been disproved at the reference. As to the decision of the registrar and merchants as to what was necessary or not, the court has never thought of interfering with that decision. The court has always said that with regard to the items found by the registrar and merchants it would only interfere with that finding upon a question of principle, and not upon a question of detail, because this the court is wholly unable to do. The registrar and merchants have found, with regard to these items, that they were not necessary, and therefore I can see no reason to interfere. The commissions—that is, the mercantile commissions—which are alleged to have been paid, whether they were necessary or not, or whether the amount was that which was reasonably necessary, is for the registrar and merchants just as much as the other items. And also, with regard to the bottomry commission, that is a thing the propriety of which is known to the registrar and merchants, and the court has no means of rectifying as to each and every one of those items. They are the ordinary points of submission to the registrar and merchants which they are wholly competent to deal with, and, as I have said, the court will never overrule them except upon a point of principle. The question brought before us has been one of principle, and that is the question which has been so strenuously argued, and that question again I say is this: Assuming that there was no necessity to the extent to which these expenses have been incurred, nevertheless has the captain authority to bind the cargo owner to their full extent, because the merchant who lends the money made “reasonable inquiries?” I say no such law is known in England as will give the captain authority upon the faith of such facts.

BOWEN, L.J.—I am of the same opinion, and I agree entirely both with the law as propounded by the Master of the Rolls and with the reasoning by which he has come to that conclusion. Shortly expressed the law is this: The master, as it seems to me, is only the agent to bind the cargo owner in the hour of necessity. He derives all his authority from the necessity, and his authority must be measured by that. That is the great principle which seems to me to have run through the commercial law of this country, and to that I find really no exception. But, if this appeal were allowed, that principle would be destroyed, because the measure of the authority of the master to bind the cargo owner is not the necessity of the hour, but what the person lending thinks about the necessity. That is a totally new principle, I believe, not only one not hitherto recognised by the common law, but one which would be most dangerous to business. It is essential that we should keep to the lines, I think, of the common law with regard to the authority of the master, or else the shipowners of this great country would be at the mercy of many a small island and many a small court. The authorities of the common law (I will not go back to them) all bear in that direction. We have been pressed with two or three passages from the judgments in the Privy Council, and of Dr.

Lushington, I think, in which it is suggested that possibly the lender of money to the captain of a ship may be entitled to recover against the principal of the master, if there is an apparent necessity without the real necessity, providing he has made what is called reasonable inquiry. I fail myself to see how, upon principle, what the lender of the money may reasonably think can possibly extend the master's authority, which is, as I said before, derived from the necessity of the case. But then there is the language in the judgment in the case of *The Saxe-Coburg* (*ubi sup.*). It appears to me that the language there used, when read by the light of the explanation which the Master of the Rolls has given, really ceases to be effective for the purpose of the appellants' argument. Whether it is so or not, that language, great as is the authority of the lips from which it came, is inconsistent with the doctrine which I consider is applicable to this case, and I cannot follow it. It seems to me to be language which is contrary to the common law. I wish also to say that, even if the law were as has been propounded by Dr. Phillimore and Mr. Aspinall, viz., that reasonable inquiries would warrant the lender in lending money which was really not wanted for the purpose of the ship continuing her voyage, yet in this case there seems to me to be no evidence of any such inquiry as would justify any honest man in dealing with the credit of others. There seems to me to be an absence of all reasonable inquiry on the part of the lender.

FRY, L.J.—I concur in the conclusion to which my brethren have come in this case, although I have not been able to do so with such freedom from doubt as they have. The doubt in my mind is, whether a tradesman supplying goods to the ship was not a tradesman supplying goods on behalf of the ship, but an independent merchant making a loan. My doubt is due to the two authorities, *The Prince of Saxe-Coburg* and *The Royal Stuart*, both of them judgments of great authority. The rule, as Dr. Lushington lays it down, does seem to me to be more elastic than the rule laid down by the Master of the Rolls and Bowen, L.J., and but for the observations he made in those cases I should be free to agree with the law as now laid down by my learned brothers. The passages to which I refer have created a doubt in my mind as to whether, when the lender is a person who has nothing to do with the supplies made to the ship, and *bonâ fide* makes advances for the purposes of the ship after due inquiry, and believing as the result of his inquiries that the money is to be expended in necessities, whether in such a case as that the bottomry bond is not good for the whole amount. In the present case it is, however, not necessary to decide that point, because, in my judgment, the appellants have not shown that reasonable inquiries were made, nor that the advance was made upon the faith of reasonable inquiries. In the first place, it appears to me that the lender ought to have satisfied himself that the repairs bound to be done were not more than were necessary for the completion of the voyage. I have been unable to find in the documents or in the evidence anything that shows the least inquiry on the part of the lender. In the next place, it appears to me that the lender being, as he is described, a merchant in that port, was primarily bound to make some

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inquiries as to the prices charged for the repairs to the ship. The result I arrive at is this: having regard to the report, if he had made reasonable inquiry he would have found that the copper sheathing was charged at an exorbitant price. Therefore I say, if the doubt which I venture to express is a doubt, it is quite plain that the appellants have not brought themselves within the doubt which I have expressed, and therefore I entirely concur with the decision of the Master of the Rolls and the Lord Justice.

*Appeal dismissed.*

Solicitors for the appellants, *Lowless and Co.*

Solicitors for the respondents, *Ingledeu, Ince, and Colt.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

*Thursday, Dec. 4, 1884.*

(Before KAY, J.)

*Re MILLER AND MILLER; Re FRENCH; LOVE v. HILLS. (a)*

*Practice—Jurisdiction—Bill of costs delivered—Scandalous and impertinent matter—Rules of Court 1883, Order XIX., r. 27; Order XXXVIII., r. 11.*

*An application was made that certain parts of a bill of costs delivered might be expunged for scandal and impertinency.*

*It was contended, in opposition, that the jurisdiction of the court was confined to scandalous and impertinent matter in pleadings and affidavits, and that therefore the application could not be entertained.*

*Held, that every proceeding, of whatever nature, in the Court of Chancery, which was made the vehicle for the introduction of scandalous or irrelevant matter, could be amended or otherwise dealt with under the general jurisdiction of the court.*

*Erskine v. Garthshore (18 Ves. 114) followed.*

MARY REEVES was a claimant against the estate of Robert French for the sum of 425*l.* and interest.

The defendants, who were the executors and trustees of Robert French's will, did not consider her claim a proper one to be allowed; but the claim was eventually referred to one of the official referees, who allowed it.

By an order made in the action, dated the 15th Aug. 1884, it was referred to the taxing master to tax Mary Reeves her proper costs of establishing her claim allowed by the chief clerk's separate certificate, dated the 14th June 1884.

The defendants' solicitors subsequently requested the claimant's solicitors to carry their bill of costs into the taxing office, and requested to be furnished with a copy of such bill of costs.

On the 27th Nov. 1884 the claimant's solicitors furnished a copy of their bill of costs as desired, for which they charged the sum of 3*l.* 6*s.* 8*d.*, being at the rate of 4*d.* per folio for 200 folios, and the defendants' solicitors paid them that sum.

On the 1st Dec. 1884 the defendants' solicitors gave notice of motion that the several parts, par-

ticularised in the schedule to the notice of motion, of the bill of costs of the claimant's solicitors carried in and lodged by them at the taxing office might be expunged for scandal and impertinency; and that the claimant's solicitors might be ordered to pay to the defendants' solicitors the costs occasioned by the introduction of such scandalous and impertinent matter, including the costs of this application.

On the 2nd Dec. 1884 the claimant's solicitors wrote the following letter to the defendants' solicitors:

We were somewhat surprised at receiving the notice of motion, served by you last night, to strike out certain entries in the bill of costs delivered in this matter, and on inquiry into it we find that, by mistake, the clerk who made out the bill of costs inserted a number of solicitor and client items, which were simply entered in the draft costs as a matter of record at the time as against the clients, and never intended to be inserted in the present bill of costs. We, therefore, without recognising your right to adopt the present course, withdraw our bill from taxation, and also the copy supplied to you, and will deliver an amended copy for taxation, and also refund the difference in the charges with regard to the folios. We may also mention that we shall be willing to pay your charges with reference to this matter, to be taxed. Kindly let us hear from you that the motion has been withdrawn, otherwise we shall have to appear on same, and shall read this letter in evidence, and also an affidavit, which will be deposed to by the clerk who made out the bill, saying that it was a mistake the solicitor and client items being inserted in the bill, and that it was without our Mr. Miller's knowledge.

After this letter was written an interview took place, at which a request was made that claimant's solicitors should put in writing a statement that they had not seen or settled the charges before delivery of the bill of costs.

Accordingly, on the same day the claimant's solicitors wrote again as follows:

With reference to our clerk's interview with you today, we beg to say that the bill of costs we have sent you was made out by our clerk, and that we neither saw nor settled the charges before it was delivered to you. Kindly hand our clerk the bill of costs, so that we may amend it, and also the copy delivered to the taxing master. Our Mr. Miller had no personal knowledge in any way of the contents of the bill, and has no wish whatever for anything to be put into it, and it is furthest from his thoughts to do anything offensive.

On the 3rd Dec. 1884 the defendants' solicitors sent the following reply:

We have to acknowledge the receipt of your two letters of yesterday's date. We must also ask you to send an apology . . . for having been the cause of publishing the slanderous statements referring to him, and state that you withdraw them entirely. It is really a very serious matter. We can see you this morning at 11.30 or 12 o'clock to discuss the matter, and endeavour to arrange terms so far as the intended motion is concerned. If Mr. Miller does not propose to come himself, you must be good enough to give your clerk sufficient authority so that he may be able to settle everything (including amount of costs) without referring again to you. We may mention that, as there appeared to be a prospect of settling the matter, we last evening stopped all the work which was in hand for the briefs, so that the expenses might be kept down as low as possible . . . —P.S. Inclosed we send you a form of letter for you to write . . . and we think it meets the case.

On the same day the claimant's solicitors answered as follows:

We are in receipt of your letter, but we think we have done everything in reason to rectify our clerk's error. As we have before fully explained to you, the bill referred to was made out without having been seen by us, and we would not have sanctioned the insertion of the objection-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.



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able items. An unfortunate mistake occurred, and we have done all we can to retrieve it, but when you ask us to apologise to your client, and to acknowledge the falseness of statements which without our knowledge crept into the bill, it is difficult to resist the impression that you are making use of the accident to extort oppressive terms, and we are not disposed to go beyond what we have done. If you consider you are entitled to anything further, we are quite prepared to submit the matter to the judge, and we shall use the correspondence on the hearing.

The motion now came on for hearing.

*H. Fellows*, for the defendants' solicitors, in support of the motion.—The court has power in any proceeding before it to expunge any matter which is scandalous and improper:

*Ex parte Simpson*, 15 Ves. 476;

*Erskine v. Garthshore*, 18 Ves. 114.

*Graham Hastings*, Q.C. and *Dunham*, for the claimant's solicitors, contended that the jurisdiction of the court was confined to scandalous and impertinent matter in pleadings and affidavits, and that therefore the motion must be refused. They cited

*Davis v. Earl of Dysart*, 20 Beav. 405; 1 Jur. N. S. 743;

Rules of Court 1883, Order XIX., r. 27; Order XXXVIII., r. 11.

*Fellows* replied.

*KAY, J.*—This case comes before me in the following way: An application is made to strike out of a bill of costs certain portions which are alleged to be scandalous. The bill of costs is that of a creditor claiming against the estate of a deceased person, and the opponents of the claim are the legal personal representatives of the deceased person. The creditor succeeded in establishing the claim, and it was ordered to be paid, with costs, out of the estate, and then this bill of costs was brought in against the legal personal representatives for taxation. Now, I do not hesitate to say that the bill contains most scandalous statements, and statements most improper in every way; and with reference to the suggestion which was made that the court has not jurisdiction to interfere, I entirely disagree with that suggestion. It is quite true that the rules of court only refer to scandal in pleadings or affidavits. But the jurisdiction of the court, to prevent any proceeding before it from being made the vehicle for scandal, is a jurisdiction which existed very long before these rules of court were made; and I think that the case which has been cited of *Erskine v. Garthshore* (18 Ves. 114) is a most complete authority for showing that every proceeding, of whatever nature, in the Court of Chancery which is made the vehicle of slander can be amended under the general jurisdiction of the court, and any part thereof struck out. I have no doubt whatever that that is within the jurisdiction of the court. In the case of *Erskine v. Garthshore* (*ubi sup.*) a statement was taken in before the master, as it now is every day before the chief clerk, although there is no formal rule for it as there was in the old masters' office. Supposing a statement of that kind were used for the purpose of venting the malice and spite of the person who brought it in, in making charges against another man, I should not hesitate for a moment to order everything of that kind to be struck out, and that the persons who brought it in for a malicious purpose should pay the costs of the application. I have

no doubt whatever that, if a bill of costs were taken into the taxing master's office, and used for some purpose of malice and spite, and scandalous charges were inserted in it, the court has ample jurisdiction to order that scandalous matter to be struck out, and that the person who takes in such bill should have to pay the costs. If this case were brought on before me in that stage, I should not hesitate to order those parts complained of, and which I have marked in the bill, to be struck out as being scandalous and improper, besides being irrelevant, and having nothing to do with the taxation of costs in any way. But what actually took place was this: The notice of motion was given, and then there came from the gentlemen whose names are on the back of the bill a most proper letter. [His Lordship read the first letter of the 2nd Dec. and continued:] Then it seems there was an interview at which a request was made that these gentlemen should put in writing the statement that they had not seen or settled the charges before delivery. Accordingly, on the same day, the same gentlemen wrote again: [His Lordship read the second letter of the 2nd Dec. and continued:] Those, as it seems to me, were very proper letters, and ought at once to have been acceded to. There, so far as this court is concerned, the matter stops. If there was any wrong, this is not the tribunal to deal with it. If the matter was libellous, an action in the Queen's Bench Division would give any remedy that the party might be entitled to in that court. But the other side were not satisfied, and wrote this letter: [His Lordship read the letter of the 3rd Dec. and continued:] Now what have I to do with that? I cannot try a question of libel or slander here in this jurisdiction, and on a motion of this kind. I must say I am very sorry that the apology was not given. It seems to me to be a case in which, so far as it is proper for me to express an opinion, it was quite proper to give an apology, and an answer was given which I am sorry to find written. [His Lordship read the letter of the claimant's solicitors of the 3rd Dec. and continued:] I think that the apology ought to have been given; but that is not the matter before me, and I am not going to determine a question of the kind. What I order is this: On those respondents undertaking at once to withdraw their bill of costs, and to deliver an amended bill, without these statements which have been objected to, I order them to pay the costs of the motion, as between party and party, up to the date of their first letter of the 2nd Dec., and as to the rest I give no costs on either side.

Solicitors: *Ravenscroft, Hills, and Woodward; Miller and Miller.*

Monday, Jan. 19.

(Before *KAY, J.*)

*FURNESS v. DAVIS. (a)*

*Practice — Costs — Disallowances — Solicitor — Administration suit — Delay — Rules of Court 1883, Order LXV., r. 11 — Reference to taxing master to inquire into delay.*

*Where very considerable delay had occurred in proceedings under a decree in an administration*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.



suit which, in the opinion of the court, ought to be accounted for, the Court, in exercise of the powers afforded by Order LXV., r. 11, of the Rules of Court 1883, ordered that, in the taxation of the costs, the matter be referred specially to the taxing master, and he be directed to inquire into the cause of the delay, to make such disallowance of costs in respect thereof as he might think fit, and to call upon the solicitors engaged in the conduct of the case to show cause why that disallowance should not be made.

On the 17th May 1873 a suit was commenced by the plaintiff, John Furness, for the execution of the trusts of the will of Mary Davis and for the administration of her real and personal estate under the direction of the court.

By her will the testatrix had divided her residuary estate among a numerous class of persons. The decree in the suit, directing the usual inquiries to ascertain the parties entitled, was made on the 31st May 1873. The chief clerk's certificate was prepared in chambers in 1881, but it was not completed until the 5th Dec. 1884.

John Messiter was one of the beneficiaries under the will, who, by order, dated the 25th June 1875, had liberty to attend the proceedings under the decree. In July 1876 a summons was taken out by John Messiter, asking to have the conduct of the cause on the ground of the plaintiff's delay. The summons, after being allowed to drop, was, on the 28th Feb. 1879, again brought before the chief clerk, but no order was made upon it, as it was considered that there had been no unnecessary delay.

On the 29th April 1884, as the delay still continued, John Messiter again took out a summons for the conduct of the cause. The summons was adjourned into court, and was ultimately ordered to stand to the hearing of the further consideration of the action.

The delay in the proceedings was attributed by the plaintiff to the difficulty of ascertaining the members of the several classes of beneficiaries, as they were people in very humble circumstances, very illiterate, and belonging principally to the costermonger and itinerant classes, and their pedigree and antecedents had been most difficult to trace. The plaintiff stated that he had issued several advertisements for this purpose.

Robinson, Q.C. and E. Ford in support of the summons.

Graham Hastings, Q.C. and E. Widdrington Byrne for the plaintiff.

Kekewich, Q.C. and H. W. Horne, Beaumont, Walter Renshaw, and Church, appeared for other parties.

KAY, J.—In this case there seems to have been a most enormous delay which I must have accounted for. The bill was filed on the 17th May 1873. The certificate was obtained on the 5th Dec. 1884, more than eleven years afterwards. The judgment, I understand, was also in 1873. Under Order LXV., r. 11, of the Rules of Court 1883, the court or a judge may refer the matter to a taxing officer for inquiry and report, and direct the solicitor in the first place to show cause before such taxing officer. In this case, in directing the taxation of the costs, I shall refer the matter specially to the taxing master, and direct him to inquire into the cause of this

extreme delay, and to make such disallowance of costs, in respect of the delay, as he may think fit, and to call upon the solicitors engaged in the case to show cause why that disallowance should not be made. The registrar will be good enough to understand that I wish an express reference made under the 65th Order, r. 11, and that the taxing master's attention should be called to this great delay. It has been said that no jurisdiction arises unless it is shown that the costs have been needlessly incurred. But the last part of rule 11 provides that: "The court or judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to show cause before such taxing officer, and may also, if they or he think fit, direct or authorise the official solicitor of the Supreme Court to attend and take part in such inquiry." I do not do that, but I direct the solicitor to show cause before the taxing officer why any costs occasioned by this great delay should not be disallowed.

Solicitors: *Clarence Harcourt; F. J. and G. J. Braikenridge; W. Carpenter and Sons; Reep, Lane, and Co.*

Saturday, Dec. 6, 1884.

(Before PEARSON, J.)

Re HARRIS'S SETTLED ESTATE. (a)

*Settled Estates Act 1877 (40 & 41 Vict. c. 18), s. 50*

*—Married Women's Property Act 1882 (45 & 46*

*Vict. c. 75), s. 1—Examination of married woman*

*—Woman married before Jan. 1, 1883—Property*

*acquired before Jan. 1, 1883.*

*In the case of a woman married before the commencement of the Married Women's Property Act 1882, sect. 1 applies only to property acquired by her after such commencement. It is therefore still necessary, upon an application to the court under the Settled Estates Act 1877 to sanction a lease of property of the above description, that the woman should be examined under sect. 50 of the latter Act, apart from her husband.*

In 1866 T. Harris died, having by his will, made in 1863, devised certain lands including those in question to trustees upon trust for sale and investment, and thereafter to assign and transfer the proceeds and investments "to and amongst all and every such child or children of his god-daughter, M. A. Merry, as should be living at his decease or born in due time after, to be equally divided between them if more than one, when they should attain twenty-one.

There were six children of Mrs. Merry living at the testator's death, of whom five lived to twenty-one. No others were born.

On the 17th Sept. 1877 Isabella Merry (one of the five), by a settlement made in contemplation of her marriage with the Rev. C. L. Coghlan, assigned to trustees all her one-fifth share under the will "to hold the same on trust for herself during her life, but during the then intended coverture for her separate use without power of anticipation," and after her death in trust for her intended husband, during his life, with remainder over in favour of the issue of the marriage in the usual form.

In 1880 another daughter of Mrs. Merry was

(a) Reported by H. G. WILLINK, Esq., Barrister-at-Law.

Q.B. Div.] GLEN v. CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM. [Q.B. Div.]

married to a Mr. Wrenford, having executed a settlement similar to that executed upon the marriage of Mr. and Mrs. Coghlan. There were children of one marriage but not of the other; such children were infants.

The lands in question not having been sold, the present petition was presented by the trustees of the will, Mr. and Mrs. Coghlan, Mr. and Mrs. Wrenford, and the infant children (by their father as next friend), praying for the sanction of the court of an agreement which had been entered into by the petitioners (other than the infants) for a lease of the premises, and that the trustees of the will might be at liberty to execute a lease a draft of which had been prepared accordingly.

The trustees of the two settlements were, except as to one person, trustees of the will. The petition was served upon that one trustee.

*John Dixon* for the petitioners.—The 1st section of the Married Women's Property Act 1882 (a) applies in the case of a woman married (as here) before the 1st Jan. 1883. It is therefore unnecessary that Mrs. Coghlan or Mrs. Wrenford should be examined apart from their respective husband under sect. 50 of the Settled Estates Act 1877. He referred to

*Riddell v. Errington*, 50 L. T. Rep. N. S. 584; Ch. Div. 220.

*PEARSON, J.*—I think that, in the case of a woman married before the commencement of the Act of 1882, sect. 1 applies only to property acquired after the commencement of that Act. These ladies must therefore be examined separately.

Solicitors: *Gregory, Rowcliffe, and Co.*

## QUEEN'S BENCH DIVISION.

Friday, Dec. 5, 1884.

(Before STEPHEN, MATHEW, and DAY, JJ.)

GLEN (app.) v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM (resps.). (b)

*Rate—Validity of—Order under seal of district board requiring overseers to levy rate—"Issuing of such order"—The Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 158, 161.*

*On the 9th April 1884 the Fulham District Board of Works affixed their seal to certain orders or precepts addressed to the churchwardens and*

(a) Sect. 1 of the Married Women's Property Act 1882 is as follows:—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee. (2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her. . . . (3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown. (4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

(b) Reported by H. D. BONSBY, Esq., Barrister-at-Law.

*overseers of the several parishes within their district, requiring them to levy and pay over to the treasurer of the board the sums therein mentioned. On the same day the clerk to the board wrote to the overseers informing them that the precepts had been sealed, and were ready to be issued, but stating that before issuing the precepts he was instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts.*

*The precepts were retained by the district board, and were not, in fact, served upon the overseers until the 15th May 1884, on which day the overseers paid to the board the amount of the excess of the last year's precepts, and delivered a duly audited statement.*

*Before the precepts were served on the overseers, namely, on the 19th April 1884, the churchwardens and overseers signed three several rates or assessments, entitled respectively a lighting rate, a general rate, and a sewers rate, and these rates were allowed by two justices of the county of Middlesex on the 19th April 1884.*

*Held, by Stephen and Mathew, JJ. (Day, J. dissenting), that it was not necessary that the precepts should be actually served upon the overseers before the rates were levied, and therefore the rates were valid.*

UPON appeal against a lighting rate, a general rate, and a sewers and metropolitan consolidated rate, made by a majority of the churchwardens and overseers of the parish of Fulham, the parties, pursuant to the provisions of the 12 & 13 Vict. c. 45, s. 11, by consent and by the order of Smith, J., dated the 18th July 1884, stated for the opinion of the court the following

## SPECIAL CASE.

1. The appellant is the occupier of a house and premises situate and being No. 40, Auriol-road, in the parish of Fulham, in the county of Middlesex, and is a member of the Fulham District Board of Works hereinafter mentioned.

2. The respondents are the churchwardens and overseers of the parish of Fulham.

3. The parish of Fulham is a parish within the district of the Fulham District Board of Works.

4. On or about the 17th March 1884 the clerk to the said district board wrote to the vestry clerk of the parish of Fulham a letter in the words and figures following—that is to say:

Board of Works for the Fulham District (Clerk's Office), Broadway House, Hammer-smith, W., 17th March 1884.  
—Dear Sir,—In answer to your letter, dated this day, I beg to inform you that the amount of the metropolitan board's precepts is made up as follows:

	£	s.	d.
Main drainage	1390	18	4
Fire brigade	772	13	6
Bridge expenses	752	8	0
General improvements	2084	3	4
For all other purposes of the board	1434	7	1

26434 10 3

Yours truly, THOMAS E. JONES, Clerk to the Board.—  
C. J. Foakes, Vestry Clerk, Fulham.

5. On the 9th April 1884 the Fulham District Board of Works, acting pursuant to the 18 & 19 Vict. c. 120, ss. 158 and 174, affixed their seal to certain orders or precepts addressed to the churchwardens and overseers of the several parishes in their district, requiring such overseers to levy and pay over to the treasurer of such dis-

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trict board the sums therein respectively mentioned at or before the dates therein mentioned.

6. Four such orders or precepts purported to be addressed to the churchwardens and overseers of the parish of Fulham, requiring them to levy the sums hereinafter mentioned for general rate, lighting rate, and sewers rate and metropolitan consolidated rate respectively.

7. On the same 9th April 1884 the clerk to the Fulham District Board of Works, by direction of the said board, wrote to the vestry clerk of the parish of Fulham a letter in the words and figures following—that is to say :

Board of Works for the Fulham District (Clerk's Office), Broadway House, Hammer-smith, W., 9th April 1884.—Dear Sir,—I am directed to inform the parish officers of Fulham that the board have sealed precepts, which are now ready to be issued, for raising the following sums, viz. :

	£	s.	d.
General rate	25,140	16	11
Lighting rate	3,070	15	5
Local sewers rate	4,280	17	6

£32,494 9 10

But before issuing the precepts I am instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts.—Yours faithfully, THOMAS ED. JONES, Clerk to the Board.—C. J. Foskes, Esq., Vestry Clerk, Fulham, S.W.

The audited statement and the excess referred to in the said letter are the audited statement and excess required to be handed over by the churchwardens and overseers of the district board in pursuance of sect. 161 of the Metropolitan Management Act 1855 and sect. 14 of the Metropolitan Management Act 1862.

8. The amount of the said excess was duly paid to the said district board, to wit, the sum of 753*l.* 6*s.* 11*d.*, on the 3rd, and the sum of 10*l.* on the 15th May 1884, and the said audited statement was duly delivered to such board on the 15th May aforesaid in pursuance of the said Acts.

9. The precepts so sealed as aforesaid were retained by the said district board, and were not in fact served upon the said overseers until the 15th May 1884.

10. Before the precepts were served as aforesaid, to wit, on the 19th April, the churchwardens and overseers of the said parish signed three several rates or assessments, entitled respectively "a lighting rate, at and after the rate of one penny in the pound; a general rate, at and after the rate of one shilling and one penny in the pound; and a sewers rate and a metropolitan consolidated rate, at and after the rate of sixpence in the pound;" and the said rates or assessments were allowed by two justices of the county of Middlesex on the same 19th April 1884. In each of the said rates the appellant was assessed as occupier of his house and premises aforesaid.

11. Notice of appeal against the said rates to the quarter sessions in and for the county of Middlesex was on the 17th June 1884 duly given by the appellant to the respondents. The grounds of appeal stated in the said notice are as follows: (1) That the said rates or assessments were and each of them was made by the said churchwardens and overseers without lawful authority; (2) that such rates and assessments were not nor was any of them made for the purpose of levying the amounts of any orders or order of the Fulham District Board of Works issued to the said

churchwardens and overseers; and (3) that, whereas the orders of the said district board, in respect of which such rates or assessments were respectively made, were not issued to the said churchwardens and overseers until the 15th May last, the said rates had been made on the 19th April last, and notice that such orders would not be issued until certain conditions had been complied with (which said conditions were not complied with when the said rates or assessments were made), was given to the said churchwardens and overseers before they made the said rates or assessments.

12. The appellant contends that, for the reasons and on the grounds set forth in the notice and grounds of appeal aforesaid, the said rates and assessments are invalid and ought to be quashed. The respondents contend that the precepts were sealed on the 9th April, and that any rates and assessments made after the said precepts were sealed were valid rates and assessments, although the said precepts had not actually been delivered to the respondents at the time, but were ready for delivery when and as soon as the excess referred to in paragraph 8 of this case had been paid. The respondents further contend that the sealing of the precepts on the 9th April, and the letter of the same date notifying that fact to the respondents, was an issuing of the precepts which justified the respondents in making the said rates and assessments.

13. The question for the opinion of the court is whether, under the circumstances aforesaid, the said rates are good and valid rates. If this court shall be of opinion that the said rates and assessments, or any of them, are valid, then the said appeal is to be dismissed as to such rate or rates, and the Court of Quarter Sessions shall and may adjudge accordingly. If the court shall be of opinion that the said rates, or any of them, are invalid, then the said appeal shall be allowed as to the rate or rates held to be invalid, and the Court of Quarter Sessions shall and may enter judgment that such rate or rates be quashed.

14. It is agreed that judgment in conformity with the decision of this court, and for such costs as this court shall adjudge, may be entered on motion by either party at the quarter sessions in and for the county of Middlesex next, or next but one, after such decision shall have been given.

By the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), s. 158, it is enacted that

Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be hereafter incurred); and every such vestry and board shall distinguish in their orders sums required for, &c.

By sect. 161:

The overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied that is to say, &c.

[Q.B. Div.] GLEN v. CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM. [Q.B. Div.]

*Macmorran* for the appellant.—The overseers have no power to levy the rate until the precept is issued by the district board as required by sect. 161 of 18 & 19 Vict. c. 120. Sealing the precept is not issuing it within the meaning of the section. In fact, the board gave express notice to the overseers that the precept was not issued, and would not be issued until they paid over to the board the amounts collected in excess of the last year's precepts. The rate is therefore invalid.

*Tickell* for the respondents.—There is no express provision in the Act that the overseers may not levy the rate until the precept is issued. But, if it is necessary, I contend that the precept was issued within the meaning of the Act. It was sealed by the board as required by sect. 158, and notice of this was given to the overseers by the letter of the clerk to the board on the 9th April 1884. The Act does not require actual service of the precept on the overseers.

*DAY, J.*—I am sorry that I have the misfortune to differ from my learned brothers in this case, and for that reason I somewhat mistrust my own opinion; but I have a strong view on the matter, and therefore I must express it. I quite appreciate the inconvenience that may arise if we hold that this rate is invalid; but an argument of that kind cannot be taken into consideration when the true construction of the statute is the question which we have to decide. The power to levy a rate was created by sect. 161, and that gives the overseers powers in these words: "The overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied; that is to say, a separate rate," &c. Now, this raises the question whether in the case before us any order has been "issued," and I am of opinion that it has not. It is quite true that the order was sealed, and was ready to be issued, but the district board of works designedly abstained from issuing it before the parish officers furnished them with a duly audited statement and paid over to them the amounts collected in excess of the last year's precepts, and it seems to me that the course which the board adopted was not at all unreasonable. The amount in excess of last year's precepts in the hands of the parish officers might be so small that it would not affect the amount to be levied; but, on the other hand, it might be so large that it would be unreasonable and improper to issue a precept until it was ascertained. Suppose, for instance, the amount in excess of last year's precepts in the hands of the parish officers had been 10,000*l.*, then it would have been only necessary to issue a precept for 20,000*l.* and not 30,000*l.*, which is the amount required in this case, and therefore it seems to me to be reasonable not to issue the precept until the parish officers have made a statement and paid over to the board the amounts collected in excess of last year's precepts. It also appears to me to be quite clear that the power of the overseers to levy the rate depends on the precept being issued. The district board had sealed the precepts and were pre-

pared to issue them, and, in my opinion, there is a wide distinction between sealing and issuing a precept, just as there is between sealing and delivering any instrument. In one sense, the precepts had been communicated to the overseers, but they were distinctly told that they were not issued. I do not think the letter written by the clerk to the board, informing the parish officers that the precepts had been sealed and were ready to be issued, amounted to an "issuing" of the precepts within the meaning of the statute, and therefore I am of opinion that it is a bad rate.

*MATHEW, J.*—I think this rate is valid. The question is whether it was intended by the Act of Parliament to make the service of the precept on the parish officers a condition precedent to levying the rate, and I find nothing in the Act to that effect. The precepts were prepared and sealed under sect. 158, which enacts that "Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be hereafter incurred); and every such vestry and board shall distinguish in their orders sums required for defraying expenses of constructing, altering, maintaining, and cleansing sewers," &c. That is the section under which the precepts were sealed, one of which required the parish officers to levy a rate of 643*l.* 10*s.* 3*d.* and to pay it over in four quarterly payments, and the other required them to levy a general rate of 25,140*l.* 16*s.* 11*d.* and to pay it over by eight equal monthly instalments, and both these precepts were dated the 9th April 1884. Under those precepts the parish officers have made rates. It appears that at the date these precepts were executed there was some difference existing between the parish officers and the district board as to the retention by the parish officers of a sum of money which they had collected in excess of the last year's precepts, and, after the precepts had been sealed, the clerk to the board wrote to inform the parish officers that before issuing the precepts he was instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts. The parish officers do not appear to have complied with that request, and proceeded to make a rate, and I think, under the words of sect. 158, they had authority to do so. Then it is said, that by a later section—that is sect. 161—a condition precedent is imposed of issuing the precept, but I do not so read the section. I feel the difficulty my brother Day pointed out, but I have to construe the statute, and I do not think that the board had a right to withhold the document. I do not see the use of serving the precept on the parish officers, and therefore I think the rate is good and valid.

*STEPHEN, J.*—With the highest respect to my brother Day's opinion, I agree with my brother

Mathew. The question lies in the narrowest possible compass. Sect. 158 says that "Every vestry and district board shall from time to time, by order under their seals, require the overseers of their parish, or of the several parishes in their district, to levy and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act." And sect. 161 says that "the overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof." Now, the words differ in the two sections, but are they expressions which mean the same thing or expressions which mean different things? As I read the sections, issuing is the same as sealing. Issuing is not sending the precept to the overseers, but issuing out of their own minds and sealing it. If it is brought to the notice of the overseers that the precept has been sealed, I think it is as good as if they had actually received it, and I think the precept was issued when it was sealed. On that ground alone I think this rate is valid. I am also glad to think that this interpretation is the most convenient, and my brother Day admits that. When I find that the construction I put on a statute is the most convenient it strengthens me in my opinion that the interpretation is the right one. I can well understand what my brother Day says as to the expediency of not issuing a precept until overseers have paid over the excess of the last year's precepts, but the board have the power to enforce payment. If the board had said, "We are prepared to seal the precepts, but shall not do so until the overseers pay over the excess of last year's precepts," I think they would have been within their right; and, besides that, they have the strongest power against the overseers personally if they do not pay the excess of last year's precepts. I am of opinion that the rate is valid.

Solicitors for the appellant, *Green and Hartcup*.

Solicitor for the respondent, *John Haynes*.

Nov. 27 and Dec. 3, 1884.

(Before Lord COLERIDGE, C.J., MATHEW and SMITH, JJ.)

PRITCHARD v. PRITCHARD. (a)

*Practice*—County Court appeals—Rule nisi—Motion upon notice—Action remitted to County Court for trial—The County Courts Act 1856 (19 & 20 Vict. c. 108), s. 26—Order XXXIX., r. 3—Order LII., r. 2—Order LXXII., r. 2.

In an action commenced in the High Court and remitted to a County Court for trial under 19 & 20 Vict. c. 108, s. 26, an application for a new trial must be made to a divisional court of the Queen's Bench Division before the expiration of four days from the day of trial, by motion calling upon the opposite party to show cause.

This was an application on the part of the plaintiff in the action for a new trial, purporting to be made by way of motion upon an eight days' notice to the opposite party under Order XXXIX., rr. 3 and 4.

(a) Reported by J. SMITH, Esq., Barrister-at-Law.

The action was originally commenced in the High Court, and was remitted after joinder of issue to the County Court of Carnarvonshire at Pwllheli for trial under the 26th section of 19 & 20 Vict. c. 108. At the trial there, on the 19th May 1884, a verdict was entered for the defendant. On the 26th May the plaintiff served the defendant with notice of motion for a new trial, and this was the motion which now came on for hearing.

F. Marshall, for the plaintiff, was proceeding to support the motion, when

J. Herbert Williams, for the defendant, took a preliminary objection.—This application is not properly made by motion under Order XXXIX., rr. 3 and 4 (a), since this is an action remitted to the County Court for trial under 19 & 20 Vict. c. 108, s. 26, and neither Order XXXIX., rr. 3 and 4 (a), nor Order LII., r. 2 (b), nor any other of the Rules of 1883 have any application so as to alter the practice in moving for new trials in such actions. This was decided as to Order XXXIX., r. 1, of the Rules of December 1876 in the case of *London v. Roffey* (3 Q. B. Div. 6), where Cockburn, C.J. says: "I am of opinion that Order XXXIX. does not apply to actions remitted for trial to a County Court. The practice before the Judicature Act remains unaltered, except so far as altered by that Act and the rules. Consequently the application should have been made within the period prescribed by the old practice." This decision was further approved by the Court of Appeal on the question being raised before them in the case of *Davis v. Godbehere* (40 L. T. Rep. N. S. 359; 4 Ex. Div. 215). There, in an action remitted to a County Court for trial, an application for a new trial was made directly to the Court of Appeal on the ground that the trial had been before a judge without a jury, and therefore the application was properly made to the Court of Appeal. There the Court said: "The word 'judge' in Order XXXIX., r. 1 (of the Rules of December 1876) means a judge of one of the divisional courts, and when we look at the context it is clear that it does not apply to a judge of the County Courts. The order, therefore, has no application to trials before a County Court judge without a jury; the motion ought to have been made to the Exchequer Division." The same arguments which prevailed in these

(a) Order XXXIX., rr. 3 and 4 of the Rules of the Supreme Court 1883 are:

3. Every application for a new trial shall be by notice of motion, and no rule nisi, order to show cause, or formal proceeding other than such notice of motion shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the findings is complained of.

4. The notice of motion shall be an eight days' notice, and shall be served within the times following, viz., if the trial has taken place in London or Middlesex, within eight days after the trial; if the trial has taken place elsewhere than in London or Middlesex, within seven days after the last day of sitting on the circuits for England and Wales during which the trial shall have taken place. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion.

(b) Order LII., r. 2, is: No motion or application for a rule nisi or order to show cause shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution.

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two cases are equally applicable to Order XXXIX. of the Rules of 1883. This has, in fact, been so decided in the case of *The Swansea Co-operative Building Society v. Davies* (49 L. T. Rep. N. S. 603; 12 Q. B. Div. 21). In that case, on an application to a divisional court for a new trial, it was objected that the application should have been to the Court of Appeal, but the court overruled the objection on the distinct ground that there was no substantial difference in the language of the new rules, and that therefore the decision in *Davis v. Godbhere* (*ubi sup.*) was binding. It is true that in *Shapcott v. Chappell* (12 Q. B. Div. 58) it was held that rule 6 of Order XXXIX. applied to appeals from County Courts, but the decision in that case was entirely overruled by the Court of Appeal in *Mathews v. Ovey* (50 L. T. Rep. N. S. 776; 13 Q. B. Div. 403), where Brett, M.R., after carefully considering the various rules of Order XXXIX., came to the conclusion that he was compelled to disagree with the judgment in *Shapcott v. Chappell*, although of opinion that it would be very useful if many of the rules made under the Judicature Acts were applicable to appeals from County Courts. [Lord COLERIDGE, C.J.—It was not the intention of those who framed the rules that County Court actions of any description should be included in them. In fact, I endeavoured, when the rules were being discussed, to make the County Court practice uniform with that of the High Court, but was overruled. What do you say is the practice which ought to have been followed in this case?] Order LXXII., r. 2, provides that where no other provision is made by the Acts or rules, "the present procedure and practice remain in force." The practice was therefore to be that settled by the case of *London v. Rofey* (*ubi sup.*), and the application ought to have been made by moving for a rule *nisi* before the expiration of four days from the day of trial.

*F. Marshall* for the plaintiff.—This motion is properly made under Order XXXIX. The case of *Mathews v. Ovey* does not apply to this case, inasmuch as that was an action commenced in the County Court, whereas the present action was commenced in the High Court, and was merely remitted to the County Court for the purposes of trial, remaining in the High Court for all other purposes, the County Court not even having the power of entering judgment, but merely of certifying the result by its registrar to the Superior Court. The action is therefore at its institution, and never ceases to be, an action in the High Court, and therefore an action within the meaning of Order LII., r. 2, which says that no motion or application for a rule *nisi* or order to show cause shall hereafter be made "in any action." An application for a rule *nisi* being therefore in terms forbidden, the procedure under Order XXXIX. is alone possible. There is no case conflicting with this view. The judgment of the Master of the Rolls in *Mathews v. Ovey* (*ubi sup.*) is based on that action being commenced in the County Court. "Therefore," he says, "the word 'action' in Order LII., r. 2, does not include an action commenced in a County Court, and that rule does not apply." That case, therefore, is not in point. The difference between cases remitted to a County Court for trial under 19 & 20 Vict. c. 108, s. 26, and other County Court cases, is clearly pointed out in the case of *Balmforth v. Pledge* (14 L. T.

Rep. N. S. 361; L. Rep. 1 Q. B. 427), where it was decided that where a cause brought in a Superior Court is tried in a County Court pursuant to a judge's order, the jurisdiction to grant a new trial remains in the Superior Court, Lush, J. observing, in the course of his judgment: "Under sect. 26 the County Court judge is simply substituted for the under-sheriff or commissioner of assize, and therefore the general jurisdiction over the cause remains exactly as it was before the section passed." [SMITH, J.—But *London v. Rofey* (*ubi sup.*) was a remitted case like the present.] That case would apply but for the new provision of Order LII., r. 2 which has overruled it. [MATHEW, J.—Then in that case you ought to have gone direct to the Court of Appeal.] No: the case of *Davis v. Godbhere* (*ubi sup.*) decided that the words "trial without a jury," in Order XXXIX., r. 1, mean trial by a judge of the High Court without a jury. [Lord COLERIDGE, C.J.—Is not the explanation of the matter really, that it was forgotten when the rules were made that there were cases remitted to the County Court for trial, and kept for all other purposes in the High Court?] At any rate the words of the rules oblige us to proceed by notice of motion. [Lord COLERIDGE, C.J.—In case we decide that the Rules of 1883 make no alteration in the practice, have we power to enlarge the time for moving? Yes, the old practice is that originally instituted by rule 50 of the *Regule Generales Hilary Term 1853*, forbidding any motion for a new trial after the expiration of four days from the day of trial, which it was decided in *Balmforth v. Pledge* (*ubi sup.*) and *Copcutt v. The Great Western Railway Company* (16 L. T. Rep. N. S. 384; L. Rep. 2 C. P. 465) applied to actions remitted to the County Court under 19 & 20 Vict. c. 108, s. 26, and under that rule the court has power to grant an extension of time:

*Thomas v. Edwards*, 1 Cr. M. & R. 332;

*Harris v. The Great Northern Railway Company*, 11 C. B. 542;

*Hawker v. Sault*, 17 C. B. 595.

At the conclusion of the argument it was mentioned to the court that there were four other cases in the day's list, in which the same point arose, and the attention of the court was further called to the following cases:

*Birt v. Barlow*, 1 Doug. 171;

*Price v. Duggan*, 3 M. & G. 641.

Lord COLERIDGE, C.J.—Under those circumstances the court will take time to consider the point, and in the meantime all these cases will stand out of the list.

*Cur. adv. nult.*

Dec. 3.—The following judgments were delivered by the Court:—

Lord COLERIDGE, C.J.—In this case the point submitted to us for our decision arises also in four other cases to which our judgment is to apply, and there are doubtless several other cases which will be governed by it. We are, therefore, very desirous of coming to a clear and correct conclusion, and of avoiding as far as we can the possibility of any misleading result arising from it hereafter. They are applications for new trials in actions remitted to the County Court for trial under 19 & 20 Vict. c. 108, s. 26, and they come before us in the form of motions on the supposition that the new rules of Order XXXIX.

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apply to them. Now, it is only right that I should here say that there existed at the time that the issues in them were tried an express decision of this court, in which it was held that these rules did apply to County Court actions, using for a moment the phrase "County Court actions" in a general sense. Further investigation, however, of this matter in the Court of Appeal—and a further examination of the rules on my own account has quite satisfied me that the decision at which the Court of Appeal arrived is quite right—resulted in the correction of the erroneous view originally taken by this court; and although it is true that it is very hard that individual suitors should suffer for our view, yet I am afraid that in such a case as this such a misfortune cannot be avoided. Now, I just now used the phrase "County Court actions" in a general sense, but there really are three classes: First, County Court actions proper, as to which no question arises; secondly, actions originally commenced in the High Court and transferred for all purposes to the County Court, which, when the transfer has been effected, become County Court actions proper, and are entirely upon the same footing; and then, thirdly, there is the class (to which I understand all the cases now before us belong) which are commenced in the High Court, and then the issue therein is sent to the County Court for trial, while for all other purposes they are retained in the High Court. To this latter class of cases it was thought by the appellants in the cases before us that the same rules applied with respect to new trials as applied to ordinary actions in the High Court. They have therefore proceeded under the 3rd rule of Order XXXIX. of the Rules of 1853, and have given notice of motion thereunder for the purpose of obtaining new trials. On consideration it does not appear to us to be the case that this rule applies to the class of actions in question. The expressions "court" and "judge" in the rules of the order in question clearly, to my mind, apply to courts and judges of the High Court. Now, the judges appealed from in these cases are not judges of the High Court, but County Court judges, and it is therefore plain that these rules do not apply to the third class of County Court cases any more than to the other two classes. It follows then that the procedure remains the same as it was under the old practice, since no other provision is made by the Judicature Acts or the rules thereunder. Now, according to this practice all these cases would be out of time, for the practice to which we are relegated is that instituted by *Regulæ Generales Hilary Term 1853*—an obviously inconvenient practice, since it provides that all applications for rules *nisi* for new trials from County Courts in all parts of England must be made within four days from the day of trial. Everyone, therefore, of these cases is out of time; but the procedure under which they come is a procedure which stands on the authority of the court to which this court has succeeded, and there is sufficient authority to show that it has been the practice of the court not to make this rule absolutely inflexible, but that the limited time appointed by the rule has been extended by them where gross injustice would have otherwise resulted. Many authorities to this effect have been brought to the attention of the court, as, for instance, in the case of *Hawker v. Seale* (17 C.B.

595), where a *bond fide* mistake was made by counsel engaged in the case, who moved and obtained a rule in the Court of Exchequer, the case actually being in the Court of Common Pleas, whereupon the Court of Common Pleas thought itself justified in correcting a mistake of that kind, refusing to allow its own rules to be used to defeat justice. In this case, as there was a mistake of a similar nature, we shall grant an extension of time, so as to allow the motions to be made; but it must be understood that, after the careful consideration and full discussion that has now taken place with respect to these cases, the practice now is in accordance with the provisions of the old rules of 1853, and, after this time nothing more must be heard of mistakes arising from a wrong understanding of the present practice and of the effect of the new rules.

MATHEW, J.—I thoroughly agree with my Lord that Order XXXIX. is not applicable to this case. It was also further said that Order LII. applied. When, however, we examine it, it is clearly subservient to Order XXXIX. It is, I think, perfectly plain that these rules were not intended to apply to cases such as this. That being so, under what procedure are the parties in such cases to proceed? Does the same procedure apply in cases remitted for trial only as in cases which are wholly remitted to the County Court? I think that the question must be decided by Order LXXII., and I am of opinion that under that order recourse must be had to the rule of 1853 (*Regulæ Generales Hilary Term 1853*, rule 50) which requires application for a new trial in actions remitted to a County Court for trial under 19 & 20 Vict. c. 108, s. 26, to be made by moving for a rule *nisi* within four days from the day of trial. I quite agree that anything more inconvenient could not well be imagined. Now, then, that we are driven back to the Rules of 1853, what is their character? This question is discussed in the case of *Rouberry v. Morgan* (9 Exch. 730), and from this case we find that they were not laid before Parliament, and have not the force and effect of an Act of Parliament, but were merely made by the judges with a view to the interpretation of the practice of the courts, and are therefore subject to the control and discretion of the court. Rules of this description the courts have always strictly enforced, except in cases in which due cause has been shown to the contrary, and where applications have not been made within the time fixed by the rule the courts have refused to interfere. At the same time they have in many cases pointed out that such interference was possible. It is, perhaps, sufficient to refer to two cases in which this point has been discussed. In *Rex v. Holt* (5 T. R. 436) Buller, J. says: "The case of *R. v. Gough* was one of the first cases in which the court granted a new trial after the expiration of the time allowed by the practice of the court to move for a new trial. But the court did not interpose without being apprised that they were exceeding the rules of the court; and nothing would have induced them to break through those rules but the clear opinion which they entertained that injustice would otherwise have been done to the defendant." And in *Newton v. Boodle* (5 Dowl. & L. P. C. 664; 16 L. J. 135, C. P.), where a judge died before sealing a bill of exceptions, the court thought it right to grant a



rule *nisi* for a new trial, which was afterwards made absolute, although more than a year had elapsed between the trial and the day of motion. Then there is the case to which my Lord has referred. Many other cases might be cited in which the parties have been misled, and the courts have in consequence allowed them to move for a new trial after the expiration of the time allowed them by the rule for that purpose. It appears to me, therefore, to be in accordance with the practice of the court that, where a mistake has arisen such as has arisen in the cases now before us, the time for moving should be extended; and for these reasons I am of opinion that the court ought in these cases to allow this to be done.

SMITH, J.—The question which the court has to decide in these cases is, whether the various rules of Orders XXXIX. and LII. of the Rules of 1883 apply to cases remitted to a County Court for trial under 19 & 20 Vict. c. 108, s. 26. It has already been decided that where actions are commenced in the County Court they do not apply, and further, that they do not apply where actions are commenced in the High Court and transferred for all purposes to the County Court. The cases of the *Swansea Co-operative Building Society v. Davies* (*ubi sup.*), *London v. Roffey* (3 Q. B. Div. 6), and *Davies v. Godbehere* (40 L. T. Rep. N. S. 358; 4 Ex. Div. 215) are decisive that they do not apply in the cases I have mentioned. But it is said that in cases remitted to a County Court for trial only, these rules do apply. To my mind it is quite clear that Order XXXIX. does not apply to County Court cases at all. Order LII. stands upon slightly different ground, and it has been argued that that order applies, because it is there said that no motion or application for a rule *nisi* or order to show cause shall hereafter be made in any action. It seems to me, however, that the rule relied upon is only applicable to cases which have been decided in the High Court and to no other. I am of opinion, therefore, that the rules in question do not apply to the cases before us, and I therefore agree entirely with what has fallen from my Lord and my learned Brother.

Lord COLERIDGE, C.J.—The cases must be put into the paper in the ordinary course and a rule *nisi* moved for when they are reached, and the respondents will be at liberty to show cause at once if they choose to do so.

Solicitors for the plaintiff, *Chester, Mayhew, Broom, and Griffiths*, for *R. Ivor Parry, Pwllheli*.

Solicitors for the defendant, *Simonds and Goolden*, for *Hughes and Pritchard*, Bangor, and for *T. Roberts*, Portmadoc.

## Supreme Court of Judicature.

### COURT OF APPEAL.

June 24 and 26, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

KENSIT v. GREAT EASTERN RAILWAY COMPANY. (a)

*Riparian owner—Licence to non-riparian owner to take water—Absence of damage—Injunction—Rights of riparian owner in artificial stream.*

A riparian owner granted a licence to a person, whose land did not abut on the river, to take water from the river for use in his factory. The water was returned to the stream at a point six feet lower down than the point of withdrawal, unpolluted and undiminished.

Held (affirming the decision of Pollock, B., 48 L. T. Rep. N. S. 784), that a lower riparian owner was not entitled to an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken. The rights which can be acquired by a riparian owner in an artificial stream observed upon.

THIS was an appeal from a judgment of Pollock, B., sitting for Pearson, J.

The plaintiffs were the owner and the tenant of land at Mistley, near Manningtree, in Essex, through which a stream of water had always flowed.

In 1856 the defendant company purchased some of the land for the purposes of their railway, and built an embankment on it, with a culvert through which the stream flowed.

In Aug. 1881 Robert Free, who was a saccharine manufacturer, and whose factory was on land which joined that of the defendant company, but did not abut on the stream, under a licence or grant from the company laid two pipes through their land. By one of them he drew water from the stream, which he used for cooling purposes connected with his business, and it was then returned to the stream by the other a few feet further down.

In the agreement between Free and the company there was no limitation as to the amount of water which the former might draw from the stream.

This action was brought by the plaintiffs, as owners of land which abutted on the stream below, to restrain this use of the water. There was an allegation in the statement of claim that the water was returned diminished in quantity and deteriorated. This was denied by the defendants, and at the hearing it was admitted that the water was returned to the stream uninjured and undiminished.

Pollock, B. held that the plaintiffs had no cause of action, and gave judgment for the defendants. The case is reported in the court below at 48 L. T. Rep. N. S. 784, where the facts are fully stated.

From this decision the plaintiffs appealed.

*Basber, Q.C.* and *C. E. Jones* for the appellants.—A riparian owner is only entitled to use the water for his own purposes, and in a reasonable manner. He cannot grant a licence to take water

(a) Reported by W. C. Buss, Esq., Barrister-at-Law.

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to a person who is not a riparian owner. It is not necessary to prove actual damage, as there has been a violation of a legal right. Besides, the railway company has only a right to use the water for the purposes of their undertaking. Even if there is no present damage, there may be hereafter. If Free uses the water in this way for twenty years he may get a prescriptive right to it. He would obtain the position of a riparian owner with regard to the artificial watercourse, and that would be injurious to the plaintiffs. They referred to

*Stockport Waterworks Company v. Potter*, 10 L. T. Rep. N. S. 748; 3 H. & C. 300;  
*Nuttall v. Bracewell*, 15 L. T. Rep. N. S. 813; L. Rep. 2 Ex. 1;  
*Ormerod v. Todmorden Joint Stock Mill Company*, 11 Q. B. Div. 155;  
*Wilts and Berks Canal Navigation Company v. Swindon Waterworks Company*, 30 L. T. Rep. N. S. 448; L. Rep. 9 Ch. App. 451;  
*Bickett v. Morris*, 14 L. T. Rep. N. S. 835; L. Rep. 1 Ex. & Div. App. 47;  
*Elmhirst v. Spencer*, 14 L. T. Rep. O. S. 433; 2 Mac. & G. 45;  
*Embrey v. Owen*, 6 Ex. 353;  
*Goddard on Easements*, p. 334.

[COTTON, L.J. referred to *Earl of Norbury v. Kitchen*, 15 L. T. Rep. N. S. 501.]

*Philbrick, Q.C. and Smart* for the defendants.—There is no invasion of a legal right in this case, and there is no right of action until damage in fact. The plaintiffs have received no damage, and cannot show that they are likely to receive any. This user of the water cannot grow into a right adverse to the plaintiffs. It is admitted that the water is returned to the stream unpolluted and undiminished, and if at any time that state of things is altered, the plaintiffs can then bring their action. Until there is actually some injury the time for prescription will not commence to run. If a riparian owner can bring such an action to restrain the user of the water by a stranger without proving damage, then it might just as well be brought by a riparian owner above the place where the water is taken as by one below it. They referred to

*Orr Ewing v. Colquhoun*, 2 App. Cas. 839;  
*Williams v. Morland*, 2 B. & C. 910;  
*Embrey v. Owen*, 6 Ex. 353;  
*Miner v. Gilmour*, 12 Moo. P. C. 181;  
*Nuttall v. Bracewell*, 15 L. T. Rep. N. S. 813; L. Rep. 2 Ex. 1;  
*Pennington v. Brinsop Hall Company*, 37 L. T. Rep. N. S. 149; 15 Ch. Div. 769;  
*Brown v. East*, 1 Wilson, 175;  
*Mason v. Hill*, 3 Barn. & Ad. 304;  
*Goddard on Easements*, p. 200.

*Barber, Q.C.* in reply.

BAGGALLAY, L.J.—This is an appeal from a judgment given by Pollock, B., sitting for Pearson, J., in favour of the defendants in the action. The action was brought under circumstances to which I am about to refer. It is very inconvenient in this case that for some reason or other the plaintiffs do not seek in any way whatever to substantiate the particular view of the case put forward in their statement of claim. Upon the hearing of the action they relied entirely upon certain other views. It appears that the railway company, crossing a small brook in the county of Essex, covered in, or inclosed, if I may use the expression, in a culvert, that portion of the stream which passed under their railway. They had taken the

land on which the railway was constructed from a gentleman of the name of Kensit, and he had land lower down the stream than the portion of the stream where it passed through the railway company's land. The railway company entered into an agreement with a gentleman of the name of Free, by virtue of which, according to the terms of the agreement, water could be diverted, by aid of a three-inch pipe leading from the culvert where the stream passed under the railway company's land in a direction substantially perpendicular to the course of the stream, to the premises of Mr. Free, who had no portion of his land abutting upon the stream; he was not a riparian owner in any sense of the word. The agreement in effect enabled him for a trifling consideration to draw water from the stream by means of the three-inch pipe so let into the culvert; it contained no restrictions whatever upon Mr. Free as regards the mode in which he was to use the water which he was so allowed to abstract. So far as it was an agreement between the company on the one hand and Mr. Free on the other, he was at perfect liberty to do whatever he pleased with the water which was so abstracted. The plaintiff Norman is the tenant of the plaintiff Kensit. The action was commenced in the month of Oct. 1881, and by the statement of claim, after referring to the pipe as being inserted into the culvert, so that the water was conveyed to Mr. Free's land, it was alleged in paragraphs 6 and 7 as follows: "The said pipe still continues inserted in the said culvert, and ever since the month of August the defendants have continued to obstruct the said watercourse, and by means of the said pipe to divert and abstract large quantities of water from the said watercourse. In and about and ever since the said month of August the defendants have polluted and disturbed the water of the said watercourse by throwing and causing to flow into the same large quantities of noxious substances and fluids and heated water. In consequence, the water in the watercourse has ceased to flow through the plaintiffs' land and into the plaintiffs' lake in its natural state as heretofore, and has become diminished in quantity and polluted in quality, and unfit for the purposes for which, before the acts complained of, it had been used by the plaintiffs, and the plaintiffs' land has become deteriorated in value." Those are the circumstances stated in their statement of claim, and upon which the plaintiffs came to the court and asked relief. What they asked for was "an injunction to restrain the defendants from obstructing the said watercourse, or polluting, diverting, diminishing, abstracting, or interfering with the water therein, or in any way using the same so as to injure the plaintiffs in their property, or their rights thereto." A statement of defence was put in, in which the defendants stated: "By an agreement with the defendant railway company, the defendant Free possesses the right to take water from the said watercourse at a point within the land belonging to the defendant company, and which point is herein referred to as the point of withdrawal. The object for which the said right was granted was that the water so drawn should, as hereinafter mentioned, be employed in the saccharine factory recently erected by the defendant Free near the said watercourse. This factory of the defendant Free was constructed in the month of August 1881."

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Then the company allege an agreement with Mr. Free, by virtue of which Mr. Free has the right to take the water from the brook by means of this pipe, and convey it to his own premises to be employed in his saccharine factory recently erected there. However, they go on to say in paragraph 6: "The defendant Free draws the said water into a tank or filter-bed erected on the bank of the said watercourse, and from that tank the water is pumped through a three-inch cast-iron suction pipe into the said defendant's factory. The water so drawn is used by the said defendant for condensing only, and is then returned to the said watercourse at a point some six feet below the point of withdrawal, and within the land of the defendant company. The water so returned is not diminished in quantity, nor in any way fouled or polluted, or rendered less fit for any of the uses to which riparian proprietors lower down the said watercourse can, or are entitled to, put the same." That is the statement of the case made by the defendants in answer to the plaintiffs' claim. There they recognise fully the fact that the water is abstracted; they detail the mode in which the abstraction is made, namely, first of all drawing it into a tank on the company's premises, and from that pumping the water which is used. As I understand it, Mr. Free requires and uses the water for condensing purposes only. I suppose it passes round the tank which contains the hot matter used in the saccharine manufacture, travels on, and comes back into the stream at a point only six feet from the point where it was withdrawn. If those are the facts, it is very difficult to see what injury the plaintiffs can possibly have sustained. The water is drawn up, it performs a little circuit, comes back again, and then goes into the stream only six feet from the point where it is abstracted. Then we have this very singular state of circumstances. In the pleadings there is a direct conflict, the allegation in the statement of claim being abstraction of water and pollution of what is returned, and a defence, in the strongest possible terms, that there is no abstraction whatever, and no pollution or injury whatever. Then, when the parties came into court, it was admitted by the plaintiff that the water was returned to the stream uninjured and undiminished. That may be gathered, not only from the statement of the reporters in the court below, but also from the judgment of Pollock, B. to this effect; and, in consequence of that admission, it became unnecessary for the defendants to enter into any evidence, because all that they had alleged in their statement of defence was admitted—viz., that the water no doubt was taken away, but it was returned undiminished in quantity, and unaffected in quality. I can hardly imagine a case coming in that form before the court more completely leading up to a judgment in favour of the defendants—a case put forward which, if it had been substantiated, would have most certainly entitled them to the injunction which they had asked, but which upon their own admission upon the hearing of the action was given up, and admission made quite to the contrary of the allegations. The way in which I look at the case is this. I leave out of consideration, for the moment, the fact of there having been any agreement between the company and Free. I find that the plaintiffs come into court alleging certain acts have been done which, if they had been done as alleged by

them would have led to very substantial injury; but, at the hearing, the whole case, as alleged by them in their statement of claim, is entirely displaced. That is, in my opinion, quite sufficient to support the decision at which the learned judge arrived. But then it is said, if you look further than that, if you have regard to the real agreement entered into between the two defendants, it amounted to a right conferred, if such a right could be conferred, by the company upon Mr. Free, to abstract all the water which a three-inch pipe could convey, and allow Mr. Free to use it for any purpose he pleased, for the agreement contained no provision whatever as to how it was to be used. That is the way in which it was put. Well, that may have been a grant of such rights as the company, as riparian owners, had no right to grant. But is that a matter for the court to take into consideration upon an inquiry of this kind? If you look into the facts of the case as, in the absence of evidence, they are admitted, you have a state of things which, possibly, if it led to injury, would give the plaintiffs a right to complain, but which, upon admission between the two parties, leads to no present damage or injury to them whatever. Now, I fully admit that if it appeared that, although there was no immediate injury sustained, there might be an injury derived from the continuance of the course which the defendants are adopting, then, according to the view which I at present hold, there would be a case which would entitle the plaintiffs to an injunction. There may be a question which I do not think it worth while now to enter into, upon which of the two parties the burden would lie to show whether there might or might not be a future injury if the same user were continued. According to some of the decisions, it would be for the party who has done that which might lead to injury (and which, if it did lead to injury, would entitle the other party to an injunction) to prove that it could not, in any event, lead to injury. But, without considering upon whom the burden of proof would lie, it appears to me beyond all question that, so far as the present user of the pipe which has been inserted into the culvert, and by which the defendant Free's premises are supplied, is concerned, it is impossible that there should be any injury of which the plaintiffs would be entitled to complain. It was suggested, in the course of the argument, and at one time I thought that there might be some force in the suggestion, that, by this diversion of the stream, there might be certain riparian rights acquired by Mr. Free if the present state of things was allowed to go on for a period of twenty years. But, according to the best opinion I can form on the case, it appears to me to be impossible, as long as he continues to return to the river the whole of the water he takes out, and that in an unpolluted state, that any injury can arise to the plaintiffs from his doing so. If at any future time he changes his course of action, and either reduces the quantity of water abstracted or pollutes that which he returns into the stream, then, no doubt, from the point of view which I take, a right of action would arise, but it would arise only when that act was done; and no continuance for twenty years, or any other period, of the present user would in any way prejudice the plaintiffs in respect of the rights they would have if any such future interference with this right

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was attempted. Therefore, for those reasons, it appears to me that the plaintiffs have come into court alleging a case which they utterly fail to support, and which, by their own admissions, is entirely contrary to the real facts of the case. I think Pollock, B. was perfectly right in the judgment which he pronounced, and that the appeal should be dismissed with costs.

COTTON, L.J.—I do not in any way differ from what has been said by Baggallay, L.J., as to the position of plaintiffs who have come into court making the case which here the plaintiffs did, and who have entirely failed to support the allegations on which they came into court. But I would rather dispose of this case on the substantial question which has been argued before us, and it is this: The plaintiffs, who are lower riparian owners, complain of the action of the defendants, and they do so with the admission (having brought no evidence to support the case they originally made) that, although there is a diversion of the water to the works of the defendant Free, yet the water which is so diverted is restored before the stream comes to his land, not at all diminished in quantity or quality. I may mention here that it occurred to me at one time during the argument that there might be an intermittent action in the stream, in consequence of what was done by the defendants—and possibly there was when the pipe was originally opened; but I think we ought not, in the absence of any evidence, to infer that now there is any intermission in the flow of the stream caused by what has been done by the defendants, or simply because that was once caused some time ago, to grant an injunction. Now, the plaintiffs say, and they are right, that a riparian owner is in this position, that he can maintain an action for interference with his right, even although he does not show that at the time he has suffered any actual damage. But then we must consider what are his rights with regard to the lower riparian owners. It is this, that he has a right to take and use the water as it runs past him for all reasonable purposes. I need not go further into what are “reasonable purposes.” Then, as against the upper proprietors, he is entitled to have the flow of the water in the natural bed of the river coming down to him unaltered in quality and quantity, subject only to the right of the upper proprietors to take the water for reasonable purposes. Then he has this right, that where the stream comes opposite to or through his land, it shall come in its ordinary and accustomed channel. Now, have these rights been interfered with? I am of opinion that they have not. The quantity and quality of the stream when it comes to the plaintiffs’ lands is the same as it always was. Then it is said that there has been a diversion here, and, therefore, it does not come in its accustomed channel. Well, undoubtedly there has been a diversion of a certain portion of the stream, and one must consider that it might extend to the whole of it. What is to be understood by “coming in its accustomed channel?” In the quotation from Kent’s Commentaries, cited in *Sampson v. Hoddinott* (1 C. B. N. S. 590, 605) it is said: “He may use the water while it runs over his land; he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate;” that is to say, that a lower riparian proprietor, as against the upper riparian

proprietors, has a right to say, “You shall not so deal with the water that when it comes into my land it is not in its customary channel in my land.” Then it is said that *Bickett v. Morris* (14 L. T. Rep. N. S. 835; L. Rep. 1 Sc. & D. 47) establishes this proposition, that when there is any interference with the bed of the river, this, although not causing any injury to an opposite owner, or to the lower riparian owners, is ground of action. That, I think, was not the real meaning of *Bickett v. Morris*. Lord Westbury disposed of that proposition by suggesting that, if that were so, the building of a boathouse on a stream would give a right of action to all lower riparian owners. What was decided was, that anything which interfered with the channel of the river was a matter which would be actionable, unless the court were satisfied that there would not be any injury resulting from it either then or at a future time; and in such a case as the flow of water, which is so difficult to deal with, it would be a difficult thing to determine whether what had been done would or would not produce any injury. If there was a reasonable prospect that it would produce any damage to the opposite or lower riparian owners, then that would give a right of action, although no actual injury was shown to have resulted from it. Here, therefore, if the water, although diverted in the upper riparian owner’s property, was reintroduced, but reintroduced in such a way as that probably injury might be caused to the lower riparian owner, or that the entrance of the water to his land might be so altered that injury might be caused to him, that would be a diversion which, although taking place only in an upper riparian proprietor’s property, might be actionable as one which would probably interfere with the accustomed flow, and therefore with the rights of the lower riparian owner. But here I do not see that there is any contention that this diversion and reintroduction, putting aside the temporary interference with the flow which must have existed at the first, can in any way occasion any injury or loss to the plaintiffs. Lord *Norbury v. Kitchen* (15 L. T. Rep. N. S. 501) is a case which at first sight seems to support the view of the appellants. There Wood, V.C. said that, having regard to the case of *Bickett v. Morris*, he must grant the injunction, although no loss was shown to have been sustained by the plaintiff. That case had been tried at law, and on two questions, the diversion of the stream to an artificial pond of the defendant, and the damming of the river. The jury had granted a verdict for the plaintiff with one farthing damages—that is to say, their finding was this, that no actual loss had been sustained by the plaintiff, but that his rights had been interfered with, and on that footing Wood, V.C., decided that the plaintiff was entitled to an injunction, because, although no actual loss was shown to have been sustained by him, yet his right was shown to have been interfered with, and his right being interfered with, there was such a possibility of future loss as entitled him to an injunction. So that does not support the contention here of the plaintiff. Then it was said that the licence, or grant, as it was called, which had been made was wrongful, and that that gave a right of action against the company and against Free, who had accepted it. I think there was a

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mistake in the use of the word "wrongful" if it meant that it gave a right of action that might sustain the plaintiffs' case. It is not wrongful in the sense of giving anyone a right to bring an action. It is wrongful in this sense, that it is *ultra vires*, and it is not effectual to put the defendant Free in the position of having the same rights which he would have as a riparian owner. Then it was said that the attempt to put another person in the position of a riparian proprietor was a wrong in respect of which the plaintiffs are entitled to maintain an action on the ground that the riparian proprietors are a body who cannot be added to except by the acquisition of a portion of the bank of the river, and an attempt to do it in any other way was therefore wrongful. No case was cited to support that proposition, and, in my opinion, it cannot be contended that a right of action lies against a man who attempts to do that which by law he cannot do, unless under that attempt something is done which interferes with the rights of the plaintiffs. Undoubtedly Free has not the rights of a riparian proprietor, which to some extent do interfere with the enjoyment of the lower riparian proprietors. But he is not exercising such rights. If he was attempting to do so his doing so would give a right of action, but the mere fact that he has accepted the grant, if it purports to give him that which he cannot have, in my opinion would not give, as against him or the grantor, a right of action on the part of the plaintiff, the lower riparian owner. Then there was this argument, on the part of the plaintiffs, that, although what the defendant Free is doing does not now produce any loss or injury to them, he may, by the supply he has acquired, be put in a position to deprive them of that water which he is not now depriving them of. Of course, so far as that depends upon user, the right will only be acquired from the time when he begins to use the water in derogation of the rights of the plaintiffs as riparian owners. He does not so use it now. He is using it in such a way as not to interfere with the flow, either in quantity or quality. But the argument comes to this, that by the existence for a number of years—it is not necessary to say what number of years—in this channel of this pipe, by means of which the water is diverted from the river, Free might, by being on the banks of that cut, acquire the rights of a riparian proprietor. But the natural rights of a riparian proprietor, as such, are rights, not of user, but rights incident to the ownership of property. In my opinion, it is impossible to say that in this case Free, by living on the banks of this pipe, could ever acquire such rights. It is unnecessary, in my opinion, to say whether there could be any such artificial cut as could ever so far become part of the natural stream of the river as to give the owners on the banks of it the rights of riparian proprietors—that is, the rights, not of user, but from the ownership of the land. It seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut. Possibly, after a lapse of time, it might be difficult in some cases to say that a cut was not part of the natural stream, but I think it impossible to suppose that after any lapse of time the channel in question could ever be thought to be a natural channel. Mr. Barber suggested there was a case which showed that natural rights could arise in respect of an arti-

cial cut. I have been unable to find such a case. I find that Sir Montague Smith, in *Rameshwar Pershad Narian Singh v. Koonj Behari Pattuk* (4 App. Cas. 126); said this: "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin"—that is to say, in one case it would be what we call by grant or prescription; in the other case it is a natural right from the natural stream flowing through a man's land which gives him the rights incident to the ownership of the land. In my opinion it is impossible to say that it ever could be suggested hereafter that this pipe was a natural portion of the stream, and that Free could by being the riparian owner of that pipe or cut, acquire the natural rights of a riparian owner. If he attempts to get any of the rights by user, of course that would be an interference, and a right of action would then arise. The plaintiffs, therefore, in my opinion, have not suggested anything upon which we could say that, from the act which has been done without legal authority, although not producing any loss to them now, loss may hereinafter result. Therefore, in my opinion, the appeal fails.

LINDLEY, L.J.—I am of the same opinion. The case was brought into court, on the pleadings, as if the plaintiffs would be prepared with evidence which would support their case. Of course, if their case, as pleaded, had been supported by the evidence, they would have been right, and would have got an injunction. But when they come into court they produce no evidence at all of that which they allege in their pleading, and nothing is left to them except this—that they find that the defendant Free has put into this stream, above the plaintiffs' land, a pipe, and that Free has used that pipe for the purpose of taking water to his sugar manufactory, and that the water, when used, comes back, so that the plaintiffs are not injured at all. Those are the bare facts. Upon that a very ingenious argument has been addressed to us with a view to persuade us, on the part of the plaintiffs, that because somebody who is above them is taking water from the stream he ought to be restrained by injunction, although there is no injury to the plaintiffs either actual or possible. Well, that is startling. It is not admitted that there is no possible injury. On the contrary, it was contended that some possible injury might accrue. But when that contention is looked at closely, I think it vanishes. So long as Free does that which he is doing there cannot be possibly more injury than he is now inflicting, which is *nil*. Of course, if he does something different, that is another matter. If by means of that pipe he were to impede this stream, and not return the water, there would be cause to complain. As long

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as he is doing nothing more or less than he does now there is no possibility of injury at all. Then, failing that, a very ingenious attempt has been made to support this case by trying to force us to carry a step further the decisions as regards non-riparian grants. I mean the *Stockport Waterworks Company v. Potter*, and *Ormerod v. Todmorden Joint Stock Mill Company*. It is put in this way. It is said that a man who is not a riparian proprietor has no right to take water from a stream at all, and that if I, a riparian proprietor, find anybody who is not a riparian proprietor taking water from the stream I can maintain an action for an injunction, although I am not damnified. Well, that is a very startling proposition, and one would like to see some authority for it. It goes to an extent which is bordering on the absurd. According to that, if I am a riparian proprietor at the mouth of the Mississippi, and somebody a thousand miles up diverts the water, although not to my detriment, I can obtain an injunction. That is ridiculous. Let us see what the cases come to, and whether they afford any countenance for a proposition of that kind. When they are looked at they do not do anything of the sort. The case of *Stockport Waterworks Company v. Potter* simply decides that the grantee of a riparian proprietor must take the water as he finds it. If it is dirty when it comes to the mouth of his pipe, he cannot complain of those who have dirtied it. He has not the rights of a riparian proprietor. The case does not decide that the licensee or grantee of a riparian proprietor cannot take some water from the stream if he hurts nobody. Such a proposition strikes me as monstrous. In *Ormerod v. Todmorden Joint Stock Mill Company*, the decision was that the grantee of a riparian proprietor could not take water and return it in a state so as to do injury to those below him. The argument there was that he could, provided he was doing that which was reasonable. The stress of the contention was that he had all the rights of a riparian proprietor. But neither of those cases decides that a licensee, or a grantee of a riparian proprietor, cannot take any water from the stream. They decided nothing of the sort, nor do they warrant any such inference. Yet, unless we go that length, this argument in support of the plaintiffs case cannot be sustained. The argument cannot be maintained unless we say that a riparian proprietor cannot allow anybody to take any water out of a stream, whether anybody is injured or not. It seems to me it would be monstrous to say anything of the sort. Then it is put in another way—in an extremely ingenious way—in Mr. Barber's argument, to the effect that riparian proprietors in a stream are a class of persons in the nature of a close borough, and that any one of them has a right to object to the introduction into that class of persons who have not got property bordering on the stream. Well, where is the authority for that? It is an ingenious suggestion, but no authority has been cited in support of it, and I am very wary of extending to the discussion of the rights of water any analogy drawn from close boroughs, or anything of the sort. I distrust the argument. It strikes me as a false analogy altogether. It comes back, however, to this—that the right of these plaintiffs has not been infringed, and that is the answer to the whole case. That is the view which was taken by the judge in

the court below, and that is the view which we take.

*Appeal dismissed.*

Solicitors for the plaintiffs, *E. Doyle and Sons*, for Jones and Son, Colchester.

Solicitors for the defendants, *Philbrick and Free*.

Wednesday, Nov. 5, 1884.

(Before BAGGALLAY, BOWEN, and FRY, L.JJ.)

**LE MAY v. WELCH, MARGETSON, AND Co.; Re LE MAY'S REGISTERED DESIGN. (a)**

*Design—Copyright—Infringement—Registration—“New or original design.”—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57) Part III., ss. 47, 90.*

*Under the Patents, Designs, and Trade Marks Act 1883, s. 47, the comptroller may, on application by any person claiming to be the proprietor of “any new or original design not previously published in the United Kingdom,” register the design under the Act.*

*In order to justify the registration of a design there must be some clearly marked and defined difference between it and the design of any similar articles previously known in the trade. There must not be a mere novelty of outline, but something which, having regard to the nature of the article, is a substantial variation.*

*Decision of Pearson, J. reversed.*

In Feb. 1884 a design was registered by the plaintiffs W. H. and H. Le May, under sect. 47 of the Patents, Designs, and Trade Marks Act 1883, for an improvement in the shape of a collar known as the “Masher” collar. The alleged improvement consisted of cutting down the front of the collar so as to form a curved opening in which the chin of the wearer could move freely.

The pattern or design was shown by a drawing on the certificate of registration.

The plaintiffs brought an action for infringement.

A motion was made on behalf of the plaintiffs for an injunction to restrain the defendants, Margetson and Co., from infringing the plaintiffs' design and from applying such design, or any imitation thereof, to any collars or other articles of a similar nature, and from selling any such collars or other articles.

A counter application was made on behalf of the defendants that the Register of Designs might be rectified by removing from it the plaintiffs' design, on the ground that it was neither novel nor original, and that it ought not therefore to have been registered.

The defendants asserted that they had not in fact infringed the plaintiffs' design.

In support of the defendants' case many collars of various descriptions were produced, which so closely resembled those made by the plaintiffs that it was difficult to distinguish the difference.

These collars had all the characteristics of the plaintiffs' collar, but the plaintiffs claimed a new combination of old elements as an original design.

The motions were heard before Pearson, J. on the 4th July, 1884.

*Napier Higgins, Q.C., and Swinfen Eady* for the plaintiffs.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.



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*Aston, Q.C., H. A. Giffard, Q.C., and E. S. Ford* for the defendants.

PEARSON, J.—The only excuse for this case having taken so much time in this court is that I am told, and I believe, therefore, that commercially there is very great value in the plaintiffs' design; otherwise that something like three hours in this court should have been expended in determining the proper value of the shape of a collar is shocking to any person who knows the value of time. The plaintiffs in this case complain that the defendants, who are well-known hosiers, have infringed a registered design for the shape of a collar. On the other hand, the defendants say that, although that design has been registered, it ought never to have been registered, and that it has nothing in it either novel or original. The only terms used in the Patents, Designs, and Trade Marks Act 1883 which have to be complied with, are that the person who claims to be registered must be the proprietor of any new or original design not previously published in the United Kingdom. The word "design" has a very wide meaning under the 60th section; and, inasmuch as this allows the registration not only of designs with regard to shape but of pattern also, I cannot help coming to the conclusion that the Legislature intended that matters that might seem minute and trivial might nevertheless be registered under this Act. If I wanted authority for that I should say that the case of *Holdsworth v. M'Crea* which the House of Lords decided, shows that this court must not dismiss applications of this kind simply because, to the judge sitting here, the matter, whether it is design or pattern which is the subject of dispute, seems to be of the extremest triviality. The matter here in dispute is a collar, and it is claimed that at the present time any application of this kind should be capable of being sustained in the court, either on one side or the other. However, it appears to me what was designed by these persons was very much an improvement upon a collar that had existed at that time. There had been originally, as one recollects, and as one sees in pictures, collars very much larger than those worn at the present day, ending in front in points which were more or less sharp, and which accordingly, in order to avoid irritation to the face and chin, had to be turned down. It appears to have struck divers manufacturers that, instead of the clumsy artifice of turning down the front of the collar, it would be better to improve the collar by removing these points altogether, and consequently I have before me various specimens of collars that have been made from time to time in which, in various ways, the difficulty in regard to the points has been overcome by removing a larger or a smaller proportion of the end of the collar, either by simply cutting off in a straight line the offending corner or in various curves reducing the collar so as to leave an opening for the chin to work in. Many collars have bands to them. Apparently, according to modern ideas, it is desirable to do away with the band. The more modern collar has dispensed with the band altogether; and I am told that that is a great improvement, and the improvement consists in this—that if you choose then to have anything put into the collar and fastened by a button, or an ornamental stud, and to wear a handkerchief round it, you can put the handker-

chief below the stud, so that all that appears above it shall be collar, and not band. As I am told, then came into existence—I know not when—a collar which has been known, and is known, by the name of the "Masher" collar. The "Masher" collar was completely square, so that when the ends met and joined together there was a square under the chin. Whatever advantages that may have had, it had evidently this disadvantage, that the stiffer it was the less play there was for the head which was above it. It appears to have struck the plaintiffs that, whereas that collar had the advantage to which I have before referred, that the handkerchief could be put below the stud, leaving nothing but collar appearing above it, it would be a still further advantage if the top part of the collar underneath the chin was cut away in such a manner as to give the chin easy play on the top of the collar. Accordingly they did cut away a certain portion of it in the shape of a curve, but in cutting that curve they took care to cut it so high above the one button hole through which the stud passes as to leave a considerable portion of the collar between the lower part of the segment and the button hole. The only collar I have had shown me which at all resembles this is the one marked "R. K. 6." Now, no doubt very much the same thing has been done in the design which is now attempted to be removed from the register, because, leaving the collar in such a manner as to show when it is buttoned, a considerable part of the collar above the button is cut away at an acute angle. It is not cut away in the segment of a circle at all. But really the difference between that collar and this is that, in this case, the slope of the collar from the bottom of the segment down to the button hole is much less in the present design than it is in the design R. K. 6. Then there is the difference of the segment of a circle being used instead of a straight line. A segment of a circle undoubtedly gives a larger opening for the chin than the straight line which was used in R. K. 6. No doubt the difference is small. The difference really consists, as I have said, of these two minute particulars, and the question that I have to determine is whether or not there is a sufficient distinction between the two to justify the registration of the present design. Considering as I do that, in any design with regard to a collar, the differences must necessarily be small, I cannot say that these differences are so small as not to constitute a substantial difference between the collars, so far as the case admits of any substance at all. If I were to come to the conclusion that there was no distinction at all between these collars, I think the only conclusion at which I should arrive would be this—that it would be almost impossible to decide that any collar could be registered at all. If I were to come to that conclusion I think I should be defeating the purposes of the Act, which seems to me to have let the door open wide enough for the registration of any design that is either novel or original. But then Mr. Aston has argued that, after all, this is neither novel nor original; because, as he says, and he says it with great force, "You had the curve, you had the fall between the curve and the button hole, and you had the scoop, if I may say so, to the collar, all invented before, and all used for the manufacture



of a variety of collars." Still, there comes to be a question whether or not this particular combination is not different from other combinations of those elements; and I have come to the conclusion, after hearing this long argument upon the subject, that there is something at all events different from all other collars that had been made, and having, as far as I can see, in all probability, some advantage over all the other designs of all the other collars which have been introduced before. I, therefore, must decide that this design was a design which it was proper to register under the Act, and I must refuse the application to strike it out of the register. The other question is a simple question as to whether, or not, the collars which have been made have been infringements of the design. With regard to that, I must say I do not think the case is arguable, because if the design is a design that can be registered, the others that have been made are, to my mind, palpable imitations. I must therefore grant the injunction that is asked, and I have the less hesitation in doing that because it is perfectly plain to me, from the evidence that has been read, that the second defendants who are mentioned upon the record purposely manufactured the collars to be an imitation of these collars with the knowledge that the collar had been registered, and taking their chance really and truly as to whether or not they could defeat the registration of the design. I must therefore refuse the application to erase this from the register, and I must grant the injunction as asked for by the plaintiff.

The defendants appealed.

*Aston, Q.C., H. A. Giffard, Q.C., and E. S. Ford,* for the appellants, referred to

Patents, Designs, and Trade Marks Act 1883, 3rd Schedule, class 10;

*Windover v. Smith*, 32 Beav. 200;

*Thom v. Syddall*, 26 L. T. Rep. N. S. 15;

*Mulloney v. Stevens*, 10 L. T. Rep. N. S. 190.

[*Fry, L.J.* referred to *McCrea v. Holdsworth* (23 L. T. Rep. N. S. 444; L. Rep. 6 Ch. App. 418) and *Lazarus v. Charles* (L. Rep. 16 Eq. 117).]

*Napier Higgins, Q.C., and Swinfen Eady*, for the plaintiffs, referred to

*Murray v. Clayton*, 27 L. T. Rep. N. S. 110; L. Rep. 15 Eq. 115;

Patents, Designs, and Trade Marks Act 1883, ss. 47, 61;

*Harrison v. Taylor*, 4 H. & N. 815.

BAGGALLAY, L.J.—We need not trouble you Mr. Aston to reply. On the 4th Feb. of the present year Messrs. W. H. and H. Le May registered, under the Patents, Designs, and Trade Marks Act of 1883, a design for a collar, which was described in their application for registration as "applicable for shape." It seems nowhere described as a collar. The only words which indicate it as a design for a collar, namely, a crescent collar, appear to be struck out, as if it was an improper thing to be registered. However, I pass that by. In due form this collar was registered and was numbered 1247, and the pattern or design is indicated by the drawing on the face of the certificate. Having obtained the design for this particular collar, Messrs. Le May now complain of the infringement of that design by the defendants, Messrs. Welch, Margetson, and Co., who, it appears, are manufacturers in a similar line of business to the plaintiffs. The plaintiffs complain that the particular collar

manufactured and sold by the defendants is a colourable imitation—a close imitation of their protected design. That complaint was met by the defendants (the present appellants) on two grounds, first, that the design was not a design which ought to have been registered, being neither new or original; and secondly, that if it was new or original the collar manufactured by them was not an infringement. Not only did they rest their case upon the defence to the action so brought against them, but they moved, under sect. 90 of the Act, to have the register rectified by removing from it this particular registration, upon the ground that it was not a design proper to be registered. Pearson, J., when the matter came before him, was of opinion, for the reasons assigned by him in his judgment, which we have had the opportunity of considering, that it was established to his satisfaction that the design of the plaintiffs was new, and that it was entitled to be registered; and secondly, being new and entitled to be registered, that that which the defendants had done amounted to an infringement of the protection afforded to the plaintiffs. Thereupon he dismissed the motion of the present appellants for rectification of the register, and granted an injunction, as prayed, in accordance with his view that the defendants' collar was an infringement of the registered design. From that decision the present appeal is brought. Now, it occurred to this court, at a very early stage of the proceedings, that the substantial question was whether or not the design ought to have been registered. We felt that, if it ought to have been registered, there was a great deal to be said about infringement by the appellants. It is said that the right way to show that the present design ought not to be registered is by applying the same rule to the plaintiffs, and saying that the slightest difference between the one collar and the other would be sufficient to be an infringement. That is not the right way to deal with the case. The proper way to deal with it is to see whether the registration should be maintained or removed from the register. There is no doubt that Pearson, J. gave a great deal of care and attention to this case, and if I had only read his judgment, and had assumed that all the materials necessary for deciding the matter were to be found stated on the face of his judgment, I should have had a strong inclination, if not to follow it, at least not to interfere with the conclusion at which he arrived. But it appears there were materials in evidence in the case which were either not sufficiently brought to his attention, or, if they were brought to his attention, not sufficiently considered by him when he gave his judgment. Here is a collar of particular shape which the plaintiffs call the "Tandem Collar." It is a collar which encircles the neck, as all collars do, but it has no band like the old-fashioned collars. It has a stud hole at the bottom, leaving a considerable amount of space above, not only up to the line where the collar encircles the neck, but a broad rim before there comes a cut in the collar, which cut has been referred to very much. It has been called a segmental cut. A more correct way of describing the collar would be "an all-round collar," having a wedge-like form cut into it, not wedge-like in the sense of there being two straight lines approaching to a point, but two arcs of a circle

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meeting at the lowest point, and representing the upper part of a gothic arch—the two halves of the circle meeting at a particular point, inverted of course. In that state of things the case is met by the production of a number of collars which were made within four or five years of the date when the plaintiffs obtained registration of their design. Some of the earlier collars in date have bands, and some of them resemble the plaintiffs'. Of course it does not appear from the registration what is the excellence of the design. That is left to the ingenuity of the counsel who represent the plaintiffs to make out in court, and we are told by Mr. Higgins that the novelty of the design consists in the combination of three characteristics, the first being the absence of the band, the second the distance between the stud and the upper part of the collar, and the third what is described as a segmental opening, or a wedge-formed opening, immediately over where the stud is introduced, for the purpose of allowing the neck to go into the opening, and to give more easy play to the neck. We may take it those are the three characteristics of the collar, and although those characteristics existed in other collars, there is a new combination of recognised old things. But are the plaintiffs right in so saying? We have had a number of collars produced before us which were in use before the date of this registration. I omit all reference to several of them, and will come to one in particular, and that is the one to which I drew Mr. Higgins' attention very early in the course of the case, marked "A. H. K." I am bound to say that when I examine that collar I see that it has the exact combination of all the three elements which the plaintiffs consider confined to their design. I do not mean to say that there may not be a little longer bit in one part or a little shorter bit in another, but all the characteristics are there to be found. That exhibit to which I have referred was manufactured in 1883, some months before the plaintiffs' collar was registered, and it was sold in 1883. The same witness who proves that collar produces another, also combining the three characteristics, which he says had been on sale for three years previous to the date of registration. However, I do not refer so much to that one as to the one which he says was made and sold in the summer of 1883. I should hardly take the same view as Pearson, J. has taken of "R. K. 6," but possibly the learned judge took that view generally affecting all that was before him. In "T. S. 3" I find all the three elements combined. Mr. Higgins during his argument put one of the old designs and the new design together, and he handed them up to us for our consideration, and when we looked at them we found that the one manufactured in the year 1883 much more resembled the registered drawing of the plaintiffs than the other. It is hardly necessary to say that Mr. Higgins would not put them before us in any way unfavourable to the party for whom he appears. Now, with regard to this matter of designs, especially with reference to such matters as collars and articles of dress in constant and daily use, there must be something clearly marked and defined, according to my view of the case, between that which is to be registered as a new design and that which has gone before. If we are to take the difference of half an inch in the placing of a stud or such little element as that, I do not see

how any person can have a collar made in his own house by any of his servants without running the risk of making a collar like someone else. It would be oppressive in the extreme if such an article as this can be registered so as to deprive all the rest of the world from making an article of the same, or like form. Upon this ground it appears to me that the case is not brought within the 47th section of the Act of Parliament, which only permits registration of a new and original design. In my opinion this is not a new or original design, and therefore the registration of it was a mistake, and the register ought to be rectified by its removal.

BOWEN, L.J.—I am of the same opinion. In order to enable the respondents to maintain the registration, they must be, or claim to be, the proprietors of a new or original design. In the present case is there any new or original design shown by this drawing? In considering whether the design is new or original, we must remember, in the first place, that we are dealing with a design which purports to found itself on shape—to deal with outline more or less. Secondly, we are considering the question with reference to an article of dress of the very simplest and least complicated kind, an article of dress which may well vary in form in every town in England—to say nothing of every year—in which collars have been worn by mankind. We must not allow industry to be oppressed. It is not every mere difference of cut, every change of outline, every change of length, or breadth, or configuration in a simple, uncomplicated, most familiar article of dress like this, which constitutes novelty of design. To hold that would be to paralyse industry, and to make the Patent, Designs, and Trade Marks Act 1883 still more than it is a trap to catch honest traders. It cannot be said that there is a new design every time a coat or waistcoat is made with a different slope, or a different number of buttons, the object of which may be to make it convenient to a particular class of wearers, or to suit more or less fastidiousness of taste. Tailoring would become impossible if such were the law, and it does not appear to me that that is the law. There must be substantial novelty in the design. Now, in the present case, is there substantial novelty? That is an issue of fact which we can judge of by the view. It is true the combination might well satisfy the Act, as Mr. Higgins says, and he asks us to find such combination and novelty in the presence, for the first time, in his article, of three characteristics, viz., the absence of band, the downward curve, and the large portion of collar above the button. The answer, which seems to go to the root of his contention, is this, that if you take the specimen which Baggallay, L.J. has dwelt upon as the most conspicuous instance you will see that Mr. Higgins' combination is not true. It does take to itself one or more elements which have been combined before, but I can find no other novelty. It would be a most dangerous view of this Act to allow a design which presents no other element of novelty to have the benefit of registration.

FRY, L.J.—I should have been contented to express my concurrence with the judgment of my learned brethren very shortly, were it not for the fact that, in the present appeal, we are about to differ from the decision of the learned judge of

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the court below, and also that it involves the interpretation of an important Act of Parliament. For those reasons I propose to state my view at more length. The question which arises is this: Was the design at the date of registration, on which the plaintiffs rely, either novel or original? Either one or the other will satisfy the terms of the Act of Parliament. Now, what is the meaning of the words "novel and original" applied to a design in that Act of Parliament. It has been suggested by Mr. Swinfen Eady that, unless a design precisely similar, absolutely identical, has been used, or been in existence prior to the Act, the design will be novel or original. Such a conclusion would be a very serious and alarming one when it is borne in mind that the Act may be applied to every possible object which is the subject of human industry, and that, when so applied, it will remain in force for a space of five years. It appears to me that such a mode of interpreting the Act would be highly unreasonable, and that the meaning of the words "novel or original" is this, that it must either be substantially novel or substantially original, having regard to the nature and character of the design, and the nature and character of the subject-matter to which it is to be applied. In coming to that conclusion it appears to me that I am in consonance with previous decisions upon a similar Act of Parliament. The matter came before Hatherley, L.C. in the year 1870, in the case of *McCrea v. Houldsworth* (23 L. T. Rep. N. S. 444; L. Rep. 6 Ch. App. 380). There the Lord Chancellor said this: "It has been argued that, when a design of this kind is registered, and the designer, instead of describing the design in words, chooses to place the design itself upon the register in the shape of a part of the article designed, then he is tied down to that identical design so exhibited, and is not at liberty to complain of any person making a thing which is to all outward appearance exactly the same, and which, for all purposes for which the thing is manufactured, is identical. And it has been argued that, if the person who exhibits a design for all practical purposes identical with the registered design is astute enough, as in this case, to turn what is called a 'star' in the opposite direction upon the pattern, though it is of exactly the same dimensions and effect to the eye, he may do so with impunity." Further on, he said: "If the designs are used in exactly the same manner, as I hold they are in this case, and have the same effect, or nearly the same effect, then of course the shifting or turning round of a star, as in this particular case, cannot be allowed to protect the defendants from the consequences of the piracy." The Lord Chancellor held that it was necessary to have identity between the design and the thing of which it was said to be an infringement. A similar thing appears to apply in the comparison of designs which existed previous to registration. Now, in the year 1873 the case of *Lazarus v. Charles* (L. Rep. 16 Eq. 117), came before Malins, V.C., and there the learned judge said this: "Now, unless the design is new and original it cannot come within the statute." The words of the statute were the same then as now, except that the word "and" was used instead of the word "or." "And although it may be pretty and ornamental, it is not on that account entitled to protection, and,

as far as I am able to judge, I have come to the conclusion that it is neither a new or original design within the meaning of the statute, and on that ground, if the case depended upon that alone, I should be adverse to the contention of the plaintiffs; and though the courts have shown much more liberality in dealing with cases under the act for registration of designs than under the act giving protection by means of patents, yet the same principle applies as to patents, and people, who manufacture articles with only a slight alteration in form from other articles already manufactured, should not rush into the mistake of registering their design, thus causing an embarrassment to trade." The views thus expressed by Lord Hatherley and Malins, V.C. appear to express the true light in which this Act ought to be interpreted. I think that unless the design be in substance either novel or original it is not novel or original within the meaning of the Act of Parliament. I observe, with satisfaction, that the learned judge in the court below, from whose decision we differ, determined the case on the same lines, and regarded the proposition on the same lines as ourselves, the only point on which we differ being whether in fact the design is novel or original. That brings me to the second question: Was the design in question substantially novel or original? That is a question which clearly must be very much answered by the eye. You must take the collars which existed before Feb. 1884, and the collar which was registered on that date, and ask yourself the question whether the two collars are substantially the same. I will not go over the ground which has been gone over already by my learned brethren, but will only say that I concur in the view which they have expressed; and the result of the comparison is that there is no substantial difference between the old collars and the new collar, and no substantial novelty in the new design. It has been said that, if we so hold, the result will be that no collar can be registered. That is a conclusion which, to my mind, is neither astonishing or alarming. It is not astonishing when one regards the fact, of which one may take judicial cognisance, that shirt collars have been worn for many years, and that the fashion has been changing perpetually with regard to the form and design of shirt collars. If it is impossible to register a design for shirt collars, there will not be much calamity about it. I come to the conclusion that the learned judge erred in holding that there was sufficient novelty, and consequently these appeals will be allowed with the usual results.

*Appeal allowed and plaintiffs' design ordered to be removed from the register. Costs to be paid by the plaintiffs.*

Solicitors for the plaintiffs, *Hicklin, Washington, and Pasmore.*

Solicitors for the defendants, *Phelps, Sidgwick, and Biddle.*

April 22 and 23, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

HOWARTH v. HOWARTH. (a)

*Divorce — Intervention — "Material facts not brought before the court"—23 & 24 Vict. c. 144, s. 7.*

*A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made.*

*The husband applied for a new trial on the ground that fresh evidence had been discovered to show the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial, which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on this application for a new trial. There was nothing to show that he was acting on behalf of or in collusion with the respondent.*

*The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial.*

*Held (affirming the decision of Sir James Hannen), that, the facts alleged by the affidavits being material, and a case having been shown which ought to be investigated, the intervention must be allowed.*

*Sect. 7 of 23 & 24 Vict. c. 144 authorises intervention by any person where material facts have not been brought before the court either intentionally or accidentally.*

*Whether the Queen's Proctor alone has the right to intervene where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, quære.*

*The words "not brought before the court" mean, not brought before the court when deciding whether a decree nisi ought to be made.*

*Where the facts have been brought before the court on an application for a new trial, they have not been brought before the court within the meaning of this section so as to prevent an intervention.*

*Whether the rules as to granting a new trial on the ground that fresh evidence has been discovered showing misconduct on the part of the petitioner are the same as in a case between ordinary litigants, quære.*

*The fact that the intervener is a near relation of the respondent is no ground for rejecting the intervention on the ground of collusion.*

*On the 5th July 1882 Mrs. Howarth commenced this action for dissolution of the marriage on the ground of adultery and cruelty of her husband. The respondent alleged by his answer that the petitioner had been guilty of adultery. The trial took place before Butt, J., without a jury, who on June 18, 1883, made a decree nisi for dissolution of the marriage, being of opinion that the adultery and cruelty on the part of the husband were proved, and that the counter-charge of adultery was not proved.*

*On the 26th June the husband obtained a rule*

*nisi for a new trial, on the ground that material evidence in support of the charge of adultery by the wife with a certain person, and which had come to the knowledge of the husband's solicitors during an adjournment of the hearing of the case, had been rejected, and that material evidence with reference to the wife's adultery had been discovered after the respondent's case on that issue was closed. The affidavits stated certain facts in support of the particular acts of adultery charged at the trial, and also other facts by which it was sought to prove acts of adultery before the trial, but which were not mentioned at the hearing.*

*On the 11th Dec. 1883 the rule nisi for a new trial was discharged.*

*Mr. Howarth appealed.*

*On the 17th Dec. 1883 Mr. Walker, an uncle of the husband, applied for leave to intervene.*

*On the 22nd Jan. 1884 a motion was made on behalf of the wife that the decree for dissolution might be made absolute. This motion was refused, but leave was given to her to move the court to reject the intervention of Mr. Walker. Shortly after this the husband's appeal from the refusal to grant a new trial was abandoned.*

*On the 5th Feb. the application to reject the intervention of Mr. Walker was heard by Sir James Hannen, who gave judgment on the 26th Feb. allowing Mr. Walker to intervene upon his giving security for the costs in the same way as the husband would have to do. Under the circumstances his Lordship thought it expedient not to make any observation on the case, or give any reasons for his decision.*

*The wife appealed, and the appeal was heard on the 22nd and 23rd April 1884.*

*The appellant's contention was, that no material facts were alleged by Mr. Walker which had not previously been brought before the court, and that he was not an independent intervener, but was acting in collusion with Mr. Howarth. Mr. Walker filed an affidavit in which he expressly stated that he intervened in the case on his own responsibility without any communication with the husband. It was also alleged that, during a conversation between the solicitors of the husband and wife on the 27th Nov. 1883, the solicitor of the husband said that if they did not get a new trial they should put someone in to intervene. The husband's solicitor denied having said this, though he admitted having said that for the wife a new trial would be the best way of meeting the new evidence, for that by the practice of the court she was entitled to costs against her husband in any event, whereas in the case of intervention no such rule applied. Nothing was, however, shown connecting the husband's solicitor with Mr. Walker.*

*Inderwick, Q.C. and Middleton for the appellant.—By sect. 7 of the Divorce Court Amendment Act 1860 (a), the intervention of a stranger*

*(a) 23 & 24 Vict. c. 144, s. 7: Every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time (not less than three months from the pronouncing thereof) as the court shall by general or special order from time to time direct, and during that period any person shall be at liberty in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of*

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

is only permitted on the ground of collusion, or that material facts have not been brought before the court. Here the facts alleged by Mr. Walker had all been previously brought before the court. The very same affidavits, word for word, only re-sworn, were used on the application for leave to intervene as had been used on the application for a new trial, and the judges having considered the facts stated therein refused a new trial on the ground that if the facts had been before the court there was no reason to suppose that they would have made any difference in the result. Besides, Mr. Walker is the uncle of the respondent, and is acting as his agent in the matter. The husband is really trying to obtain indirectly a new trial which he has failed to obtain in a direct manner. The court has always discouraged the intervention of strangers unless they can show a strong case. They referred to

*Lautour v. Her Majesty's Proctor*, 10 H. of L. Cas. 685;

*Forster v. Forster*, 9 L. T. Rep. N. S. 148; 3 Sw. & Tr. 151;

*Hulse v. Hulse*, 25 L. T. Rep. N. S. 764; L. Rep. 2 P. & D. 259;

*Stoate v. Stoate*, 5 L. T. Rep. N. S. 138; 2 Sw. & Tr. 384;

*Clements v. Clements*, 10 L. T. Rep. N. S. 352; 3 Sw. & Tr. 394.

C. Russell, Q.C., Bigham, Q.C., and Bayford, for the respondent, Mr. Walker.—The facts stated in the affidavits are material, if true, and their truth can only be determined at the trial. It was necessary for the respondent to make out a clear case before he could obtain a new trial, and the fact that the judges did not think them sufficient is not conclusive. But these facts have never been brought before the court within the meaning of the section. The words "by reason of the facts not being brought before the court" mean not being brought before the court at the original trial. There is no proof that Mr. Walker is acting in collusion with the husband, and he swears in his affidavit that it is not so. The only allegation against him is, that he is Mr. Howarth's uncle; but relations of the parties are the only persons likely to intervene. The Legislature cannot have meant to favour the intervention of mere strangers. This is an appeal from the discretion of the judge.

*Indervick* in reply.

BAGGALLAY, L.J.—The parties in this case were married in the month of March 1881, and Mrs. Howarth presented a petition for dissolution of marriage in the month of July 1882. The matter was brought to a hearing in the usual way, and

material facts not brought before the court; and on cause being so shown the court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry or otherwise as justice may require; and at any time during the progress of the cause, or before the decree is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General and by leave of the court, intervene in the suit alleging such case of collusion and retain counsel and subpoena witnesses to prove it.

on the 18th June 1883 a decree nisi for the dissolution of the marriage was made on the ground of the adultery and cruelty of the husband. An application was made very shortly afterwards for a new trial, which application was refused, and the husband appealed. On the 17th Dec. 1883 Mr. Walker, the intervener, intervened in this matter. A motion to make the decree absolute was heard on the 22nd Jan. 1884, and the court refused the application to make the decree absolute pending the respondent's appeal from the order refusing a new trial, but gave leave to the petitioner to move the court on the 5th Feb. to reject the intervention. The appeal which was then pending against the refusal of an order for a new trial was not prosecuted. The president on the 5th Feb. declined to reject the intervention, and from that refusal the present appeal is brought. It has been said in the first place for the appellant, that the intervention is really an intervention at the instance of the husband, and not an independent intervention; and in the second place that, even assuming that Mr. Walker, the actual intervener, is to be regarded as an independent intervener for the purposes of the present investigation, still, as the facts upon which he relies were all before the court at the time when the application for a new trial was refused, there is no sufficient new material to justify the order allowing the intervention. As regards the question whether Mr. Walker can be regarded as an independent intervener, it is convenient first to observe what the statutory provisions are as regards intervention. Until the Act 23 & 24 Vict. c. 144, this right of intervention did not exist, but by that statute provision was made for intervention in one of two ways, the one being by the intervention of any third party, the other by intervention of the Queen's Proctor under the direction of the Attorney-General. The intervention of the Queen's Proctor was of two kinds: one, a general power of intervention; and the other a power of intervention on the ground of the existence of collusion, in which latter case there were particular directions in the statute as to costs. What we have now to consider is, what are the provisions of the statute as regards the intervention of a third party. The 7th section says: "Every decree for a divorce shall in the first instance be a decree nisi not to be made absolute until after the expiration of such time not less than three months" (extended by 29 Vict. c. 32, c. 3, to six months) "from the pronouncing thereof as the court shall by general or special order from time to time direct; and during that period" (not during the period of six months, but during the period between the time when the decree nisi is made and the time when the decree absolute is made) "any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court." In the present case the intervention is not on the ground of collusion, but on the ground that material facts had not been brought before the court. Now I interpret the words "not brought before the court" as meaning "not brought before the court at or before the time when the decree nisi is

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made." It has been suggested that the words must have a more extended meaning than that, because the party may intervene in respect of acts of criminality committed in the interval between the time when the decree *nisi* was made and the intervention takes place; but, according to my recollection of the practice, which is rather fortified by what Mr. Inderwick stated, I think that those applications with reference to criminal offences committed between the time of the decree *nisi* and the time of intervention are cases of intervention by the Attorney-General and not by private parties. In this case I am bound to say that I come to the conclusion to which the president of the court came, that there are now brought before the court facts more or less material as regards the ultimate decision of this case, that had not been brought before the court at the time when the decree *nisi* was made. It appears to me, therefore, that, assuming Mr. Walker to be an independent intervener, not an intervener acting in collusion or by arrangement with either of the parties to the suit, there were circumstances which would justify the intervention. The question then is whether he can be regarded as a person independently intervening. I am not sure that it is necessary for the court to be satisfied that the party is not acting in collusion with either of the parties to the cause. I am rather disposed to think the court should allow the intervention unless it is satisfied that there is collusion between the parties intervening and one of the parties to the cause. In the present case I do not see any stronger reason urged why Mr. Walker should be considered as intervening at the instance and on behalf of Mr. Howarth than the fact that he is his uncle. There was some reference made to a conversation having taken place at the Inns of Court Hotel between the solicitors to the two parties, in which something was threatened or suggested about an intervention if other arrangements could not be made. I do not think that what took place on that occasion is deserving of consideration, and I extremely regret that a conversation of that kind, taking place under such circumstances, should have been made the subject of affidavit evidence. It appears to amount to nothing more than this, that the subject of intervention was mentioned, and the fact was noticed that the incidence of the costs was different in the case of an intervention from what it was in the case of a new trial. Now Mr. Walker most positively denies upon oath that he is in any way influenced by the respondent, or that it is in any way at the instance of the respondent that he is intervening. I can therefore come to no other conclusion than that he should be regarded as an independent intervener. Has he then brought forward circumstances sufficient to justify that intervention? As the subject-matter of the affidavits introduced before the learned president is to be made the subject of an inquiry before a jury, I do not think it right to express any opinion upon it, beyond saying that I must not be understood as having positively adopted the view that was taken when the application for a new trial was refused.

COTTON, L.J.—I am of the same opinion. The first question we have to consider is the true construction of the 7th section of the Act, 23 & 24 Vict. c. 144. Is it necessary to justify intervention that there should have been either collusion or

intentional withholding of facts from the court? In my opinion that is not so. The section authorises any person to show cause why the decree should not be made absolute by reason of the same having been obtained by collusion—that is one thing—or “by reason of material facts not brought before the court.” In my opinion this expression does not mean by reason of facts having been intentionally kept back from the court, but by reason of facts either intentionally or accidentally having not been brought before the court at the time when they would have been material for the purpose of deciding the action. The language is perhaps not quite clear, and there may be some doubt about its construction, but in my opinion what the intervener has to show is that the decree *nisi* ought not to be made absolute by reason of some material facts shown to the court which had not been before the court when deciding the question of fact on the petition. It was argued that they must be facts which were not before the court before the time of the intervention; but, in my opinion, that is not the true construction. The true construction is, if the decision, the verdict of a jury, or the decision of the judge, had been probably erroneous because all the material facts had not been before the judge, or the judge and the jury, then power is given by the Act to the intervener to come in. Of course then it is a question for the judge to determine whether or not he shall refuse the intervention or allow it. It was said, and no doubt correctly, that the Queen's Proctor, by leave of the Attorney-General, can at any time before the decree is made absolute intervene in consequence of subsequent adultery by the petitioner; it does not necessarily follow that no one else can do so. I am not satisfied that subsequent adultery does not come within the words “facts not brought before the court.” Though it was a fact that could not be brought before the court at the trial, it comes within the description of “facts not brought before the court.” I see no reason why it may not be held that power is given to anyone to intervene where, although there is no ground for saying that the decree *nisi* was wrong, it can be shown that the party applying for the divorce had so misconducted himself or herself before the decree was made absolute as on the ground of public policy not to be entitled to have it made absolute. It is not necessary to decide that question in the present case; the Queen's Proctor certainly can intervene on the ground of subsequent adultery, and we have not to consider the question whether any other person can. What then has the intervener to show? To justify the court in allowing the intervention it must be satisfied that material facts are brought before it which were not before it when the decree *nisi* was made. What have we here? Not a mere question of fresh evidence to establish matters which were considered, because there are three distinct allegations of facts which were never in any way before the judge when he made the decree *nisi*. Now, it is not necessary to give an opinion as to whether the evidence will make out those three facts, but those three facts are alleged, and the intervener says he can prove them. Now, those facts, if proved, were undoubtedly material in considering whether the petitioner's conduct had been such as to debar her from asking the intervention of the



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court. It may be that the allegations are entirely false, but, in my opinion, there is enough to show that they ought to be investigated; though, if the affidavits were simply absurd, so that the court could not say there was really any question to be tried, it would not be the duty of the court to allow the intervention; yet here, without giving any opinion as to how one would act on those affidavits in drawing a conclusion of fact, the affidavits, in my opinion, alleged facts in such a way as to show that the matter ought to be put into train for further investigation. There are two other points to be considered. First, it was said that the court, in refusing the rule for a new trial, had given an opinion as to those affidavits, and had said that they would not alter the decision. I do not quite take that view of what the court said. As far as I understand the judgment of the court, this was what they meant: that, having regard to the conduct of the respondent, and the absence of any affidavits as to what diligence he used to get this further evidence, they would not give him on an application for a new trial the opportunity of trying this matter over again before the jury. The appeal against that decision lapsed, and we must take it therefore that the respondent here is bound by the decision; but I give no opinion whether in such a case it was right to refuse a new trial. If the rules as between ordinary litigants are to apply to such a case, then undoubtedly the court was right in refusing the husband a new trial. I express no opinion on the question whether the rules are the same; but I wish to leave myself entirely free, if the point ever comes before the court on an appeal from a refusal in a case like this to grant a new trial on the ground of the discovery of fresh evidence, to say whether or no the ordinary rule as between litigants ought or ought not to apply in such a case. As I understand this Act of Parliament, the intention is, that no husband or wife shall obtain a divorce if his or her conduct is such that he or she does not come before the court pure and free from the charge which he or she is bringing against the respondent. That being so, it may be a question whether in such a case, if the respondent comes forward asking for a new trial, the ordinary rule is to be applicable, and whether, if the court has before it reasonable ground for saying that there ought to be an investigation, such an investigation ought not to be granted, even although the respondent may not be in such a position that if he were an ordinary litigant he could ask for a further investigation. It is not necessary to decide that question, but, in my opinion, the court below did not decide that this evidence was of such a character as not to require further investigation if a proper person came before the court and asked for such investigation. There is one more point to be considered. The respondent here appealed against the order refusing a new trial. He abandoned his appeal, and of course he is bound by that order. If, then, the intervener were shown to be merely acting for the respondent, and to be in fact the respondent under a different name, it would, in my opinion, be wrong to allow the respondent in a different way to get that which he sought to obtain at first by an appeal, but to which, by abandoning his appeal, he acknowledged that he had no right; and the duty of the court would be not

to allow the intervener to proceed. But, in my opinion, the onus is on the petitioner to satisfy the court that Mr. Walker, the intervener, is the respondent acting in a different name, and, in my opinion, that is not established. I therefore come to the conclusion that the decision of the court below was right, and that this appeal fails.

LINDLEY, L.J.—I am of the same opinion, and shall make only a few additional observations. The question turns upon the 7th section of the Act of 1860. That section provides that during the period there referred to any person shall be at liberty to show cause why the decree *nisi* should not be made absolute. Pausing there for a moment let us consider the meaning of "any person." It has been decided, and properly, that "any person" does not include the respondent. The respondent has other means of applying to the court besides availing himself of this intervention proceeding. "Any person" not only does not apply to the respondent, but it does not apply to the respondent in disguise; that is to say, to any mere nominee or puppet of his. That which he cannot do in his own name he cannot do by anybody else or by using anybody else's name; but, so far as I know, "any person" means anybody except the respondent, and somebody who is the respondent in disguise, his agent or his puppet. Now, it is said that the intervener here is the respondent in disguise, his agent acting in collusion with him. That is not made out. It is quite true that the intervener here is the uncle of the respondent, and I suppose (my experience is very limited in these matters) 99 per cent. of interveners are relations of the respondents. One does not expect anybody in the public to take up questions of this kind. The intervener is always connected more or less with one of the parties, and has some interest in the matter, though not a pecuniary interest, and the mere fact that the intervener is a relation is no objection to the intervention. It really appears to me that there is nothing against this gentleman except the fact that he is the respondent's uncle. I have not forgotten the conversation which has been alluded to, nor the fact that he has brought before the court affidavits which had already been used; but these circumstances are insufficient to lead me to the conclusion that this is in effect and in substance and in truth an application by the respondent through his uncle as his agent. The section then proceeds, "And during that period any person shall be at liberty in such manner, &c., to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court." Now, what is the meaning of the words "by reason of material facts not brought before the court?" It is quite obvious that "brought before the court" must mean brought before the court at such a time and in such a shape as that the court can deal with them. If the material facts are brought before the court in some proceeding that has nothing whatever to do with the decree *nisi*, that is not such a bringing before the court as is contemplated by the section. Now, these facts, the materiality of which is too obvious to require comment, were brought before the court in this way. After the decree *nisi* had been pronounced there was an application by the respondent for a new trial, and in support of that application he



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produced and used the affidavits which are now in question. In that sense, and on that occasion, and for that purpose, those affidavits were before the court. Is that a bringing of them before the court within the true meaning of this section? It appears to me that it is obviously not, and for this reason: What can the court do with them? It could not try the question of the adultery upon them. It could only look at them with reference to the particular purpose for which they were adduced, that was, to see whether there should be a new trial. The facts were never brought before the court in such a way as to affect the question of the propriety of the decree; the court had these affidavits before it merely for the purpose of enabling it to decide whether there was a proper case for a new trial or not. I think that is not what is meant by this section. What is meant by this section is such a bringing before the court as that the court can use them for the purpose of seeing whether the decree *nisi* ought to be made absolute or not. It is quite possible, so far as I can see, that an intervener may be in a position to bring forward facts which have happened since the decree. I do not say whether that is so or not. These facts happened before the decree, and they ought to have been brought before the court before the decree. They were not brought before the court by the respondent, but he brought them forward on this motion for a new trial. Now, that gives rise to this question, Ought the court, upon the affidavits then brought forward by the respondent for a new trial, to have treated them as before it in such a way that it could set aside the decree *nisi*? I do not think it could. The practice has been (I do not say whether it is right or wrong) to conduct these motions for new trials in the same way in which similar motions have been conducted and dealt with in ordinary *Nisi Prius* trials. I do not say whether, in consequence of this statutory provision about interveners, that has been too narrow a view, but that was the view the court took, and it dealt with the affidavits in this way. It said: "Having regard to the rules which we observe upon questions of new trial, we will not grant you a new trial because your conduct has been such as to disentitle you to that particular method of relief, and there is, in addition, another process by which justice can be done under the intervening clause." (Now, we are asked to say that, inasmuch as those affidavits were before the court on that occasion and for that purpose, it is not competent for a third person intervening to use the same materials in order to induce the court to have those charges investigated. It seems to me that is an entire mistake. The real truth, apart from all technicality, is this: That there is a very serious charge indeed against this lady which has never been investigated, and that is brought before the court in such a way that the court cannot, and ought not, to shut its eyes to it. What, then, has the court done? It has directed that the charge shall be investigated. It appears to me that it is perfectly right, and that no other direction could be given. On those grounds the appeal ought to be dismissed.

After some discussion the intervener, not asking for costs, the appeal was dismissed without costs.

Solicitors for the wife, *Gregory, Rowcliffe, and Co.*

Solicitor for the intervener, *Chester and Co.*

Friday, July 11, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte* GOOD; *Re* SALKELD. (a)

*Bankruptcy—Leasehold interest—Disclaimer by trustee—Leave of court—Conditions—Bankruptcy Act 1869 (32 & 33 Vict. c. 71), s. 23—Bankruptcy Rules 1871, r. 28.*

A partnership was dissolved, one of the partners purchasing the interest of the other for 12,000*l.*, which was to be paid in forty equal half-yearly instalments. The retiring partner covenanted that he would stand possessed of his share and interest in a lease of land and minerals granted to the two partners as joint tenants, in trust for the continuing partner. The continuing partner also covenanted to pay the 12,000*l.* in the manner agreed upon, and assigned to the retiring partner the buildings, machinery, and fixtures on the demised premises by way of mortgage to secure the payment of the 12,000*l.*, and covenanted that the leasehold premises should stand charged therewith. Soon afterwards the continuing partner filed a liquidation petition, and a trustee of his property was appointed. The trustee retained possession of the leasehold property for some time with a view to the benefit of the debtor's estate. The rent due under the lease was paid to the landlord by the retired partner.

Held, that the trustee should be allowed to disclaim the debtor's interest in the lease only on condition of his paying to the retired partner the rent of the premises from the date of the trustee's appointment until the day when his beneficial occupation ceased.

THIS was an appeal from an order made by Mr. Registrar Pepps on the 11th March 1884, giving leave to the trustee in the liquidation of John Salkeld to disclaim a leasehold interest of the debtor, on condition that he paid certain rent.

On the 1st Jan. 1875 a lease was granted to John Thomlinson and John Salkeld, who were partners in the business of cement manufacturers, as joint tenants for a term of twenty-one years of certain lands and beds of plaster and earth, subject to the payment of a dead rent and certain royalties, and to the observance and performance of the covenants and conditions contained in the lease.

On the 20th March 1882 Thomlinson retired from the partnership, it being agreed that Salkeld should carry on the business alone, and that he should pay Thomlinson the sum of 12,000*l.* for his interest in the business in forty equal half-yearly instalments. By the deed of dissolution Thomlinson covenanted that he would stand possessed of his share and interest in the premises comprised in the lease until the term should be determined or surrendered as thereinunder mentioned, in trust for Salkeld. It was also agreed that Thomlinson should forthwith, at the request of Salkeld, join with him in applying to the lessor to accept a surrender of the lease, and in executing a surrender, and in applying to the lessor for a grant of a new lease to Salkeld, and that, when such

new lease was granted, Salkeld would, if he could obtain a licence from the lessor, demise or assign the new lease to Thomlinson by way of mortgage to secure the payment of the 12,000*l.*

By another deed executed the same day Salkeld covenanted with Thomlinson for the payment of the 12,000*l.* in the manner agreed upon, and also assigned to Thomlinson the buildings, engines, machinery, and fixtures on the leasehold premises by way of mortgage to secure the payment of the 12,000*l.* Salkeld also covenanted with Thomlinson that the premises comprised in the lease should, until a surrender of the lease, and that, on the grant of a new lease, the premises comprised in such new lease should, until the execution of a mortgage thereof to Thomlinson, stand charged with the payment to Thomlinson of the 12,000*l.*

On the 18th Jan. 1883 Salkeld filed a liquidation petition, and on the 18th July 1883 Good was appointed trustee of his property.

The last deed mentioned above was not registered as a bill of sale, and the lease of the 1st Jan. 1875 had not been surrendered.

On the 18th July 1883 the trustee made an agreement with Salkeld's son by which he was to keep the ovens and machinery on the leasehold premises in work, paying the trustee 4*l.* a month by way of rent for the use of the same, the tenancy to be subject to one month's notice in writing on either side.

At Michaelmas 1883 Thomlinson was compelled to pay an arrear of rent to the lessor, part of which was due for the time during which the trustee had been in occupation. At Lady-day 1884 he again paid the rent, and a further sum was now due.

On the 11th Jan. 1884 the trustee applied to the court for leave to disclaim the debtor's interest in the lease, notice of the application being served on the lessor and on Thomlinson. Thomlinson had proved in the liquidation in respect of the 12,000*l.*

The registrar granted leave to disclaim, upon the terms of the trustee's paying to Thomlinson the rent of the premises as and from the 18th July 1883 (the date of the trustee's appointment) until the day when his beneficial occupation thereof ceased.

The trustee appealed.

*R. Vaughan Williams* for the appellant.—The trustee ought to have had unconditional leave to disclaim. Thomlinson has no interest in the lease, as he has sold it to Salkeld. Thomlinson ought to bear the burden of the rent. He is entitled to prove in the liquidation for the 12,000*l.*, and this right is equivalent to payment, and he can also prove on the covenant for indemnity. Thomlinson's rights arise, not under the lease, but under the deed of dissolution of partnership. The relation back of the disclaimer to the date of the trustee's appointment does not deprive Thomlinson of any right which he would otherwise have had against the debtor. Thomlinson's only remedy is his right of proof for breach of contract. The trustee has kept Thomlinson out of possession of the property, but not by virtue of the lease which he seeks to disclaim, but by virtue of a different contract. In all the previous cases the person who was to be compensated had been kept out of possession by virtue of the lease which has to be disclaimed. The arrangement

made with the debtor's son was for the preservation of the mortgaged property and was for the benefit of the estate; and the larger the sum realised for that property the less would be the amount of Thomlinson's proof. Some judges have expressed doubts whether rule 28 of the Bankruptcy Rules 1871, which requires the trustee to obtain the leave of the court before disclaiming a lease, was not *ultra vires*. He referred to—

*Ex parte Isherwood*, 48 L. T. Rep. N. S. 398; 22 Ch. Div. 384;

*Ex parte Arnal*, 49 L. T. Rep. N. S. 221; 24 Ch. Div. 26.

*F. Cooper Willis*, for Thomlinson, was not heard.

BAGGALLAY, L.J., after stating the facts, continued:—Possibly the registrar's order may mean that the trustee is personally to pay the rent. But it is not an order that he should pay the money; it is only an order giving him leave to disclaim on condition of his paying it. The substantial question is, whether Thomlinson should be allowed to receive this particular amount of rent in full, he having paid it to the landlord, or whether he is only entitled to a dividend upon it by virtue of the contract of the 20th March 1882. It is said that this condition ought not to be imposed on the trustee because he has not had any beneficial occupation of the property. It has been clearly established by a series of cases, *Ex parte Ladbury* (17 Ch. Div. 532); *Ex parte Isherwood* (48 L. T. Rep. N. S. 398; 22 Ch. Div. 384); *Ex parte Izard* (48 L. T. Rep. N. S. 502; 23 Ch. Div. 115), and *Ex parte Arnal* (49 L. T. Rep. N. S. 221; 24 Ch. Div. 26), that in determining whether, on giving leave to a trustee to disclaim a lease belonging to a bankrupt, he shall be required to pay compensation to the landlord, the court will have regard, not merely to the actual benefit which has resulted to the estate from the trustee's occupation, but to the question whether the possession was retained by him with the view of obtaining a profit for the estate. In the present case a lease was granted by the trustee of the ovens and machinery on the property to the debtor's son at an almost nominal rent, the object being that the machinery should be kept in proper order until an opportunity should arise of disposing of it for the benefit of the estate. I have no doubt that the possession of the property was retained by the trustee with the view of obtaining a benefit for the estate, and therefore the case is one in which the trustee would have been required to pay compensation to the landlord. If the landlord had not been paid the rent, the rule would have applied that leave to disclaim the lease ought to be given only on the terms of the trustee's making compensation to the landlord. The registrar thought it right to have the co-lessee as well as the landlord before him, and it seems to me that he was fully justified in requiring the trustee to pay to Thomlinson that compensation which, if he had not paid the rent to the landlord, the trustee would have been required to pay to the landlord. If this condition was not imposed the trustee would have had the beneficial occupation of the property without paying anything for it. The principle which applies to the case of a landlord appears to me to apply equally to the case of a person who has

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actually paid the rent to the landlord. This, I think, is sufficient to dispose of the case, and to show that the registrar's conclusion was right in principle. This court will not interfere with the amount of compensation fixed by him, unless it can be seen that he has assessed it on a wrong principle.

COTTON, L.J.—I think the registrar's order is right. Of course this case is different in its circumstances from previous cases. But certain rules have been laid down by those cases. The first question is, whether the trustee's occupation of the leasehold premises has either been beneficial to the bankrupt's estate, or was contemplated as likely to be beneficial to it? If so, the cases show that compensation ought to be required to be given to the landlord as a condition of allowing a disclaimer of the lease, because, inasmuch as by virtue of the disclaimer the lease would be put an end to as at the date of the adjudication, the landlord would have no other remedy. In the present case the trustee's occupation was clearly intended for the benefit of the debtor's estate; the object was to keep the machinery and other chattels in such a condition that they should realise as much as possible for the estate. The next question is, whether it is right to require the trustee to make compensation for that beneficial occupation, not to the landlord, but to Thomlinson. Thomlinson's point was this: he was legally liable to pay the whole rent to the landlord, but he had no beneficial interest in the property. He was a trustee of the lease from the debtor. If the landlord had not been paid his rent it would, according to the previous decisions, have been right to require the trustee to pay compensation to him in respect of his beneficial occupation. Thomlinson, by virtue of his position as trustee, and independently of any express contract, is entitled to be indemnified by his *cestui que trust* against his legal liability under the lease, and has for that purpose a lien on the interest of his *cestui que trust* in the lease, and when the trustee in the liquidation comes to the court and asks that he may be allowed to put an end to that interest as from an antecedent period, I think the registrar was right in allowing this only on the terms of paying compensation to Thomlinson, who, by the disclaimer, would be deprived of the lien which he would have had.

LINDLEY, L.J.—I have arrived at the same conclusion. I do not regard the case as a simple one of landlord and tenant. Thomlinson stood in a peculiar position. He was a joint lessee with Salkeld, and he afterwards became a trustee for his own interest in it for Salkeld. The trustee in the liquidation, when he was in possession of the property, was Thomlinson's *cestui que trust*. Thomlinson was liable to the landlord, and he had a lien on the beneficial interest of his *cestui que trust* for his indemnity. He was in fact a secured creditor, and when the property, on which he had a security is taken away, I think he should be treated as if he had that lien still. No doubt he had a right to prove in the liquidation, but he was also a secured creditor.

Solicitors for the appellants, *Surr, Gribble, and Co.*

Solicitors for the respondent, *Ullithorne, Currey, and Villiers.*

July 11, 12, 14, and Aug. 12, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte* HARRISON; *Re* PEAKE. (a)

*Bankruptcy—Rent—Distress—Money due to gas company for gas—Bankruptcy Act 1859 (32 & 33 Vict. c. 71), s. 34.*

*A corporation which supplied gas, had a power under their special Act "to recover from any person any rent or charge due to them by him for gas supplied, by the like means as landlords are for the time being by law allowed to recover rent in arrear."*

*Held, that after the filing of a liquidation petition by a customer, the corporation was entitled, as against the trustee in the liquidation, to levy a distress in respect of a sum due by the debtor for gas supplied before the filing of the petition.*

*Held, also, that by virtue of that clause they were entitled to the rights given to landlords by sect. 34 of the Bankruptcy Act 1869, and were not "other persons" to whom rent was due by the debtor, within the meaning of that section.*

*Though the charge for gas supplied has been called "rent" in some Acts of Parliament, it is really the price of the gas sold, and therefore a gas company does not come within the words "other persons to whom any rent is due" in sect. 34 of the Bankruptcy Act 1869, which refer to a person who is in a position analogous to that of a landlord, and is entitled to distrain for rent strictly so called.*

*Decision of Cave, J. affirmed.*

*Ex parte* Hill (37 L. T. Rep. N. S. 46; 6 Ch. Div. 63), and *Ex parte* The Birmingham and Staffordshire Gas Company (24 L. T. Rep. N. S. 639; L. Rep. 11 Eq. 615) commented on.

THE Birmingham and Staffordshire Gas Light Company were incorporated by a special Act (6 Geo. 4, c. lxxix.) for the purpose of supplying gas to a large district, including the borough of Walsall.

In 1845 the powers of this company were enlarged by the 8 & 9 Vict. c. lxvi.

By sect. 155 of that Act it was provided that:

*If any person supplied by the company with gas . . . shall neglect to pay any rent or charge due to the company for the same, it shall be lawful for the company, or any person acting under their authority, to stop the gas from entering the premises of such person by cutting off the service-pipe to such premises, or by such other means as the company shall think fit; and the company may recover the rent or charge due from such person, if less than 20l., together with the expenses (if any) that shall have been incurred in cutting off the gas, and costs of recovering the same, by the same means as landlords are by law empowered to recover rent in arrear.*

And sect. 187 provided that:

*Where in this Act any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by the distress, such sum of money shall be levied by distress and sale of the goods and chattels of the person liable to pay the same.*

By an agreement dated the 23rd April 1875, so much of the undertaking of the company as was within the borough of Walsall was transferred to the corporation. This agreement was confirmed by sect. 28 of an Act (39 & 40 Vict. c. cxix.) which was passed in 1876.

By sect. 29 it was provided that on the execution of a certain deed mentioned in a schedule to the Act, so much of the undertaking and

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property, rights, powers, and privileges of the company as should be comprised in the deed should, by virtue of that deed and the Act, become and should thenceforth be transferred to and vested in the corporation of Walsall. The form of the deed given in the schedule assigned to the corporation so much of the undertaking of the company "as relates to the supply of gas within the borough of Walsall, with full authority to exercise the rights, powers, and privileges connected therewith."

Sect. 44 provided :

The corporation may, without prejudice to any other remedy, recover from any person any rent or charge due to them by him for gas supplied, or on any account connected with the supply of gas to him, by the like means as landlords are for the time being by law allowed to recover rent in arrear; but the incoming tenant of any premises shall not be liable in respect of any arrears of any such rent or charge accrued before the commencement of his tenancy unless he has agreed to be liable for the same.

A deed in the form given in the schedule was afterwards executed.

On the 12th Nov. 1883, Messrs. Peake and Fisher, trading in Walsall as the Castle Iron Company, presented their petition for liquidation.

On the 14th Nov. the corporation distrained for the amount due to them from Messrs. Peake and Fisher for gas, together with 10s. 6d. costs, making together the sum of 12l. 9s. 4d.

On the 29th Nov. resolutions were passed for liquidation by arrangement, and a trustee was appointed, and on the 3rd Dec. those resolutions were registered.

The trustee paid out the distress, took possession of the works of the debtors, which were leasehold, and also paid the rent due at Christmas. He remained in possession until the 9th Jan. 1884, when he disclaimed the lease by leave of the court.

On the 13th March the County Court judge, on the application of the trustee, declared the distress invalid as against him. The corporation appealed.

The appeal was heard on the 7th April 1884.

*Winslow*, Q.C. and *R. V. Williams* for the appellants.

*A. T. Lawrence* for the trustee.

CAVE, J.—I am of opinion that the decision appealed against is wrong. It is to mind impossible to distinguish this case from that of *Ex parte Birmingham Gas Light Company* (24 L. T. Rep. N. S. 639; L. Rep. 11 Eq. 615), and although that case was before the Court of Appeal in *Ex parte Hill* (37 L. T. Rep. N. S. 46; 6 Ch. Div. 63), and was considered by them, it was not disapproved of. It is true that the Court of Appeal distinguished that case from the case then before them, but that is a very different thing from overruling it. I think this case turns on the words "other person to whom rent is due" in the 34th section of the Bankruptcy Act 1869. The important words in that description are "other person," and they are used in conjunction with "landlord" which is the preceding word, and the disjunctive "or" is used. Therefore the other person, although not a landlord, must be a person *ejusdem generis*. He must be a person who, although not a landlord, has rights analogous to the peculiar rights and remedies of a landlord

which are dealt with by the 34th section. And if he is a person who has those rights and remedies, and can by distress obtain payment of some debt due to him, he answers the description of "other person to whom rent is due" in that section. If that is the true construction, the appellant corporation exactly fills that position, because, although they are not landlords, they have under their special Act the same powers and remedies that a landlord has by law to recover rent in arrear. In *Ex parte Hill* (*ubi sup.*) the gas company had no power to levy a distress without the intermediation of a justice. They had to resort to a legal process before they could distrain. They had not in fact the rights and remedies which a landlord has by law to recover his rent. Here the appellants' special Act empowers them to recover their gas rent "by the like means as landlords are by law allowed to recover rent in arrear." That sufficiently distinguishes the two cases. I am of opinion, therefore, that this appeal must be allowed with costs.

From this decision the trustee now appealed.

*A. T. Lawrence* and *Tyrrell Paine* for the trustee, and *Winslow*, Q.C. and *R. Vaughan Williams* for corporation, referred to

*Ex parte Birmingham and Staffordshire Gas Light Company*, 24 L. T. Rep. N. S. 639; L. Rep. 11 Eq. 615;

*Ex parte Hill*; *Re Roberts*, 37 L. T. Rep. N. S. 46; 6 Ch. Div. 63;

*Comyn's Digest*, 5th edit. vol. vii. p. 247;

*Jacob's Law Dictionary*, sect. 34;

*Bankruptcy Act 1869*, ss. 12, 13, and 34;

8 & 9 Vict. c. lxxvi. ss. 155 and 187;

39 & 40 Vict. c. clix. s. 44.

BAGGALLAY, L.J., after stating the facts, and referring to the provisions of the Acts of 1845 and 1876, continued:—In my opinion, whatever may have been the powers conferred upon the original company by the 155th section of their special Act (limited, it may be, by the 187th section) those powers have passed to the Walsall Corporation; but they have also, in addition to those powers, the other powers which are conferred upon them by their own special Act of 1876. Therefore, to my mind, it is immaterial to consider what right they have under the provisions of the original Act of 1845. It appears to me impossible to get over the words of sect. 44, which, in my opinion, applies to the present case. At the time when the liquidation petition was filed there was a sum due from Messrs. Peake and Fisher to the corporation for gas supplied, and for that amount a distress was put in. The corporation had by sect. 44 the remedy which a landlord had in recovering rent in arrear. The remedy which the Act conferred upon the corporation was being put in force, and this appears to me really to be sufficient to dispose of the case. But I wish to say a few words as to the authorities which have been referred to. The first case is *Ex parte Birmingham and Staffordshire Gas Light Company* (24 L. T. Rep. N. S. 639; L. Rep. 11 Eq. 615) the circumstances of which were similar to those of the present case. In that case, directly after a petition for liquidation had been presented, an *interim* injunction was granted by a County Court, professedly under the 13th section of the Bankruptcy Act 1869, restraining the company from further proceeding with a distress which they levied on the property of the liquidating debtors, which was taken to be a

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legal proceeding on behalf of the company. Afterwards, the creditors having resolved upon a liquidation by arrangement, and appointed a trustee, the injunction was made perpetual. From that injunction an appeal was presented to Bacon, V.C. The substantial question for him to consider was whether the distress was "an execution or legal process" within the meaning of the 13th section—whether there had been "proceedings in any action, suit, execution, or other legal process, against the debtor in respect of any debt provable in bankruptcy." Having regard to the terms of the 155th section of the special Act of 1845, the Vice-Chancellor was of opinion that the power of distress which was thereby conferred on the company—a power to levy a distress of the same nature and of the same kind which a landlord was entitled to put in for arrears of rent—was not a legal proceeding within the meaning of the 13th section of the Bankruptcy Act. No doubt he had regard to the terms of the 155th section, because, without that section, there would have been no right on the part of the gas company to recover the amount due to them for gas by distress. The Vice-Chancellor's attention does not seem to have been directed very prominently to the 187th section of the special Act, which limited the right of distress to the goods of the person liable to pay the debt, for I do not find that it is adverted to in his judgment, though it was referred to in the course of the argument. The other case is *Ex parte Hill* (37 L. T. Rep. N. S. 46; 6 Ch. Div. 63). That was a very different case. There the special Act did not give the company the same power to recover money for gas as a landlord has to recover rent in arrear; but, as the head-note states, "The special Act of a gas company empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, and provided that any justice on application might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same." That is not the simple form of distress of which a landlord could take advantage; it is a special form of distress, and the court held that "the company did not come within the words 'landlord or other person to whom any rent is due from the bankrupt' in sect. 34 of the Bankruptcy Act 1869; but that the distress was a legal process against the estate of the debtor in respect of a provable debt which the court had, under sect. 13 of the Act, or under r. 260 of the Bankruptcy Rules 1870, power to restrain." The distress was clearly a legal process against the estate of the debtor, and upon that ground it appears to me that the decision in *Ex parte Hill* is to be supported. I was a party to the judgment, and it does not appear to me in any way to conflict with the judgment of Bacon, V.C. in the case of *Ex parte Birmingham and Staffordshire Gas Light Company* (24 L. T. Rep. N. S. 639; L. Rep. 11 Eq. 615). The distress, as it appears to me, was in the nature of a legal process for enforcing the payment of a debt due, and it came within the 13th section of the Bankruptcy Act 1869, and not within the 34th. The present case does not, as it appears to me, depend on either of those cases. The circumstances are different. The 44th section of the special Act gives the corporation a very wide power, and authorises them to do that which they have done.

Under the circumstances, I think the view which Cave, J. has taken is the true one.

COTTON, L.J.—This is an important case, both to gas producers and to gas consumers. In the court below it appears to have been decided on the ground that the corporation had a right to distrain under the 34th section of the Bankruptcy Act 1869, as being other persons to whom rent was due from the debtors. It is said that in various Acts of Parliament the charge payable for gas is called "rent," and that therefore, although the corporation are certainly not landlords, they are persons other than a landlord to whom what an Act of Parliament has declared to be "rent" was due, and that they had the right of a landlord to distrain for it. Now, if there was nothing more in the case, I should be of opinion that the decision appealed from was wrong, because I still adhere to the opinion which I expressed in *Ex parte Hill* (*ubi sup.*), that the words "other person to whom any rent is due," in sect. 34, must mean a person to whom "rent," properly so called, with the legal incidents of rent, is due—a person who stands not exactly in the position of a landlord, but in a somewhat analogous position. But that is not all in the present case; it really turns on the provisions of sect. 44 of the Act of 1876. I will deal first with the objection that the trustee must be considered as an "incoming tenant," and that the goods being his by virtue of the relation back of his title, it would not be right to give effect to the distress which was levied after the presentation of the liquidation petition, though before the appointment of the trustee. In my opinion, the trustee cannot be considered as an "incoming tenant." He was not the tenant at all till a period far remote; he was not in fact tenant at the time when the distress was levied, and he cannot, in my opinion, be considered, within the fair meaning of sect. 44, "the incoming tenant," on whose goods no distress could be levied in respect of the rent or charge due to the corporation for gas supplied by them before he became tenant. It comes, therefore, to this, that the corporation are, under sect. 44, entitled to recover the sum due to them for gas supplied "by the like means as landlords are for the time being by law allowed to recover rent in arrear." There was power very like this given by sect. 155 of the previous Act of 1845, but there was, as it appears to me, a restriction upon it by sect. 187, that it should only be exercised as against the goods of the person from whom the rent was due. But, whatever may be the effect of sect. 187 on the power given by sect. 155, in the present case the corporation are relying, not solely on the powers of that Act, but upon the new power given by sect. 44 of the Act of 1876, which is without any restriction except that which I have already dealt with, that "the incoming tenant" is not to be liable—that is, to have his goods taken—in respect of a charge accrued before the commencement of his tenancy. It is on this power, and on this alone, without reference to the restriction imposed by sect. 187 of the earlier Act, that in my opinion, we must take our stand; and then we have this, that the corporation may enforce payment of the charge "by the like means as landlords are for the time being by law allowed to recover rent in arrear." It is said that that was merely meant to

point out the process by which they may enforce their claim and not to give them any preferential right. But if the process when put in force does of itself give a preference, it follows, in my opinion, that the corporation may obtain the same result and the same benefit by putting it in force as landlords are by law allowed to obtain by it. Then we come to sect. 34 of the Bankruptcy Act 1869, the effect of which is to give landlords, with certain restrictions, certain rights in case of the bankruptcy of their tenants. Here the corporation may enforce payment by those means which are allowed to landlords for the recovery of rent in arrear, and, in my opinion, so far as sect. 34 gives any power to landlords, so far as it frees them from any difficulty which they would otherwise have had in recovering their rent, and so far also as it imposes restrictions on them in enforcing their remedy by distress, both the benefits given and the restrictions imposed by sect. 34 apply to the corporation by virtue of sect. 44 of their Act of 1876. We need not refer to the words in sect. 34, "other persons to whom rent is due." Sect. 44 is a statutory declaration that the corporation, for the purpose of recovering any sum due to them for gas supplied, are to have the same remedies as landlords have for recovering rent in arrear. Strike out from the 34th section everything except that which relates to landlords, and it comes to this, that the power is given to this corporation of recovering the gas charges by distress or by any other remedy which a landlord has for recovering rent in arrear. In my opinion, therefore, by virtue of sect. 44 of this particular Act, the corporation had a right to enforce the gas charge in question by the distress which was put in.

LINDLEY, L.J.—I am of the same opinion. This is not the first time that the court has found a difficulty in construing two Acts of Parliament—a special Act and a general Act—which have to be read together. It is true that owing to circumstances which I am not able to explain, the charge for gas supplied, which is neither more nor less than the price of goods sold and delivered, has come to be called a "gas rent," and it is so called in the Gas Clauses Act 1847 as well as in the Gas Clauses Act 1871. But, notwithstanding that, it is not right to say that gas rent is "rent" within the meaning of sect. 34 of the Bankruptcy Act 1869, or any other Act, unless there is something else to show that such a charge is to be considered as "rent." I will say nothing about the true construction of sects. 155 and 187 of the 8 & 9 Vict. c. lvi. I do not think it necessary to consider the operation of those sections. It would, in my opinion, require a good deal of consideration before one could safely say whether sect. 155 was qualified by sect. 187, which is very special in its language. But the corporation have the power which is given to them by sect. 44 of their Act of 1876. [His Lordship read the section.] Now, the gas consumer is the person from whom the rent or charge is to be recovered "by the like means as landlords are for the time being by law allowed to recover rent in arrear," and the question is by what means landlords are allowed to recover rent in arrear. Then we go to sect. 34 of the Bankruptcy Act of 1869, and the question arises, why should not this corporation be entitled to distrain after the bankruptcy by virtue of these two sections? I cannot see any reason at all why they

should not. It seems to me that this case is exactly within the 34th section, and that we cannot escape from that construction. I do not think that the corporation is in the position of any "other person to whom any rent is due" within the true meaning of sect. 34. The language of that section is a little confused, but I take it "the landlord" means the immediate landlord of the bankrupt, and the words "the landlord or other person" include any person who is in the same position as a landlord and entitled to distrain for rent properly so called. For instance, it often happens that there are two or three landlords entitled to two or three ground rents one after the other, and they can all distrain. The words would include also a mortgagee to whom the mortgagor has attorned as tenant. The words mean that a landlord, or any person in an analogous position, may distrain for rent. They do not include a gas company, although the charge for gas is sometimes called a "rent." I cannot come to the conclusion that the Walsall Corporation, or any gas company, is a "person to whom any rent is due" within the true meaning of sect. 34 of the Bankruptcy Act; but I cannot escape from the conclusion that this corporation is, under sect. 44 of its special Act, entitled to the ordinary remedies allowed to landlords for recovering rent in arrear.

*Appeal dismissed with costs.*

Aug. 12.—A. T. Lawrence, for the trustee, asked leave to appeal to the House of Lords.

The COURT (BAGGALLAY, COTTON, and LINDLEY, L.JJ.) refused the application.

Solicitors for the trustee, *Duignan, Smiles, and Co.*, for *Duignan, Lewis, and Elliott*, Walsall.

Solicitors for the corporation, *Sharpe, Parkers, and Co.*, for *Wilkinson, Gillespie, and Wilkinson*, Walsall.

Monday, Aug. 4, 1884.

(Before BAGGALLAY, COTTON, and LINDLEY, L.JJ.)

*Ex parte* EDWARDS; *Re* CHAPMAN. (a)

*Bankruptcy—Pending petition—Receipt of money from debtor by petitioning creditor's solicitor—Repayment to trustee.*

*While the hearing of a bankruptcy petition was pending, the solicitor of the petitioning creditor, as his agent and with notice of the act of bankruptcy on which the petition was founded, received from the debtor various sums as consideration for several adjournments of the hearing of the petition. He paid over or accounted for these sums to his client. An adjudication having afterwards been made on the petition:*

*Held, that the title of the trustee relating back to the act of bankruptcy, of which the solicitor had notice, he must repay the money to the trustee, and was not discharged by the payment to his own principal.*

THIS was an appeal from a decision of Mr. Registrar Murray.

On the 20th Feb. 1883 John Storey presented a bankruptcy petition against James Chapman, founded on the failure of Chapman to comply with a debtor's summons which Storey had served on him for 492l. Mr. Thomas Edwards acted as

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solicitor for Storey with reference both to the summons and the petition.

The petition was to have been heard on the 5th March, when, by consent, the hearing was adjourned to the 10th April, Chapman paying 100*l.* as a consideration for the postponement, which sum was paid to Edwards on behalf of Storey. The petition was afterwards adjourned on three occasions, Chapman paying each time respectively 130*l.*, 50*l.*, and 25*l.*, which sums were also received by Edwards on behalf of Storey.

Ultimately on the 24th Oct. the petition was heard, and Chapman was adjudicated a bankrupt. Edwards afterwards rendered an account to Storey from Jan. 1883 to the 3rd Aug., in which he credited him with 305*l.*, the amount of the four sums received by him from Chapman, and debited him with 150*l.* paid to him on the 30th April, and also with several items for costs, the account showing a balance due from Storey of 190*l.*

The trustee in the bankruptcy applied to the court for an order that Edwards should pay the 305*l.* to him, on the ground that he had received it with notice of the act of bankruptcy.

The Registrar made the order, and Edwards appealed.

*A. a'Becket Terrell and Wyatt Hart* for the appellant—Under the circumstances Edwards is not liable to pay the 305*l.* to the trustee, though Storey may be. He was the authorised agent of Storey to receive the money on his behalf, and was bound to hand it over to his principal. In law the money came to the hands of Storey, the principal, not to the hands of Edwards, the agent. There is no suggestion of any fraud or other improper conduct, and Edwards, the agent, is protected by the authority of Storey, the principal:

*Cranch v. White*, 1 Bing. N. C. 414;

*Perkins v. Smith*, 1 Wil. 328;

*Attorney-General v. Earl of Chesterfield*, 18 Beav. 586;

*Maw v. Pearson*, 10 L. T. Rep. N. S. 323; 28 Beav. 196;

*Barnes v. Addy*, 30 L. T. Rep. N. S. 4; L. Rep. 9 Ch. App. 244.

The trustee's application is in the nature of an action for money had and received to his use. In bankruptcy, until the adjudication and appointment of trustee, the bankrupt is the true owner of his property, and until the trustee demanded the money the agent was bound to hand the money to his principal. Storey could have dismissed this petition, and no other creditor could have availed himself of the particular act of bankruptcy: (Bankruptcy Act 1869, sect. 6, subsect. 6.) [LINDLEY, L.J. referred to *Sharland v. Mildon*, 5 Hare, 469.] In that case the agent of the executrix *de son tort* was held liable to be sued for the moneys belonging to the testator's estate which he had received and handed over to his principal, because she had no title at all. In *Stead v. Thornton* (3 B. & Ad. 357), the principal had become lunatic before the money had been received by the agent, and the agency was therefore revoked. In *Ex parte Jay* (29 L. T. Rep. N. S. 854; L. Rep. 9 Ch. App. 133), a receiver had been appointed. *Ex parte Hankin* (32 L. T. Rep. N. S. 316; L. Rep. 10 Ch. App. 267) does not apply, and *Vernon v. Hankey* (2 T. R. 113) and *Hollins v. Fowler* (33 L. T. Rep. N. S. 73;

L. Rep. 7 E. & I. 757) are distinguishable. The case of *Ex parte Helder* (49 L. T. Rep. N. S. 612; 24 Ch. Div. 339) was relied on, but there the question was whether the act of bankruptcy was complete when the agent handed over the money, and it was held it was not. They also referred to

*Coles v. Wright*, 4 Taunt. 198;

*Type v. Hockin*, 7 B. & C. 101;

*Stephens v. Badcock*, 8 B. & Ad. 354.

*Winslow*, Q.C. and *Sidney Woolf*, for the trustee, were not called on.

BAGGALLAY, L.J.—It appears to me that, as soon as the facts and the relative positions of the parties are clearly appreciated, the propriety of the registrar's order is manifest. A number of cases have been cited to us. Many of them have no relation to the law of bankruptcy, though some have. But this observation must be made, that in none of them was the relative position of the parties the same as in the present case. To my mind we derive no assistance from any of the cases, especially so far as they illustrate general principles. [His Lordship stated the facts and continued:] The question is, whether the several payments that were made by Edwards to Storey out of the moneys which had been handed to him by Chapman were properly made as against the trustee in the bankruptcy. It is said that they were, because Edwards, in receiving the money, was acting simply as agent for Storey. Edwards was employed by Storey as his solicitor, and it is said that he was bound to hand over the money which he had received to Storey. I cannot accede to this view. Before any of the payments were made by Chapman to Edwards an act of bankruptcy had been committed by Chapman, and this was well known to Edwards, who was acting as solicitor to Storey in the matter of the petition. He had full notice of the act of bankruptcy. He knew perfectly well that, if an adjudication of bankruptcy was made on the petition, the title of the trustee in the bankruptcy would relate back to the act of bankruptcy, and that all the property, which would otherwise have belonged to the bankrupt, would be the property of the trustee as from the date of the act of bankruptcy. Knowing this, Edwards handed over the money to Storey. It is sufficient to state the facts in order to show that, having regard to the relation between the parties, the payments made by Edwards to Storey cannot possibly stand as against the trustee. It would have been a very different thing if an action had been brought to recover Storey's debt. The case of *Sharland v. Mildon* (5 Hare, 469) shows clearly that, if a person is employed as an agent to do a particular thing and receives money for his principal in the course of his agency, still, if the person who employs him has no right to the money, the agent is not entitled to hand it over to him, and is liable for it to the true owner if he does so hand it over. In my opinion the principle of that case applies to the present.

COTTON, L.J.—I am of the same opinion. I will assume that the whole of the money has been paid over by Edwards to Storey. But, notwithstanding this payment, is he not liable for it to the trustee? In my opinion he is. A number of cases have been cited to show that, in the absence of fraud or some other wrongful act of an agent who has accounted to his principal cannot be



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made liable to the true owner of the money for which he has so accounted; but very little argument has been addressed to the question whether the payment by the agent in the present case was not a wrongful act. In my opinion it was. An act of bankruptcy had been committed by Chapman, and upon that act a bankruptcy petition had been presented by Storey. Upon a payment being made to him by Chapman, Storey might no doubt have dismissed his petition. The petition, however, was not dismissed. On the contrary, the petition being pending, the payments in question were made by Chapman to Edwards, and, while Storey was still seeking to have an adjudication made against Chapman, Edwards handed over the money that he had thus received to Chapman. In my opinion that was wrong. So long as Storey was seeking to have an adjudication made on his petition, he had no right to retain that money which, if he succeeded upon his petition, would have been applicable to the payment of all Chapman's creditors rateably. In my opinion, therefore, the payment by Edwards to Storey was a wrongful act, and we need not deal with the other points which have been argued. It is said that Edwards could not have successfully resisted an action by Storey for the money. In my opinion he could, and nothing would have compelled him to pay it over. It may be (though I give no decided opinion) that, if the petition had been dismissed, Edwards could safely have handed over the money to Storey, if he had had no notice of any other act of bankruptcy. Of course, if he had had notice of another act of bankruptcy, he would have stood in the same position as that in which he now stands. In my opinion the registrar's order is quite right.

LINDLEY, L.J.—I also think that the order is right. Edwards was acting as solicitor for the petitioning creditor, and he knew of the act of bankruptcy, and he knew that in a certain event (which has since happened) the person who paid the money to him would have no right to pay it, and that the person for whom he received it would have no right to retain it. I am of opinion that, under these circumstances, Edwards was not justified in paying over the money. I think that in principle *Sharland v. Mildon* (5 Hare, 469) is very like the present case. I think that the appeal must be dismissed with costs.

Aug. 11.—*A. a'Beckett Terrell*, for the appellant, asked for leave to appeal to the House of Lords. He referred to *Ex parte Bateman* (5 De G. M. & G. 358), and urged that the same question might have arisen, not in a bankruptcy, but in an action, when an appeal to the House of Lords would have been of right.

The COURT refused the application, saying that the case was not one of any difficulty.

Solicitor for the appellant, *Thomas Edwards*.

Solicitors for the trustee, *Munns and Longden*.

Monday, Jan. 12.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

THE BEESWING. (a)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Practice—Appeal—Cross-appeal—R. S. C., Order LVIII., r. 6.*

*Where an appellant withdraws his appeal after the respondent has given notice of motion by way of cross-appeal under Order LVIII., r. 6, should the respondent determine to continue with his cross-appeal, his cross-notice will be treated as a substantive notice of appeal, in which case the original appellant may give a cross-notice of appeal that he intends to bring forward the subject-matter of his original appeal.*

THIS was an application to the Court of Appeal by the defendants in an action to recover master's wages and disbursements.

The action was heard by Butt, J., who, on Aug. 12, 1884, gave judgment in favour of the plaintiff, but not for the full amount of his claim.

The plaintiff, being dissatisfied with part of the judgment, gave notice of appeal on Aug. 30 that the judgment of Butt, J. might be varied.

On Nov. 18 the defendants served a notice by way of cross-appeal under Order LVIII., r. 6.

Shortly afterwards the plaintiff determined to withdraw his appeal, and on Nov. 27 notice was given to the defendants' solicitors that the plaintiff abandoned and withdrew his appeal.

Under these circumstances the defendants (the respondents) served the plaintiff with the following notice of motion:

Take notice that the Court of Appeal, sitting at the Royal Courts of Justice, will be moved on Monday the 12th day of January 1885, at 10.30 a.m., by counsel, on behalf of the defendants, that the notice of contention given by the defendants pursuant to rule 6 of Order LVIII. of the Rules of the Supreme Court 1883, on the 18th day of November 1884, may take the place in the list of appeals of the appeal of the plaintiff, notice of which was given on the 30th day of August 1884, and which stood No. 97 in the printed list of appeals for the last Michaelmas sittings, such last-mentioned appeal having been abandoned by the plaintiff; and that the costs of and occasioned by this application may be costs in the said appeal.

*J. G. Alexander*, for the defendants, in support of the motion, stated that the question was whether the defendants' cross-notice of appeal was to fall on the plaintiff's appeal being withdrawn, or whether it was to stand as a substantive appeal.

*W. R. Kennedy*, for the plaintiff, *contra*.

*Cur. adv. vult.*

BRETT, M.R.—I have consulted with the other members of the Court of Appeal in regard to the question raised in this case, in order that the practice may be settled. We are of opinion that in this and similar cases the cross-notice, which the respondent gave under Order LVIII., r. 6, should be treated as a cross-appeal, but that, in the event of the original notice of appeal by the appellants being withdrawn, the respondents should have the right to elect whether they should continue or withdraw their cross-appeal. If the respondents determine to continue with their cross-appeal, then the original appellant should

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have the right of giving a cross-notice to the effect that he intends to bring forward the subject-matter of the first appeal. The order is, that the respondents are to treat their notice as an appeal, and they are to become the appellants. In the present case the respondents may have three days to determine whether under the circumstances they will adhere to their application, and if so the costs in this motion shall be costs in the appeal.

COTTON and LINDLEY, L.JJ. concurred.

Solicitors for the appellant, *F. Venn and Co.*

Solicitors for the respondent, *Harper and Batcock.*

## HIGH COURT OF JUSTICE.

### CHANCERY DIVISION.

Oct. 31 and Nov. 19, 1884.

(Before KAY, J.)

Re VARDON'S TRUSTS. (a)

*Marriage settlement—Wife an infant—Life interest in property without power of anticipation—After-acquired property—Covenant to settle—Bequest—Election—Sequestration.*

By a marriage settlement, dated in 1860, after reciting that it had been agreed that the wife (then an infant) and the husband should enter into the covenant thereafter contained for the settlement of her future estate and effects, the husband settled certain property upon trust for himself for life, then for the wife for life, and then for the children of the marriage; and the father of the wife settled certain property in which he gave her the first life interest for her separate use without power of anticipation; and the deed contained a covenant by the husband and wife to settle any after-acquired property of the wife upon the trusts therein mentioned.

In 1883, and during the coverture, the wife became entitled for her separate use to certain property which was bequeathed to her. This was bound by the covenant of the wife, but as she was an infant at the time of the marriage the covenant was voidable. She elected to avoid her covenant as to the property, and to take it for her separate use, not under but against the settlement.

Held, that the restraint upon anticipation did not prevent the court from giving compensation out of such life interest; that the income which would have been payable to the wife if she had not so elected, and all the other interest to which she would have been entitled under the settlement, ought to be applied in making compensation to the persons disappointed by her election; and that the trustees of the settlement must retain and apply the same accordingly.

Smith v. Lucas (45 L. T. Rep. N. S. 460; 18 Ch. Div. 531) and Re Wheatley (51 L. T. Rep. N. S. 681; 27 Ch. Div. 606) dissented from.

By an indenture, dated the 5th Oct. 1860, and made between Jonathan W. M. Walker of the first part, Emily L. B. Walker (then Emily L. B. Vardon, a spinster and an infant) of the second part, Thomas Vardon (the father of Emily L. B. Walker) of the third part, and Sir Thomas Erskine May, Martyn B. Stapylton, Horace Walker, and Edgar Walker (the trus-

tees) of the fourth part, being the settlement made in the contemplation of the then intended marriage between Jonathan W. M. Walker and Emily L. B. Walker, after reciting that upon the treaty for the marriage it was agreed, among other things, that Jonathan W. M. Walker and Emily L. B. Walker should enter into the covenant thereafter contained for the settlement of the future estate and effects of Emily L. B. Walker, Jonathan W. M. Walker assigned unto the trustees certain sums of money then due and belonging to him; and it was declared that the trustees should, after the solemnisation of the marriage, stand possessed of the trust moneys settled on the part of Jonathan W. M. Walker and the annual income thereof upon trust to pay such annual income to Jonathan W. M. Walker during his life, or as therein mentioned, and after the determination of such trust to pay such annual income to Emily L. B. Walker and her assigns during her life, and, subject to such trusts, should stand possessed of the trust moneys in trust for such one or more of the issue of the marriage as Jonathan W. M. Walker and Emily L. B. Walker, or the survivor of them, should in the manner therein mentioned appoint, and, subject to any such appointment, for all the children of the said intended marriage as therein mentioned; and, subject to such trusts, in trust for Jonathan W. M. Walker absolutely.

By the same indenture certain moneys and shares were assigned and settled by Thomas Vardon upon trust for the benefit of Jonathan W. M. Walker and Emily L. B. Walker, and the issue of the marriage as therein mentioned, the first life interest in the last-mentioned trust moneys and shares (except a sum of 5000*l.*, covenanted to be paid by the executors or administrators of Thomas Vardon within six months from his decease) being given to Jonathan W. M. Walker, and the first life interest in such sum of 5000*l.* being given to Emily L. B. Walker for her sole and separate use, without power of anticipation.

By the same indenture Jonathan W. M. Walker and Emily L. B. Walker covenanted with the trustees that, if the marriage should take place, and if Emily L. B. Walker then was, or if during the coverture she or Jonathan W. M. Walker in her right should become seised, possessed of, or entitled to any real or personal property (other than certain real estates of Jonathan W. M. Walker therein mentioned, and the moneys and premises thereinbefore settled, and other than jewels, trinkets, ornaments, pictures, prints, and books, and other articles of the like nature, which it was thereby declared should belong to Emily L. B. Walker for her separate use) of the value of 100*l.* or upwards, for any estate or interest whatsoever, then, and in every such case, Jonathan W. M. Walker and Emily L. B. Walker, and all other necessary parties, should, at the cost of the trust estate, as soon as circumstances would permit, and to the satisfaction of the trustees for the time being, convey, assign, and assure the property to, or otherwise cause the same to be vested in, the trustees, upon trust to sell, call in, or convert into money such part or parts thereof as should not consist of money, or of an annuity, or other real or personal property, of or to which Emily L. B. Walker then was, or she, or Jonathan W. M. Walker in her

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at Law.

right, should become seised, possessed, or entitled for the life of Emily L. B. Walker only, or for a term of years determinable on her death, and to stand possessed of the moneys arising from such sale and conversion, and of the investments thereof, and the income of such investments, upon the trusts and subject to the powers thereinbefore declared concerning the trust moneys and securities on the part of Jonathan W. M. Walker thereby settled, and the income thereof; save and except that if there should be no person or persons in whom such moneys and investments should become absolutely vested under any of the last-mentioned trusts and powers, then such moneys and investments, and the income thereof, should remain and be, after the death of Jonathan W. M. Walker and such default or failure of children of the marriage, which should last happen, upon trust for the benefit of Emily L. B. Walker, her appointees and next of kin as therein mentioned.

There had been issue of the marriage one child only, viz., Charles Henry Walker, who had attained the age of twenty-one years.

In May 1864 Noel B. H. Vardon, the brother of Emily L. B. Walker, was appointed a trustee of the settlement in the place of Edgar Walker, who retired.

Noel B. H. Vardon made his will, dated the 4th Nov. 1882, and thereby appointed George E. N. Ryan, Egbert P. Vardon, and Charles R. Durant executors thereof, and, after bequeathing certain specific and pecuniary legacies, gave and bequeathed the rest of his estate to be equally divided between Emily L. B. Walker and his nephews and niece, "all legacies to women to be for their sole use and benefit, free from the control of their husbands."

The testator died on the 24th Dec. 1833.

By an order made on the 14th June 1884 it was declared that the residuary estate of the testator was divisible into sixths equally between Emily L. B. Walker, or the trustees of her marriage settlement, and the nephews and niece of the testator.

The executors of the will were informed that the trustees of the settlement claimed that the share of the residuary estate of the testator bequeathed to Emily L. B. Walker was payable to them, and that Emily L. B. Walker claimed to have such share paid in full to her only, upon her own receipt, and for her own separate and absolute use, on the ground that such share was not affected by the covenant in the marriage settlement to settle after acquired property, and that if it was so affected, she, having been a minor at the time, was not bound by any such covenant.

The executors of the will sold a considerable portion of the estate of the testator, and they had in their hands a sum of 52,000*l.*, being the residue of the proceeds of such sale after payment of debts and legacies, of which sum they distributed the sum of 51,600*l.* by dividing the same among the parties entitled. They set apart and appropriated out of such sum the sum of 8600*l.*, as representing the one-sixth share which belonged to Emily L. B. Walker, or to the trustees of the marriage settlement, and after deducting from the 8600*l.* the sum of 27*l.*, which they retained for the cost of payment into court, they paid into court the sum of 8573*l.* on the 5th Sept. 1884.

A petition was presented by Emily L. B. Walker,

submitting that she was not bound by the marriage settlement, or by the covenant therein contained for the settlement of her after acquired property and asking that the sum of 8573*l.*, and another sum of 7*l.* 2*s.* 10*d.* might, notwithstanding the settlement, be paid to her.

The petition was presented under the Trustee Relief Act, but it was consented, with the sanction of the court, that the parties should give the court the necessary jurisdiction by taking out an originating summons under Order LV. of the Rules of Court 1883, and treating the same as being adjourned into court.

The petition now came on for argument.

*W. Pearson, Q.C.* and *Edwin Ward*, for the petitioner, referred to

*Smith v. Lucas*, 45 L. T. Rep. N. S. 460; 18 Ch. Div. 531;  
*Robinson v. Wheelwright*, 6 De G. M. & G. 535;  
*Barrow v. Barrow*, 4 K. & J. 409;  
*Griffith-Boscawen v. Scott*, 60 L. T. Rep. N. S. 386; 26 Ch. Div. 358;  
*Willoughby v. Middleton*, 6 L. T. Rep. N. S. 814; 2 J. & H. 344;  
*Re Wheatley*; *Smith v. Spence*, 77 L. T. p. 232; W. N. 1884, p. 171;  
*Pike v. Fitzgibbon*, 44 L. T. Rep. N. S. 582; 17 Ch. Div. 454.

[*KAY, J.* referred to *Wilder v. Pigott*, 48 L. T. Rep. N. S. 112; 22 Ch. Div. 263.]

*Graham Hastings, Q.C.* and *Charles Parke*, for the respondents, the trustees of the settlement, referred to

*Codrington v. Codrington*, 34 L. T. Rep. N. S. 221; L. Rep. 7 E. & Ir. App. 854;  
*Cahill v. Cahill*, 49 L. T. Rep. N. S. 605; 8 App. Cas. 420;  
*Campbell v. Ingilby*, 21 Beav. 567; 1 De G. & J. 393;  
*Pickersgill v. Rodger*, 5 Ch. Div. 163;  
*Cooper v. Cooper*, 30 L. T. Rep. N. S. 409; L. Rep. 7 E. & Ir. App. 53.

[*KAY, J.* referred to *Wilson v. Townshend*, 2 Ves. Jun. 693, and *Wall v. Wall*, 15 Sim. 513.]

*Sayles*, for the respondents, the executors of the will, asked for costs of appearance, on the ground that the executors wished to learn from the court how to deal with the remaining portion of the petitioner's share of the residuary estate of the testator.

*Pearson*, in reply, referred to

*King v. Lucas*, 49 L. T. Rep. N. S. 216; 23 Ch. Div. 712;

and, on the question of the executors' costs of appearance, to

*Re Sutton*, 46 L. T. Rep. N. S. 740; 21 Ch. Div. 855.

*Cur. adv. vult.*

Nov. 19, 1884.—The following written judgment was delivered by

*KAY, J.*—By a settlement in 1860, in contemplation of the marriage of Mrs. Walker, then an infant, after reciting, amongst other things, that it had been agreed that she and her intended husband should enter into the covenant therein-after contained for the settlement of her future estate and effects, the intended husband settled certain property upon trust for himself for life, and then for his intended wife for life, and then for the children of the marriage; and the father of the intended wife settled certain property, in which he gave the intended wife the first life interest for her separate use, without power of

anticipation; and the deed contained a covenant by the husband and wife to settle any after-acquired property of the wife upon the trusts therein mentioned. In the year 1883, under the will of a testator, who then died, the wife became entitled, for her separate use, to certain property thereby bequeathed to her. This, of course, was not bound by the covenant of the husband, because, being limited to her separate use, he could have no interest in it. It was, however, bound by the covenant of the wife, but, as she was an infant at the time of the marriage, that covenant was voidable. The property in question being given to her for her separate use, she is in the position of a *feme sole* as to it, and she now elects to avoid her covenant as to this property, and to take it for her separate use, not under, but against the settlement. The question is, what is the consequence of this election? The ordinary rule is that no person can take a benefit under an instrument without fulfilling all its provisions, or, as it is sometimes shortly expressed, "You cannot take under and against the same instrument," or, as some judges have said, adopting a phrase borrowed from Scotch lawyers, "You cannot both approbate and reprobate." If the provision made for the lady by this settlement had been free from the restraint upon anticipation, it is not denied that the court, under the circumstances, would impound her present life interest in the property settled by her father until it thereby made good to the parties disappointed that which they had lost by this exercise of her election. Is the court prevented from enforcing this equity by reason of the restraint upon anticipation? That depends mainly upon this consideration, whether, under the doctrine in question, the lady is disabled from taking the life interest, or whether she is required to assign it over, either wholly or in part. If the latter be the true view, of course she is unable to assign; but if the former, then it would seem that her ability to assign has nothing to do with the question. Referring to the earliest cases on the subject, I find in *Noys v. Mordaunt* (2 Vern. 581) Lord Keeper Cowper states that, in such cases, the gift is an implied condition that the donee shall carry out the instrument. In *Streetfield v. Streetfield* (Forr. Cas. temp. Talb. 176) Talbot, L.C. states the rule thus: "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it, as was done in *Noys and Mordaunt's case*. There being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made." Lord Loughborough, in *Lady Cavan v. Pulteney* (2 Ves. J. 544, 559) cites with approbation the language of De Grey, L.C.J.: "The equity of this court is to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee." In *Wilson v. Townshend* (2 Ves. J. 693, 695) Lord Loughborough says: "The principle of these cases is very clear. The application is more frequent here, but it is recognised in courts of law every day. You cannot act; you cannot come forth to a court of justice claiming in repugnant rights. . . . When you claim under a deed, you must claim under the whole deed together;

you cannot take one clause and desire the court to shut their eyes against the rest. Suppose in a will a legacy is given to you by one clause, by another an estate, of which you are in possession, is given to another person; while you hold that you shall not claim the legacy. It applies as De Grey, C.J. very properly applied it in *Lord Darlington v. Pulteney* to interests of married women, interests immediate, remote, contingent, of value or not of value. You cannot dispute the ownership. It applies in the case of personal legacies. If a specific thing belonging to one of the legatees is by the will given to another person, the legatee cannot hold both. He must make himself competent to take the legacy by giving up that specific thing. Therefore the court says there shall be an election; and gives an opportunity of electing; and will not easily hold the election concluded. But if the party is under restraint, and cannot accomplish that, it is the misfortune of the party, but the consequence is, that while he continues in that situation, his claim must be barred, for it is directly contrary to the intention and distribution of the property." Lord Hardwicke, in *Kirkham v. Smith* (1 Ves. Sen. 257, 259) says: "These principles are admitted, that according to *Noys v. Mordaunt*, where one taking himself to be absolute owner of an estate when he was not so, devised it away, and gives an estate, whereof, he was absolute owner to the person claiming a remainder in tail in the other estate devised away; the court will not suffer that person to have both estates by claiming in contradiction to the will in another part. . . . On a devise to a younger son of lands entailed and a legacy to the elder, the elder shall not claim the legacy and defeat the devisee, but shall make his election." That the person electing "cannot take" the benefit given to him without fulfilling all the provisions of the instrument, is stated by Lord Commissioner Eyre in *Blake v. Bunbury* (4 Bro. C. C. 20, 21). Sir Thomas Plumer, in *Gretton v. Haward* (1 Sw. 409, 421) says that the practical consequence of electing to take against an instrument is that a person so electing is "not permitted to retain, but must relinquish the benefits which it purports to confer upon him." And after referring to Lord Loughborough's approbation of the language of De Grey, L.C.J., that the equity of the court is "to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee," he continues (at p. 425): "I conceive it to be the universal doctrine that the court possesses power to sequester the estate till satisfaction has been made, not permitting it to devolve in the customary course; out of that sequestered estate so much is taken as is requisite to indemnify the disappointed devisee; if insufficient, it is left in his hands." Lord Eldon says, in *Lord Randiffe v. Parkyns* (6 Dow. 149, 179): "If I choose to devise my real estate to the noble marquis opposite (I put it in this way because the illustration will make it more familiar), and in the same will I dispose of an estate which is not mine but his, a court of equity will say that he shall take no benefit from that will unless he makes good the whole of the will." In *Ker v. Wauchops* (1 Bli. 1, 21) Lord Eldon, in giving judgment in the House of Lords, says: "It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to

A. and gives A.'s estate to B., courts of equity hold it to be against conscience that A. should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person." Mr. Swanston's conclusion, from an examination of the authorities in a valuable note (1 Swanston 442), is thus expressed: "In the event of election to take against the instrument, the courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints," and that the surplus after compensation is "restored to the donee." The cases on this subject are so numerous that I might multiply these citations indefinitely, but it is sufficient to point out that in the latest decisions in the House of Lords the statement of the doctrine in the earliest cases is expressly recognised and adopted. In *Cooper v. Cooper* (30 L. T. Rep. N. S. 409, 410; L. Rep. 7 E. & I. App. 53, 63) Lord Cairns, in giving judgment, cites at length the language of the learned judges in *Noye v. Mordaunt* and *Streetfield v. Streetfield*, to which I have referred—to the effect that there is a tacit condition annexed to the benefit out of which compensation must be made—as being the law of the court at this day. In *Codrington v. Codrington* (34 L. T. Rep. N. S. 221, 222; L. Rep. 7 E. & I. App. 854, 861) a married woman, during the coverture, joined in a deed by which her husband and her father both brought property into settlement, and whereby she also purported to settle her reversionary interest in certain personal property. The marriage was afterwards dissolved, and then the reversion fell in, and she claimed to take it against the settlement, and it was held to be a case of election, and Lord Cairns said: "By the well-settled doctrine, which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." The order of the House, which is given at the end of the report, is framed most carefully to carry out this view. It provides for compensation out of the interest to which the married woman "would have been entitled" if she had not elected to take against the settlement. Accordingly, I must treat the life interest in the property settled by her father, which this lady claims under the settlement, as being subject to an implied condition that, if she elects to defeat the settlement in another of its provisions, she is not "competent to take" that life interest, but the court will "sequester" it, so far as may be requisite to compensate the persons claiming under the settlement who are disappointed by such election. If that condition had been expressed, there would be nothing repugnant in limiting the life interest to her separate use, without power of anticipation. The whole provision would be something to this effect: Upon

trust, in case the intended wife should fulfil the provisions of the settlement on her part, for her for life, for her separate use, without power of anticipation, but if not, then upon trust for the persons whose intended interest will be defeated by her, until they are compensated. There is a long series of cases in which the court has elected for persons under disability. I am not aware of any instance in which, having elected for an infant to take against the instrument, the court has hesitated to decree compensation out of the estate devised to the infant, because of his inability to convey. I am compelled to refer to these early authorities, and to the principle on which the doctrine of election is founded, by certain modern decisions and dicta which I will now mention. In *Robinson v. Wheelwright* (6 De G. M. & G. 535, 548), where a legacy was given to a married woman, upon an express condition that she should not convey an estate which she was restrained from anticipating, it was held that the court had no power to interfere to assist her to make such conveyance. But Turner, L.J. says: "What the result would have been if the case had been simply a case of election unaffected by condition, it is unnecessary for us to determine, but as at present advised I am not satisfied that the principle of election might not have been applied, and the rights under it effectually worked out." I agree that too much stress ought not to be laid upon mere dicta, but in the case of a judge so learned and careful I think that may be considered an intimation of opinion, deserving attention and respect, that the restraint upon anticipation was not material in a case of election. In *Willoughby v. Middleton* (6 L. T. Rep. N. S. 814; 2 J. & H. 344), the facts of which case are more fully stated by Lord Selborne in 28 L. T. Rep. N. S. 179; 8 Ch. App. 590, it appears that a settlement was executed by a lady, in contemplation of her marriage, while she was an infant which contained a covenant by herself and her husband that a certain trust fund, to which she was entitled in reversion upon her mother's death, and also all other personal estate to which she might become entitled during the coverture, should be settled on trusts for the benefit of the wife, the husband, and children, under which she took the first life interest for her separate use, without power of anticipation. On the death of the wife's mother during the coverture, the specified trust fund became vested in the wife in possession, and by the same event she became also entitled to certain valuable legacies for her separate use, without any restraint on anticipation, under her mother's will. It was decided by Wood, V.C. that, although she was at liberty to refuse to bring those legacies into the settlement, yet, if she did so, the life interest in the specified fund which her husband had then power to reduce into possession, and which was therefore effectually bound by his covenant in the deed, could not be claimed by her. His words are these (6 L. T. Rep. N. S. 816; 2 J. & H. 355): "Then the question arises, what she is to do if she elects against the deed? She says, she takes under the deed nothing but a reversionary interest which cannot be dealt with, and certain property settled to her separate use without power of anticipation. But the correct view, in my opinion, is this—that, when the doctrine of election intervenes, it takes the fund out of the settlement. This fund cannot

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be claimed without giving up the property which is referred to in the covenant; and, if this is not done, the fund becomes in equity no longer subject to the provisions of the settlement. It ceases to be a settled fund. The husband settled it on his wife with a restraint on anticipation, on the faith that all the provisions of the settlement would be carried into effect. The wife, therefore, cannot touch the fund given to her for her separate use with a restraint on anticipation, except by bringing in the other property so as to make good the rights of all parties interested under the deed." This case was carefully considered by Lord Selborne, who sent for the papers, and who gave, from his examination of them, the statement of the decision which I have quoted. His Lordship does not intimate any doubt of the propriety of that decision. On the other hand, in the case of *Smith v. Lucas* (45 L. T. Rep. N. S. 460, 464; 18 Ch. Div. 531, 545) the late Master of the Rolls, after deciding that an infant entering into such a covenant in a marriage settlement, if property comes to her during the coverture which would *prima facie* be bound by the covenant, may choose not to be so bound, then considers what is the consequence of her electing to take such property against the settlement, upon a provision for her separate use without power of anticipation contained in it. Afterwards he expresses himself thus: "Then, what is the effect of the restraint on anticipation imposed by the settlement? I am not going to discuss this point for the sake of finally deciding it, but I must say it does not appear to have been considered sufficiently by the learned judge who decided *Willoughby v. Middleton*. I am by no means clear that the effect of the wife's so-called election, that is, of her decision to keep her property to her separate use free from the voidable covenant, does deprive her of the property settled to her separate use without power of anticipation. No doubt, as a general rule, the person who elects to take against a deed forfeits all interest under the deed; the doctrine is one of compensation, although I have used the word "forfeit;" but can a person forfeit an interest who is not liable to make compensation out of the property given to him or her by the deed for what is taken away by election? In the case we have here of a married woman, can that doctrine extend to property which is, so to speak, not the person's own who elects which is her own only in a modified sense—it is her own, but is incapable of alienation? Can she by an act of election make that alienable which was not alienable before? In electing she disappoints those who take less by reason of her election, but it does not appear to follow that you can thereby take away from her, in consequence of her act, that which was inalienable. I do not intend finally to decide the point, but it is one deserving consideration. If the doctrine were established according to the judgment of the Vice-Chancellor in *Willoughby v. Middleton*, this effect would follow, that the most careful provision for the protection of a married woman would be destroyed by reason of her election thereafter to take some property for her separate use (assuming she was an infant when she married), and the whole of her life interest provided for her by her father or relatives would be taken away. I should hesitate long before coming to such a conclusion, and it does not appear to me

that the point was either sufficiently discussed in *Willoughby v. Middleton*, or sufficiently considered by the learned judge who decided that case; therefore I do not regard that case as finally deciding the point so far as relates to the property or interest of the married woman in respect of which she is restrained from anticipation. It seems to me it may well be held that the property remains inalienable as it was before, notwithstanding the act of the married woman in electing to take her own property, and that the persons who take under the settlement have no right to complain, because they know it was property which no act of hers could divest her of. However, it does not appear necessary to finally decide that point now, and I have only thrown out these observations in order that it may not be considered that I thought the point finally settled by the case referred to." This, as appears by the language, was not a decision; but merely a dictum, and I do not think it can have the same weight as the deliberate decision of Lord Hatherley in *Willoughby v. Middleton* (*ubi sup.*). There is in the language of the Master of the Rolls a suggestion that, as a matter of construction, it might be held not to be the intention of the settlement that, if the wife elects to take against it, she should be deprived of the life interest which she is restrained from anticipating. That would make the restraint upon anticipation equivalent to a provision that she may elect to take other benefits against the settlement and yet retain this life interest. Is that a reasonable construction? If the parties to the settlement intended that this equitable rule of election should not apply, must not that be expressed, or, at any rate, much more clearly indicated than by this provision restraining anticipation, which, as I have said, does not seem to me to be inconsistent with the condition of compensation that is implied? Supposing that the inalienable life interest was the only provision out of which compensation could be given, such a construction would be equivalent to striking the wife's covenant to settle other property out of the settlement altogether. In a recent case of *Re Wheatley; Smith v. Spence*, which is not yet (a) reported, Chitty, J. has followed this dictum of the late Master of the Rolls in preference to the decision of Lord Hatherley. I am therefore obliged in this case to consider which of these conflicting decisions and dicta I ought to follow, and I have accordingly endeavoured to consider the question on principle; and for the reasons which I have given it seems to me, with great respect for the opinions from which I dissent, that the restraint upon anticipation does not prevent the court from giving compensation out of the life interest of the married woman to the persons who are disappointed by her election to take against the settlement. Following the language of the order of the House of Lords in *Codrington v. Codrington* (*ubi sup.*), I declare that the income which would have been payable to the lady if she had not so elected, and all other (if any) the interest to which, if she had not so elected, she would have been entitled under the settlement, ought to be applied in making compensation to the persons disappointed by her election, for the benefits of which they respectively have been, or will be,

(a) Since reported. See 51 L. T. Rep. N. S. 681; 27 Ch. Div. 606.



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thereby deprived; and the trustees of the settlement must be directed to retain and apply the same accordingly. [Having delivered the foregoing written judgment, his Lordship proceeded as follows:] With regard to the costs, it seems to me the proper order will be to give no costs to the petitioner, who will, of course, take the separate property which she elects to take free from the settlement; and that the other costs should be paid out of the life interest which will be sequestrated in order to give compensation. The executors' costs of appearance will be allowed out of the remainder of the petitioner's share of the residue. The trustees are to retain and apply the income, and the money so invested must be treated as capital, because the persons disappointed at present have no interest in possession. They will be the persons entitled in remainder. The income must be invested and accumulated. As soon as so much is accumulated as will amount to the sum which the petitioner has taken out of the settlement, or will amount to the interest of which they have been deprived by her election, the accumulation will cease and she will continue to receive her life interest. There must be liberty to apply as to the mode in which the sequestrated fund shall be dealt with.

Solicitors for the petitioner, *Talbot and Tasker*.

Solicitors for respondents, the trustees of the settlement, *Pollock and Co.*

Solicitor for respondents, the executors of the will, *Edward F. M. Ryan*.

Dec. 8, 9, and 13, 1884.

(Before KAY, J.)

SANGSTER v. COCHRANE. (a)

*Mortgage—Building society—Statutory receipt—Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 42—Legal estate—Priority—Notice.*

In 1872 A. mortgaged four freehold houses to a building society. In 1877 he sold and conveyed one of the houses to the defendant, who did not make any investigation of the title, nor require the production of any title deeds, nor did he know of any incumbrances; but he took possession immediately after the conveyance, and had continued in possession ever since. A. acted as his solicitor in the transaction. In 1881 A. applied to the plaintiff to pay off the mortgage and lend a larger sum. The plaintiff having agreed to do this, they attended at the office of the society, and the plaintiff paid the money due on the mortgage. The usual statutory receipt was indorsed on the mortgage deed, in accordance with sect. 42 of the Building Societies Act 1874, under which statute the society was incorporated. The mortgage and other title deeds were then delivered by the secretary of the society to the plaintiff. A. subsequently executed a mortgage of the four houses to the plaintiff, who knew nothing of the defendant's purchase.

The question was, what was the effect of the receipt indorsed upon the mortgage, and whether the plaintiff or defendant had priority in title to the house which had been sold to the latter.

It was contended that the plaintiff, who had no knowledge, must be treated as having constructive

notice of the defendant's ignorance of the first mortgage, because the defendant was in possession of the house he had bought.

Held, that the plaintiff had no notice that the defendant was ignorant of the mortgage to the society, and that, if he had known that fact, it would not alter his position.

Held, also, that the statutory receipt vested the legal estate in the plaintiff, and that his mortgage, to the extent of money paid to the society and interest, was prior to the defendant's claim.

*Pease v. Jackson* (L. Rep. 3 Ch. App. 576) followed.

By an indenture, dated the 18th Jan. 1872, James Chapman mortgaged a piece of land, with four houses thereon, to the Kent and Surrey Benefit Building Society in fee simple, to secure a loan of 680*l.* and such other sums as should from time to time be payable by him to the society.

In April 1881 Chapman (who was then the solicitor of the plaintiff Thomas Sangster) requested the plaintiff to pay off the amount due to the building society, and to lend him the further sum of 320*l.*, upon the security of a first mortgage on the land and houses.

Accordingly, on the 30th April 1881, the plaintiff paid to Chapman the sum of 320*l.*, and on the same day attended with him at the office of the society, and, at his request, paid to the society the sum then owing to it. The usual statutory receipt, under the seal of the society, in accordance with sect. 42 of the Building Societies Act 1874 (pursuant to which Act the society was incorporated) was then indorsed on the mortgage of 1872, and the mortgage so indorsed, together with the other title deeds relating to the mortgaged property, were at once delivered by the secretary of the society to the plaintiff.

By an indenture, dated the 1st May 1881, Chapman formally mortgaged the land and houses to the plaintiff in fee simple to secure 1000*l.* and interest at 5 per cent. per annum.

Chapman having become bankrupt, the plaintiff, in Nov. 1883, entered into receipt of the rents of three of the houses, but found the defendant Richard Edward Cochrane in occupation of the fourth house, who refused to deliver up possession or to pay the rent thereof to the plaintiff, on the ground that Chapman had previously sold and conveyed such fourth house to him (the defendant).

Neither the society nor their trustees were parties to the alleged conveyance to the defendant, and the fourth house was never discharged from the mortgage of 1872.

The plaintiff had no notice of the alleged purchase by the defendant until after the failure of Chapman, and he submitted that, under the circumstances, he was entitled to rank as against the defendant, as a legal mortgagee of the house, for the sum of 1000*l.* paid by him, with interest thereon at 5 per cent. per annum; or if not for the full amount of 1000*l.*, then for the amount paid by him to the society, and interest thereon at that rate.

The plaintiff claimed a declaration that he was a legal mortgagee of the house for the sum of 1000*l.*, with interest thereon at 5 per cent. per annum, or that such other declaration should be made as should seem just.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.



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The defendant's case was that by a deed, dated the 12th Nov. 1877, Chapman, in consideration of 320l., conveyed the fourth house to him in fee simple, free from all incumbrances, and that the deed contained a covenant by Chapman that the house was free from all incumbrances created or occasioned by him, or any person claiming under him, and also a covenant that Chapman would, upon every reasonable request, and at the expense of the defendant, produce a certain indenture of the 1st Oct. 1870.

The defendant alleged that he thereupon took possession of the house, and had continued in possession ever since, and that he had not, at the time of the conveyance to him, and in fact until these proceedings were instituted, any notice that Chapman (who was in Nov. 1877 the defendant's solicitor) had incumbered the property.

The defendant also alleged that the value of the three other houses, and of the rents received in respect thereof by the plaintiff, was sufficient to satisfy any amount due on the security of the indenture of 1872.

The defendant submitted that the fourth house was not subject to any part of the sums alleged by the plaintiff to have been advanced by him on the security thereof, or, if at all, only to the extent of the sums (if any) which might still be payable on the security of the indenture of 1872.

By his counter-claim the defendant claimed that it might be declared that the plaintiff had no charge upon the fourth house, or, if he had any such charge, that it extended only to the amount which was originally secured by the mortgage of 1872, after deducting therefrom such amount as the plaintiff should be chargeable with when the account claimed by the defendant should have been taken. The defendant also claimed that he was entitled to have the fourth house exonerated, out of the other three houses comprised in the mortgage of 1872, so far as the value of the same should extend, from and in respect of such mortgage. He further claimed an inquiry as to their value, an account, and a reconveyance.

The plaintiff, in his reply, did not admit that the value of the three houses was sufficient to satisfy the amount secured by the mortgage of 1872, and he submitted that, even if such were the case, the validity of the plaintiff's mortgage upon the fourth house would be in no way thereby affected; and he stated that he had always been willing to submit to an account, and to judgment for redemption.

The action now came on for trial.

*Graham Hastings, Q.C.* and *Abraham* for the plaintiff, referred to

*Marson v. Cox*, 42 L. T. Rep. N. S. 615, 617; 14 Ch. Div. 140, 147;

*Robinson v. Trevor*, 50 L. T. Rep. N. S. 190; 12 Q. B. Div. 423;

*Pease v. Jackson*, L. Rep. 3 Ch. App. 576;

37 & 38 Vict. c. 42, s. 42;

6 & 7 Will. 4, c. 32, s. 5.

*Dundas Gardiner*, for the defendant, referred to

*Holmes v. Powell*, 8 De G. M. & G. 572;

*Atterbury v. Wallis*, 8 De G. M. & G. 454;

*Daniels v. Davison*, 16 Ves. 246.

*Hastings*, in rep'y, referred to

*Cabalkro v. Herby*, 30 L. T. Rep. N. S. 314; L. Rep. 9 Ch. App. 417.

*Cur. adv. vult.*

Dec. 13, 1884.—The following written judgment was delivered by

KAY, J.—On the 18th Jan. 1872 James Chapman, by deed, mortgaged four freehold houses to the Kent and Surrey Benefit Building Society. In 1881 he applied to the plaintiff Sangster to pay off that mortgage and lend him a further sum, and, accordingly, on the 30th April in that year, they went together to the secretary of the building society, and Sangster then paid 600l. 16s. 6d., and a statutory receipt was indorsed on the mortgage under the seal of the society, and signed by two directors and the secretary. On or about the 1st May 1881 Chapman, by deed, mortgaged the four houses to the plaintiff for 1000l. In the meantime, on the 12th Nov. 1877, Chapman had conveyed one of these houses to the defendant Cochrane, who seems not to have made any investigation of the title, nor to have required the delivery of any title deeds, but who stated in his evidence that he did not know of any incumbrance; that he took possession immediately, and has been in possession ever since; and that Chapman acted as his solicitor in preparing the conveyance to him. Sangster knew nothing of this purchase. I have to consider what is the effect, under these circumstances, of the receipt indorsed upon the mortgage to the building society. That depends upon sect. 42 of 37 & 38 Vict. c. 42. The section appears to contemplate two modes of procedure, one a reconveyance to the "owner of the equity of redemption, or to such persons and to such uses as he may direct;" the other a receipt like the present. Nothing is said as to the effect of the reconveyance, but, with respect to the receipt, it is enacted that "such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption without any reconveyance or surrender whatever." In the former statute, 6 & 7 Will. 4, c. 32, s. 5, there was a similar provision as to a receipt, but no mention of a reconveyance. The reconveyance mentioned in the later Act to the owner of the equity of redemption, or to his nominee, may include a case of transfer of the mortgage so as to keep it alive when required; and this being an addition to the provisions as to a receipt makes it more evident that the latter applies only when the mortgage is not to be kept alive, but, as the statute expresses it, vacated and not transferred. Apart from authority, I should have thought that a stranger, not interested in the equity of redemption, paying off the mortgage and desiring to obtain a transfer, could only do this by means of a conveyance from the building society, and that the receipt could not have the effect of vesting the property in him. The section says that it shall vacate the mortgage. A transfer does not vacate the mortgage, and it proceeds to say that it shall vest the estate in the person entitled to the equity of redemption. A stranger paying off the first mortgage is not entitled to the equity of redemption, and I cannot see how it is possible that, under these words, the estate should vest in him. Therefore, apart from authority, I should conclude that the only title of the plaintiff was under his mortgage of the 1st May 1881, and that the effect of the receipt was that the society, having accepted the payment, whether as a pay-

ment by the mortgagor or otherwise, the legal estate in the house in question vested, upon the giving the receipt, by force of the statute, in the defendant, who was solely and absolutely entitled to the equity of redemption in that house. But in *Pease v. Jackson* (L. Rep. 3 Ch. App. 576), where the facts were very similar to those in the present case, a man had mortgaged to a building society under the Act of Will 4, and then made a second mortgage to the plaintiffs, and subsequently procured the Leeds Building Society to pay off the first mortgage, on which occasion a receipt was indorsed by the first building society, and the mortgagor then gave a fresh mortgage to the Leeds Society. Lord Romilly having held, following his own previous decision in *Prosser v. Rice* (28 Beav. 68), that the first mortgage was vacated, and that the legal estate had passed to the plaintiffs as second mortgagees, Lord Cairns reversed that decision, holding that the Leeds society, having paid off the first building society without notice of the plaintiff's mortgage, and having obtained the title deeds from the first mortgagees, would have, independently of the Act, a better equity to call for the legal estate, and he says, in effect, that the operation of the statute was either that by virtue of the receipt the legal estate had passed to the mortgagor, from whom the Leeds society had the best right to take it, or to the Leeds society, as being one of the persons entitled to the equity of redemption who had the best right to call for it, having become, as his Lordship says, in substance transferees from the building society. I must, of course, be wrong, but, with deference, I should have thought it clear that, if the payment was made by the mortgagor, the legal estate would vest in the second incumbrancer as the person entitled to the equity of redemption, and if the payment was not by the mortgagor, but by the Leeds society, the legal estate could not vest in them, because, as transferees, they were entitled not to the equity of redemption, but to the mortgage which was prior to the equity of redemption. The difficulty which occurs to me is, that this mode of applying the statute seems to be effecting a transfer by means of a provision which was not applicable to a case of transfer, but only to a payment which should absolutely discharge the mortgage. But not only is that a decision binding upon me, but it has been followed in subsequent cases, viz., in *Lawrence v. Clements* (31 L. T. Rep. N. S. 670), by Hall, V.C., and in *Marson v. Cox* (42 L. T. Rep. N. S. 615, 617; 14 Ch. Div. 140, 147), where the late Master of the Rolls applied the same rule to a case under the statute of 37 & 38 Vict. c. 42. There the mortgagor mortgaged property called Summerfield first to a building society, and secondly to Colman. The mortgagor then paid off the building society, and a statutory receipt was indorsed on the deed. Colman knew nothing about this transaction, but the Master of the Rolls held, as I should have done, that the legal estate vested in him. The mortgagor also mortgaged the Glenmore property, first to the building society, then to the General Credit Company, and thirdly to Marson, who on the same day, but after the execution of the mortgage to him, paid off the building society, who indorsed a statutory receipt, and the Master of the Rolls held, on the authority of *Pease v. Jackson* (*ubi sup.*), that the legal estate vested in Marson and not in the General Credit

Company. In *Robinson v. Trevor* (50 L. T. Rep. N. S. 190; 12 Q. B. Div. 423), a case which came under the statute of Will. 4, there was a first mortgage to a building society, a second mortgage to the plaintiff, and then the appellants, at the request of the mortgagor, paid off the building society, and received the title deeds and the mortgage with an indorsed receipt. The Court of Appeal, following *Pease v. Jackson* (*ubi sup.*), held, that the legal estate vested in the appellants, because when they paid off the building society they had no notice of the second mortgage. I observe that two of the learned judges abstained from giving any opinion, and merely stated that the case was governed by *Pease v. Jackson*. I cannot understand what the question of notice has to do with it. Anyone who takes a transfer of a first mortgage gets a perfectly good security, whether he has notice of subsequent mortgages or not. The equity in these cases seems to be the right to a transfer. How could that equity be affected by knowledge that there were subsequent incumbrances? In this case it is suggested that the plaintiff, who had no knowledge, must be treated as having constructive notice of Cochrane's ignorance of the first mortgage, because Cochrane was in possession of the house he had bought. This seems to me a curious attempt to extend the doctrine of constructive notice. A purchaser buying property, which is in the actual possession of some person other than the vendor, may have constructive notice of the title under which that person holds. But how can that apply to the transferee of a prior mortgage? How can the constructive notice be of anything except the actual title of the occupant, that is, in this case, that he was owner subject to a mortgage? How can the transferee be taken to know that the person in possession was ignorant of that mortgage? And, finally, what can it matter if he did know? To these questions I have not received, nor have I been able to find for myself, any satisfactory answer. I therefore hold that Sangster had no notice that Cochrane was ignorant of the mortgage to the building society, and that, if he had known that fact, it would not alter his position. Against my own opinion, and believing myself to be bound by the decisions I have mentioned, I must hold that the effect of the receipt was to vest the legal estate in Sangster, and that his mortgage, to the extent of the money paid to the building society and the interest thereon, is prior to the defendant's claim.

Solicitors for the plaintiff, *Oldacres, Dear, and Armstrong.*

Solicitor for the defendant, *Talfourd Hughes.*

Nov. 29, Dec. 5 and 6, 1884.

(Before KAY, J.)

Re DICKSON; HILL v. GRANT. (a)

*Infants—Legacies contingent on attaining twenty-one—Intermediate income—Maintenance—Conveyancing and Law of Property Act 1881, s. 43.*

*A testator by his will gave legacies to classes of persons who should be living at his death and attain twenty-one, and he gave the residue of his estate to other persons not identical with those forming the classes.*

*The persons forming the classes to whom these contingent legacies were given were not children of the testator, nor persons to whom he was in loco parentis. Some of them were infants at the date of his death, and the question arose whether the executors ought to apply the income of the legacies to which the infants were contingently entitled for their maintenance, and accumulate so much as should not be applied in that way, according to the provisions of sect. 43 of the Conveyancing Act 1881.*

*Held, that the income of these legacies was not subject to the provisions of sect. 43 of the Conveyancing Act 1881. Under the will it would undoubtedly belong to the testator's residuary legatees until the infants attained twenty-one, and sect. 43 of the Act was not intended to apply to incomes to which infants never could become entitled, but which passed as residue to other persons.*

THIS was an originating summons issued under Order LV., r. 3, of the Rules of 1883, for the purpose (so far as the case calls for a report) of obtaining the decision of the court as to whether certain infants were entitled to maintenance out of the income of legacies given to them, contingently on attaining twenty-one, and to have the residue accumulated for their benefit, or whether such income went to the testator's residuary legatees until the infants were twenty-one.

George Dickson, by his will, dated the 11th Aug. 1883, appointed John Hill and John Mason executors and trustees thereof, and, after giving certain pecuniary and other legacies, gave

To each of the children who shall be living at my death and attain twenty-one, of the following persons, namely, of my half sister Catherine Duthie (the wife of Alexander Duthie), of my half sister Jane Mason, of my half brother James Ley, of my half sister Margaret Don (the wife of William Don), and of my niece Mary Paton the sum of £1000. And in case any of the children of my said half sisters, half brother, or niece shall die in my lifetime leaving children who shall be living at my death and attain twenty-one, then I give a sum of £1000 to and equally between such children of each child of my said half sisters, half brother, or niece so dying.

The testator gave the residue of his personal estate upon trust for all his nephews and nieces living at his death, whether such nephew or niece were a child of a brother or sister, or of a half brother or half sister of his, in equal shares among them.

There was no maintenance clause in the will. The testator was not in loco parentis to any of the above legatees.

The testator died on the 25th Sept. 1883, and his will was duly proved by both executors on the 15th Dec. 1883.

One of the daughters of the testator's half sister Catherine Duthie, Jane, the wife of William Grant, died on the 8th May 1876, before the date of the testator's will. All the other children of his said half sister, as also all the children of his half sister Jane Mason, of his half brother James Ley, and of his half sister Margaret Don survived the testator and attained twenty-one. His niece Mary Paton had five children, all of whom survived the testator and were under the age of twenty-one at the date of this summons. Jane Grant left three children, the defendants William Grant, Hendry Grant, and Alexander Grant, all of whom were infants.

It was held that these children would, on attaining twenty-one, be entitled to a legacy of 1000l. under the will.

Some of the legacies had been set apart by the executors provisionally, but, owing to the uncertainty as to whether Jane Grant's children would take a legacy, all could not be set apart.

The question was "how the executors ought to provide for the payment of any legacy or legacies given to any person or persons on attaining twenty-one who is or are still under that age."

*Langworthy* for the plaintiff, the executor.

*Graham Hastings, Q.C.* and *H. M. Humphry* for the infants.—These legacies are held by the executors in trust for infants "contingently on their attaining the age of twenty-one years," within the meaning of sect. 43, sub-sect. 1, of the Conveyancing Act; the income, therefore, may be applied for their maintenance under that subsection. The part not so applied must be applied under sub-sect. 2, which says that "The trustees shall accumulate all the residue of the income in the way of compound interest . . . and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

*Farwell* for persons interested in the residue.—My contention is that the Act is not applicable to such a case as this. It does not apply to income to which the infant cannot say he will be entitled even if he does attain twenty-one:

*Re Judkin's Trusts*, 50 L. T. Rep. N. S. 200; 25 Ch. Div. 743;

*Re George*, 37 L. T. Rep. N. S. 204; 5 Ch. Div. 837.

It is different from the case where an infant will, on attaining twenty-one, become entitled to the income as well as the capital:

*Re Cotton*, 33 L. T. Rep. N. S. 720; 1 Ch. Div. 232.

*John Lloyd* for other defendants.

KAY, J. reserved judgment, intimating that he would be glad to hear any further argument that might be addressed to him.

Dec. 5.—The case was again mentioned on this day.

*Graham Hastings, Q.C.* and *H. M. Humphry*.—It has been suggested that *Re George* has been printed, in the note on page 95 of the 3rd edit. of Wolstenholme's Conveyancing Acts, in mistake for *Re Cotton*, but it was not necessary to pass an Act to avoid the question raised in *Re Cotton*. In the note on page 189 of the 2nd edit. of Hood and Challis' Conveyancing Acts it is stated that the intermediate income of a contingent legacy may be applied for the maintenance of an infant under sub-sect. 1 of sect. 43, although it does not belong to the legatee:

*Re Buckley's Trusts*, 43 L. T. Rep. N. S. 109; 22 Ch. Div. 583.

*Farwell*.—Provisions for the maintenance of infants are so usual that the court would order them to be inserted in settlements made under its order (*Turner v. Sargent*, 17 Beav. 515), but that would not be done where the infants have no income. Sect. 43 is, by sub-sect. 3, made to take effect only if and as far as a contrary intention is not expressed in the instrument under which the

interest of the infant arises, and subject to the terms and provisions of that instrument. By this will the testator has given the intermediate income of these legacies to his residuary legatees; the infants, therefore, cannot claim any part of it.

Dec. 6.—KAY, J.—In this case legacies of 1000*l.* are given to classes of persons who should be “living at the testator’s death and attain twenty-one,” and then follows a residuary gift to all the testator’s nephews and nieces living at his death. The classes of persons to whom these legacies are contingently given are not children of the testator, nor persons to whom he was in *loco parentis*. There is no direction to set apart the legacies, nor any reason for doing so, except that, the residue being payable at once, it may be necessary to retain a sufficient part of such residue to provide for them in case they should become payable. Whether actually so retained or not, there is no doubt that under the will the income until the legatees attain twenty-one would belong, not to them, but to the donees of the residue. Until these contingent legacies are payable, the fund if reserved is only residue, and the legatees, even should they attain twenty-one, will not be entitled under the will to the intermediate income of the fund so retained; but that income is part of the residue, and belongs under the will to the residuary legatees: (*Festing v. Allen*, 5 Hare 573; *Re George*). The question I have to determine is, whether sect 43 of the Conveyancing and Law of Property Act 1881 entitles the infant legatees to this income in case they should attain twenty-one, and to maintenance out of it in the meantime. Assuming that 1000*l.* has been retained out of the residue to answer one of these legacies if it shall become payable, is that “property held by trustees in trust for an infant contingently on his attaining the age of twenty-one?” If he does attain twenty-one, that sum, to the extent of 1000*l.*, supposing that all the rest of the residue has been distributed, will be payable to him, and therefore it is difficult to say that the case does not come within those words. The fact that it is not actually set apart, as was admitted in the argument, can make no difference. If not, still a portion of the residue must be held in trust for the infant contingently on his attaining twenty-one. The section is intended to replace a provision in Lord Cranworth’s Act (23 & 24 Vict. c. 145), s. 26, which is repeated by sect. 71 of this Act. Lord Cranworth’s Act only enabled trustees to apply for maintenance the income to which the infant “may be entitled in respect of such property,” and it was decided by the Court of Appeal in *Re George* that, in the case of a contingent legacy which did not carry interest, the income of a fund paid into court to the contingent legacy account could not be so applied, because, even if he attained twenty-one, the legatee would not become entitled to any of the intermediate income. That decision was in 1877, and the conveyancing Act was passed in 1881, and in Mr. Wolstenholme’s third edition, at page 95, it is stated that this section is so worded as to avoid the question raised in *Re George*. In the same note the learned editor says that “if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the section can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested. The short effect of

the section seems capable of being stated thus: where the income will go along with the capital, if and when the capital vests, then the income is applicable under the section for the benefit of the infant, otherwise not.” But if that is the effect of the Act it does not avoid the question raised in the case of *Re George*. The precise question in *Re George* was whether Lord Cranworth’s Act applied to income to which the infant never could become entitled; and if this Act was passed to avoid the effect of *Re George*, the intention must have been to enable the trustees to maintain the infant out of income of a contingent legacy, which income, but for the Act, would belong to someone else, and not to the infant, even though he should attain twenty-one. I have communicated with Mr. Wolstenholme who tells me, and allows me to state, that the note in question is erroneous. The reference should have been to *Re Cotton*. In that case the income of the legacy would belong to the legatee if he attained twenty-one, and the question was whether Lord Cranworth’s Act applied to such income, or was only applicable to income actually vested in the infant. The court saying that the more apt expression would be “may be or become” than “may be,” yet held the Act applicable. Now the difficulty is, first, that there was no necessity after that decision to alter the language of the statute to make it applicable to income of that kind; and, secondly, if altered for that purpose, the proper alteration would have been to make the phrase “may be or become,” as suggested in the judgment in *Re Cotton*. But the Act is altered after that case, and after the case of *Re George*, by striking out altogether any reference to the title of the infant to the income, and dealing with the income of any property to which he is contingently entitled, as it would seem *prima facie* to whomsoever such income may belong. A case may easily be put which would render this effect of the Conveyancing Act very startling. Suppose a testator gave a considerable legacy, say 50,000*l.*, to an infant just born if he should live to attain twenty-one, and the residue of his property to another, the case being one in which the residuary legatee would be entitled to the income of that legacy till the infant attained twenty-one. This statute, if it applies to the case, not only deprives the residuary legatee of so much of the income as is wanted for the maintenance of the infant, but it provides that the trustees “shall” accumulate all the residue of that income, and hold those accumulations “for the benefit of the person who ultimately becomes entitled to the property from which the same arise,” with power to apply them at any time as if the same were income arising in the then current year; so that it is a statutory gift of the income which the testator has given to the residuary legatee to the infant, who, under his will, could not become entitled to it in any event, and this is the more extraordinary because the provision in terms applies to wills which came into operation before the commencement of the Act. Therefore, in the supposed case, if the residuary legatee had for ten years before the passing of the Act been receiving the income of the 50,000*l.*, and had formed his plans of life on the assumption that he would in any event be certainly entitled to that income for the next ten years, till the infant attained twenty-one, this Act would at once

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deprive him of that income, and the trustees must accumulate it, and if the infant attained twenty-one must hand it over to him. This seems so extravagant that it is impossible to suppose it was the intention of the Legislature. I am driven to the conclusion that the Act cannot be intended to apply to income to which the infant never could become entitled, but which passed as residue to another person. This view is, I think, confirmed by the 3rd sub-section of sect. 43, which excepts the case where a contrary intention is expressed in the instrument, and also makes the whole provision "subject to the terms of that instrument and to the provisions therein contained." If the will had mentioned the intermediate income, and expressly given it to the residuary legatee, that might amount to the expression of a contrary intention. But if the income is in fact so given, though not by express words mentioning it, that seems to come within the other words of the clause, and to prevent the application of the section. For these reasons my opinion is that in this case the income of the contingent legacies is not subject to the provisions of sect. 43.

Solicitors for all parties, *Sandilands, Humphry, and Armstrong*,

Wednesday, Nov. 26, 1884

(Before KAY, J.)

TREADWELL v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY. (a)

*Railway company—Solicitor—Notice to treat—Counter-notice—Acceptance of by solicitor—Lands Clauses Consolidation Act 1845, s. 92—Companies Clauses Consolidation Act 1845, s. 97.*

*The acceptance by the solicitors of a railway company of a counter-notice, served upon the company under sect. 92 of the Lands Clauses Act 1845 which is bad does not bind the company.*

This was an action by a person upon whom the defendant company had served notice to treat for a certain property, for a declaration that he ought not to be compelled to sell such property without certain other property of which he contended it formed part, and an injunction to restrain the company from summoning a jury, or taking any other steps to purchase, or take compulsorily any part only of the property. The only question calling for a report was as to whether the company was bound by the acceptance by their solicitors of the plaintiff's counter-notice.

On the 18th Jan. 1883, the company gave to the plaintiff notice to treat for a yard and buildings, of which he was lessee, at the rear of two houses, of which he was also lessee. These properties had all originally been comprised in one lease, which had been assigned to the plaintiff, but at the date of the notice to treat they had been separated into three different tenements.

On the 9th Feb. 1883, the plaintiff gave to the company a counter-notice under sect. 92 of the Lands Clauses Consolidation Act 1845, requiring them to take the two houses as well as the yard and buildings. In answer to this notice the solicitors of the company wrote from their office at Waterloo Station to the plaintiff. After referring to a request which he had made that the amount of the compensation should be settled by

a jury, and deprecating such a course, they wrote as follows:

With reference to your requirement for the company to take the whole, we accept such notice, and will proceed in due course to summon a jury in respect of the whole premises, but, before actually issuing the warrant, pray let the surveyors meet, and see whether we cannot save the expense of a jury.

There was an attempt to settle the matter without a jury, and surveyors were appointed who entered into negotiations as to the value of the whole property required to be taken under the counter-notice.

In July 1883 an offer of £200. was made to the plaintiff, but it was withdrawn in a few days while under his consideration, and before he had either accepted or rejected it.

On the 13th Sept. 1883, the company's solicitors wrote to the plaintiff's solicitors as follows:

With regard to the requirement of your client that the company should take the whole of the property, we accepted service of notice to this effect in order to save you trouble; but it seems, on looking into the matter, that the case is one hardly coming within the meaning of the 92nd section of the Lands Clauses Act, and that the company could not be compelled to take more than they actually require, or at any rate more than the separate holding.

The company subsequently gave the plaintiff notice that they intended to summon a jury to assess the value of the property comprised in their original notice to treat.

In Jan. 1884, the writ in this action was issued.

The plaintiff, at the hearing, contended that the yard and buildings formed in fact part of the houses within sect. 92 of the Lands Clauses Act, but this part of the case does not call for a report.

*Robinson, Q.C. and Cripps for the plaintiff.*—The letter written by the solicitors accepting the counter-notice binds the company. In *Schwinge v. The London and Blackwall Railway Company* (3 Sm. & Giff. 30), which was the converse of this case, a similar letter by the company's solicitors was held by Stuart, V.C., to be an assent by the company to treat with the vendor so as to bind him.

They also referred to *Loosemore v. The Tiverton and North Devon Railway Company* (48 L. T. Rep. N. S. 162; 22 Ch. Div. 25; 50 L. T. Rep. N. S. 637; 9 App. Cas. 480) and *Pinchin v. The London and Blackwall Railway Company* (1 K. & J. 34).

*Graham Hastings, Q.C. and Phipson Beale, for the company,* were not called upon.

KAY, J. stated the facts, and held that the counter-notice was a bad notice on the ground that the yard and buildings did not form any part of the two houses. He continued:—The point is that that acceptance by the solicitors of the company bound the company. The postulate is, as I pressed upon the plaintiff's counsel, that the counter-notice to take the whole is bad. It is a bad counter-notice, because this part, notice to treat for which has been given, is not part of the two houses, and, accordingly, the argument would be this: that there being a bad counter-notice to take a house which the company are not compellable to take, the acceptance of that by the solicitors of the company binds the company to a contract which they were not bound to make under the Act of Parliament, viz., to take that extra property. I asked for authority for that, but was

referred to none. The company not being compellable to take this property under the Act, the contract, if there is one at all, is a mere contract to purchase land. Now, the mode in which the company is to be bound by an agreement which ought to be in writing is, under sect. 97 of the Companies Clauses Act, to be in writing, signed by a committee to make contracts, or the directors, or any two of them; but this is not signed by any committee to make contracts, or by the directors, and I ask how am I to assume, or infer what evidence is there that the solicitors of the company had power to contract that the company should buy land which they are not compellable to buy under the Act. It seems to me the plaintiff has failed to make out either that there was a good counter-notice to treat, or that the acceptance of the bad counter-notice by the solicitors was in any way or shape binding on the company, and accordingly I must dismiss this action with costs.

Solicitors for the plaintiff, *Wilkinson and Howlett*.

Solicitors for the company *Bircham and Co.*

Saturday, Dec. 6, 1884.

(Before KAY, J.)

OLDHAM v. STRINGER. (a)

*Equitable mortgage—Deposit of deeds—Foreclosure or sale—Conveyancing and Law of Property Act 1881, s. 25, sub-sect. 2.*

*An equitable mortgage by deposit of deeds applied under sect. 25, sub-sect. 2, of the Conveyancing Act 1881, for an order for sale instead of foreclosure. There was no memorandum of the charge, and no agreement by the mortgagor to execute a legal mortgage.*

*The order asked for was made.*

This was an action by an equitable mortgagee by deposit of deeds to enforce his security against the mortgaged estate by foreclosure or sale.

The defendant had borrowed from the plaintiff 200*l.* and as a security for the repayment of that sum and interest had given him a promissory note, and deposited with him the title deeds of a leasehold estate.

There was no memorandum of the deposit, and no written agreement by the mortgagor to execute a legal mortgage.

The interest being considerably in arrear, the plaintiff brought this action. The defendant did not enter an appearance or deliver any defence. The plaintiff set down the action as a short cause on motion for judgment in default of defence.

The defendant did not appear.

H. Greenwood for the plaintiff.—I ask for an order for sale instead of foreclosure. Perhaps under the Chancery Procedure Act 1852 (15 & 16 Vict. c. 86), s. 48, an equitable mortgagee by deposit was not entitled to a sale unless there had been an agreement to execute a legal mortgage: (*York Union Banking Company v. Artley*, 11 Ch. Div. 205); but the words of sub-sect. 2 of sect. 25 (b) are wide enough to authorise a sale,

(a) Reported by A. J. HALL, Esq., Barrister-at-Law.

(b) Conveyancing Act 1881, sect. 25 (3): "In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of

although there is no such agreement. In sub-sect. 6 of sect. 2 of the Act, "mortgage" is defined as including "any charge on any property for securing money or money's worth," and "mortgage money" as meaning "money or money's worth secured by a mortgage." In *Wade v. Wilson* (47 L. T. Rep. N. S. 696; 22 Ch. Div. 235), where an order for a sale was made, it does not appear from the report whether there was any agreement to execute a legal mortgage or not.

KAY, J.—I will make the order you ask for. I direct that the sale be carried out by laying proposals before the chief clerk.

Solicitors for the plaintiff, *H. B. Clarke and Son*.

June 20 and Aug. 8, 1884.

(Before CHITTY, J.)

CONOLAN v. LEYLAND. (a)

*Married woman—Separate use—Property acquired after contract—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), s. 1, sub-sects. 1 to 5.*

*The court was moved to enforce against the defendant, a married woman, an arbitrator's award made in pursuance of a consent reference by an order of April 1883. The cause of action was a contract entered into in 1879 by the defendant with the plaintiff, and it appeared that by the order of reference the defendant had agreed to pay the sum awarded by the arbitrator, and costs. It was submitted by the plaintiff that sect. 1, sub-sect. 4, of the Married Women's Property Act 1882 was retrospective, and that separate property acquired by the defendant subsequently to the date of the contract could be taken in execution, also that the consent order must be held to be equivalent to a new contract.*

*Held, that sub-sect. 4 had no retrospective operation so as to include contracts entered into by a married woman before the passing of the Act, as it was not expressly stated that it was to be retrospective; but that an order made after the passing of the Act by consent in an action by a creditor against a married woman in respect of her contract before the Act (by which order all questions under the contract were referred to an arbitrator who was to have all the powers of a judge of the High Court, and the parties bound themselves to keep the award) was an agreement by a married woman after the Act within sect. 1, sub-sects. 3 and 4; and that her separate estate which she had at the date of such agreement was liable to pay the amount found by the award to be due from her under the contract; and therefore, that any separate estate which the defendant had at, or after, the date of the contract was liable to be taken in execution of the judgment founded on the consent order.*

any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested, does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms."

(a) Reported by A. COYSEARNE SM, Esq., Barrister-at-Law.

CHAN. DIV.]

CONOLAN v. LEYLAND.

[CHAN. DIV.]

THE defendants, Mr. and Mrs. Leyland, lived apart, and in June 1879 a separation deed was executed by them, under which Mr. Leyland covenanted that he would, during the life of Mrs. Leyland, pay to Thomas Sutherland the sum of 2000*l.* per annum, to be held on trust for Mrs. Leyland for her sole and separate use.

In the early part of that year Mrs. Leyland, while on a visit to the plaintiff and his wife, proposed that she should make his house her home, and that for this purpose he should take a larger house for their joint occupancy, upon certain terms as to contributing to the expenses, which not having been reduced into writing, were differently stated by the plaintiff and the defendant.

Pursuant to this agreement, the plaintiff took a house for three years from the 31st March 1879, but the expenses proving very heavy the arrangement was terminated on the 1st Oct. 1879, and exclusive possession of the house was then given up to Mrs. Leyland.

The plaintiff had furnished Mrs. Leyland with an account of the expenses of the establishment upon which he claimed a balance of 162*l.* 7*s.* 9*d.*, and this action was brought against Mr. and Mrs. Leyland, and the trustee of the separation deed of June 1879 (Thomas Sutherland), claiming a declaration that the agreement was binding on the separate property of Mrs. Leyland, and that her separate estate, which was vested in her or in Thomas Sutherland in trust for her, was chargeable with payment of the 162*l.* 7*s.* 9*d.* and interest, and payment by Thomas Sutherland of such sum out of the moneys received by him, or coming to his hands for the separate use of the defendant Mrs. Leyland.

By her statement of defence and counter-claim Mrs. Leyland contested the accuracy of the account furnished to her by the plaintiff, denied that 162*l.* 7*s.* 9*d.*, or any part thereof, was owing from her to the plaintiff, but on the contrary asserted that the plaintiff was indebted to her in the sum of 240*l.* which she claimed by counter-claim. She also denied that the plaintiff made any disbursements at her request, or for her benefit or use, or on the faith or credit of her separate estate.

By an order made in the action when it came on for trial on the 25th April 1883, it was by consent ordered that it be referred to the award of J. E. Paget, one of the district registrars of Liverpool, to ascertain whether the agreement made between the plaintiff and the defendant Mrs. Leyland was in the terms set up by the plaintiff or in the terms set up by the defendant, and what were the terms thereof. And the arbitrator was to take the account between the parties on the footing of such agreement, and was to award and certify what was due from one party to the other; and by the like consent it was ordered that the arbitrator should have all the powers as to certify and otherwise of a judge of the High Court; and by the like consent the costs of the action were to abide the result of the said accounts, and the costs of the reference and of the award were to be in the discretion of the arbitrator; and by the like consent it was stated that the parties did and should on their respective parts in all things stand to, abide by, obey, perform, fulfil, and keep the award, &c., of the arbitrator so to be made and published, and that

no action was to be brought by either party against the arbitrator for any matter or thing he should do in or touching the question thereby referred to him.

By his award, dated the 15th Jan. 1884, the arbitrator had found and awarded that the agreement between the plaintiff and the defendant Mrs. Leyland was in the terms set up by the plaintiff, and having taken the accounts on the footing of such agreement, he awarded and certified that the sum of 70*l.* 11*s.* 7*d.* was at the commencement of the action and still was due from Mrs. Leyland to the plaintiff, and as to the costs in his discretion (which had been taxed at 197*l.* 10*s.* 2*d.*) he directed that they should be borne and paid by Mrs. Leyland.

The plaintiff now moved that the defendant Mrs. Leyland might be ordered to pay to the plaintiff the sum of 70*l.* 11*s.* 7*d.* awarded and certified to be due from her to him, and also 197*l.* 10*s.* 2*d.*, the taxed costs of the plaintiff of the action and of the reference, with interest; and that it might be declared that the separate property of the defendant Mrs. Leyland vested in her, or in the defendant Sutherland, or any other person in trust for her, was chargeable with payment of such sums and interest, and the costs thereafter directed to be paid, and that the same were payable thereout, and that the defendant Sutherland might be ordered to pay to the plaintiff the two several sums and interest and costs out of any moneys in or hereafter coming into his hands as part of the separate estate of the defendant Mrs. Leyland. The motion also asked for the appointment of a receiver of the separate estate of Mrs. Leyland, or that (if necessary) an inquiry might be directed of what such separate estate consisted on the 27th April 1880 when the writ was issued, and on the 15th April 1884, and in whom it was then and now vested, and of what it now consisted, and whether there had been any and what disposition thereof or dealings therewith by the defendant Mrs. Leyland since the dates aforesaid; for liberty to sign judgment against the defendant Mrs. Leyland, and to issue execution against her separate estate for such sums and interest and costs; and that the defendant Mrs. Leyland ought to be ordered to pay to the plaintiff his costs of this motion.

In support of the motion the plaintiff had made an affidavit to the effect that the defendant Mrs. Leyland was possessed of furniture and other household goods and effects of considerable value now in a dwelling-house occupied by her, and that she was also possessed of valuable jewellery and other personal effects of considerable value, and that such furniture, jewellery, and effects belonged to her as her separate property, and were of sufficient value to satisfy the sums of 70*l.* 11*s.* 7*d.* and 197*l.* 10*s.* 2*d.*, the plaintiff's taxed costs of the action and of the reference, which said sums were still due and unsatisfied.

*Ince*, Q.C. and *MacConkey*, for the plaintiff, in support of the motion.—The plaintiff is entitled to an order for payment, by Mrs. Leyland, of the sums which have been certified to be due from her by the award, and to a declaration of charge upon all separate property, not only on that which she was possessed of at the date of the contract, but also upon all that she has acquired subsequently. Sub-sects. 3 and 4 of sect. 1 of the



Married Women's Property Act 1882 are not confined to contracts entered into after the passing of the Act, but have a retrospective as well as a prospective operation, so as to entitle a creditor, who has secured his debt by a judgment, to realise it whenever he can find separate estate out of which to satisfy it:

*Brown v. Morgan*, 12 L. Rep. Ir. 122.

Mrs. Leyland, who appeared separately in the action, by consenting to comply with the award directed by the order of the 25th April 1883, which was made in her presence and with her consent, entered into a new contract after the Act had come into operation to pay the amount that might be found due from her, so that, in any case, sub-sects. 3 and 4 of sect. 1 apply. An order by consent in an action has all the incidents of, and may be enforced as a contract, and non-performance of the award gives a right of action:

*Wentworth v. Bullen*, 9 B. & C. 840;

*Livesley v. Gilmore*, 15 L. T. Rep. N. S. 386; L. Rep. 1 C. P. 570.

Being in the position of a married woman, she made herself liable for the amount which might be awarded, and the plaintiff is entitled to issue execution:

*Williams v. Mercier*, 47 L. T. Rep. N. S. 140; 9 Q. B. Div. 337.

The plaintiff is also entitled to recover his costs, which were to abide the result of the award. Even before the Act of 1882 a married woman could not have the benefit of a litigation, and then repudiate her liability. A married woman has been ordered personally to pay costs:

*Pemberton v. McGill*, 3 L. T. Rep. N. S. 207; 1 Jur. N. S. 1045;

*Morris v. Freeman*, 3 P. Div. 65;

*Beasant v. Wood*, 12 Ch. Div. 605.

Also a writ of *ca. sa.* against her would be a good writ:

*Newton v. Boodle*, 4 C. B. 359, 365, 369.

In the Chancery Division the order may be enforced by the appointment of a receiver until payment of the amount found due by the taxing officer's certificate, and the costs of the application, without separate proceedings to enforce the demand against her separate estate:

*Re Peace and Waller*, 49 L. T. Rep. N. S. 637; 24 Ch. Div. 405.

*Romer, Q.C.* for the defendants.—Mrs. Leyland had no separate property at the date of the contract of March 1879, which preceded the separation deed; and the Act of 1882 is not retrospective so as to bring contracts entered into by a married woman before the commencement of the Act within the provisions of sub-sects. 3 and 4 of sect. 7, and to bind separate property which she may acquire after the date of the contract. The language of that section is expressly confined to future contracts. The order of reference, which was made by consent, does not amount to a fresh contract after the commencement of the Act so as to bring the case within the provisions of sect. 1. Mrs. Leyland never intended to extend her liability by entering into a new contract. She asserted that the plaintiff had been overpaid, and in consenting to the reference she intended to bind herself to the extent of the old contract and no further, and cannot in any sense be held to have made a

fresh contract within the meaning of the Act. With regard to the cases at common law cited to prove that a married woman is personally liable to an execution for costs, and that a writ of *ca. sa.* can be maintained against her, the courts in those cases simply gave the order in case a married woman had any property in her own right for her separate use, and if she had none it could not be enforced. It was the invariable practice in Chancery not to make a married woman personally liable for costs, but only to make the costs a charge on her separate estate, which was liable to the principal claim in the suit.

CHITTY, J.—The first point to be determined in this case is, whether sub-sect. 4 of sect. 1 of the Married Women's Property Act 1882 is retrospective or not. The words are: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." In the case before me the contract was made before the time limited for the commencement of the Act. As the law stood then, her contract bound only such separate estate as she had at the date of the contract. It is not clear whether she had then, or now has, any separate estate, but I will assume that she had none at the time of entering into the contract. In my opinion, sub-sect. 4 of sect. 1 is not retrospective, as the words "shall bind," &c., are words of futurity, and are not sufficiently strong to impose a new obligation on married women, and to displace the general rule that a statute is prospective unless expressly stated to be retrospective. The Act refers to future and not to past contracts, and the words "every contract" are not, in my opinion, sufficient to include contracts entered into by her before the Act came into operation. Moreover, the first three subsections of sect. 1 are clearly clauses referring to future capacity; and it would be strange if a retrospective clause were to be found amongst prospective clauses. But then it was contended that the order by consent of April 1883 amounted to a new contract on the part of the married woman after the commencement of the Act to pay what should be found due from her. She appeared to and defended the action separately, and in the action the order of April 1883 was made by consent. The question is whether or not this was a contract on the part of the married woman. It is clear that a contract may be embodied in an order of reference, for, as was said in *Wentworth v. Bullen* (*ubi sup.*), the contract of the parties embodied in the consent order was not less a contract and subject to the incidents of a contract because there was superadded the command of the judge. It was suggested that this was a mere dictum, but in *Livesley v. Gilmore* (*ubi sup.*) Erle, C.J. says: "I think the opinion expressed by Parke, J. in *Wentworth v. Bullen*, in what was really a considered judgment rather than a dictum, was perfectly correct." I think that it was a new agreement on the part of the married woman after the commencement of the Act, and that I am not straining the effect of the order in saying so. The question cannot depend on whether she had or had not any separate estate at the time

CHAN. DIV.]

Re LLOYD AND SON'S TRADE MARK; LLOYD v. BOTTOMLEY.

[CHAN. DIV.]

of entering into the original contract. If there was a new contract, and consistently with *Wentworth v. Bullen* I am warranted in holding that this was a contract by Mrs. Leyland after the date of the commencement of the Act, then sub-sect. 3 of sect. 1 is applicable; and it is to be deemed to be a contract entered into by her with respect to and to bind her separate property, and therefore, by sub-sect. 4, any separate property which she had at or after the date of such agreement, is liable to pay the amount found to be due from her under the contract, and is liable to be taken in execution under the judgment. But neither sub-sects. 3 or 4 of sect. 1 can, in my opinion, be said to be retrospective in the sense of applying to contracts made previously to the date of the commencement of the Act. I may add that sub-sects. 2 and 5 of sect. 1 may be particularly referred to as confirming the view I take with regard to sub-sects. 3 and 4, these being plainly, from their language, clauses conferring future capacity on married women.

*Minute of Order*.—Order payment of the sums of 70*l.* 11*s.* 7*d.* and 197*l.* 10*s.* 2*d.* as asked, and also payment of the costs of this application, with a declaration that the defendant, Mrs. Leyland, is bound to pay these sums and the costs out of her separate estate generally, without regard to the time when it was acquired.

Solicitors for the appellant, *W. W. Wynne and Son*, agents for *Evans, Lockett, and Co.*, Liverpool.

Solicitors for the respondent, *Simpson and North*, Liverpool.

Aug. 8 and 11, 1884.

(Before CHITTY, J.)

Re LLOYD AND SON'S TRADE MARK; LLOYD v. BOTTOMLEY. (a)

*Trade mark—Rectification of register—Exclusive user—Five years after registration—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), ss. 64; 76, 90, 113.*

*L.* had registered a trade mark in 1877, and appeared on the register as proprietor thereof; he brought an action in 1884 against *B.*, alleging wrongful user, or imitation of the trade mark.

*B.* now moved to expunge this trade mark from the register, and alleged common user of it before and after registration.

*Held*, that the motion must succeed, as the mark ought not to have been registered; and that the right to the exclusive user of a trade mark after the expiration of five years from the date of registration given by sect. 76 of the Trade Marks Act 1883 is subject to and controlled by sect. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded, by the expiration of five years from the date of such registration, from showing that the mark ought not to have been registered.

THIS was a motion on behalf of the defendants Messrs. Bottomley and Co., cigar manufacturers, at Halifax, in Yorkshire, that the entry of a trade mark registered in the name of Edmund Lloyd and Sons, and used by them on boxes of cigars,

might be expunged from the register on the ground that it had been entered therein without sufficient cause, being a mark calculated to deceive, and being at the time of registration, and continuing to be, a common mark and *publici juris*.

On the 16th Aug. 1876 Messrs. Lloyd and Sons, who carried on business as cigar and tobacco manufacturers in Holborn and at Exeter, applied for registration of a trade mark, consisting of the words "La Minerva-Habana," in respect of tobacco; a user of eight years before the 9th Aug. 1876 being claimed for such mark, and on the 24th May 1877 the name of Edmund Lloyd was entered on the register of trade marks as proprietor of the trade mark.

Messrs. Lloyd having found out in April 1884 that Bottomley and Co., of Halifax, were selling cigars in boxes made by Rayner and Co., of Liverpool, and branded "La Minerva-Habana" in exact imitation of Lloyd's registered trade mark, issued a writ in June last against Bottomley and Rayner and Co. for damages for the wrongful use or imitation of the trade mark, and for an injunction. An interim injunction was obtained, which was afterwards, on the 10th July 1884, dissolved upon an undertaking by Bottomley to keep an account of all sales of cigar boxes bearing an imitation of the plaintiffs' trade mark until after the trial of the action; and Rayner and Co. were dismissed from the action upon terms.

Messrs. Bottomley and Co. had since served a notice of motion, and now moved to expunge the trade mark in question from the register. The application was supported by evidence that the brand "La Minerva-Habana" had been in common and continuous use in the cigar trade for many years prior to 1876 and 1877 and subsequently thereto. In particular large quantities of cigars in boxes bearing this brand had been in 1869, and continuously since, sold both in and out of this country by Stein and Co. of Antwerp, and boxes thus branded had also been largely manufactured by one Rothschild, of Leicester, whose stock-in-trade, including the brand "La Minerva-Habana," was delivered to Rayner and Co. on the 16th March 1877 in part payment of a debt due to them.

On the other hand, Messrs. Lloyd and Sons stated their belief that the trade mark in question had never been generally used in the trade as applied to cigars, and that their right to it was exclusive. It appeared also that in Dec. 1877, Jan. 1878, and April 1879, three separate firms, on threat of legal proceedings, had consented to give up the use of a facsimile of Lloyd and Son's registered mark.

*Romer, Q.C.* and *Wallace* for the applicants.—According to sub-sect. 1 (c) of sect. 64 of the Trade Marks Act 1883 the proper subject for a trade mark, and one capable of registration, must be "a distinctive device, mark, brand, heading, label, ticket, or fancy word, or words not in common use," and this the term "Minerva" is not. We have conclusive evidence to show that this term was in common and constant use in the tobacco trade long before the registration in 1877 by Lloyd and Sons. We contend that we are, in consequence, entitled, under sect. 90 of the Act of 1883 to have the entry expunged, as having been made without sufficient cause.

(a) Reported by A. COYSEBARK SIM, Esq., Barrister-at-Law.

*Aston, Q.C.* and *E. Cutler (Pocock with them)* for the respondents.—The words “La Minerva” were not common to the trade, or in general use at the time of registration, and there is no evidence adduced which shows that the thing registered was not a good trade mark, and one capable of registration. If, however, the court should be of opinion that common user in the tobacco trade before registration of the mark in question has been established, as our mark has been now on the register without opposition for five years, we have gained a legal title to it. There is a dictum by Jessel, M.R. as follows: “If they had gone on for five years they would have got a legal right if they had not been opposed.” (This only appears in the shorthand notes, and not in the report.)

*Re Hyde and Co.'s Trade Mark*, 38 L. T. Rep. N. S. 777; 7 Ch. Div. 724.

In no case as yet has a frequent user prior to registration of a trade mark been held to nullify the registration after a lapse of five years, except in cases where it was something not capable of being registered as a proper trade mark:

*Re J. B. Palmer's Application*, 46 L. T. Rep. N. S. 787; 21 Ch. Div. 47; 48 L. T. Rep. N. S. 52; 24 Ch. Div. 504;

*Re Leonard and Ellis's Trade Mark; the Valvoline case*, 51 L. T. Rep. N. S. 35; 28 Ch. Div. 298.

Granting that it may have been “publicly used by more than three persons on the same, or a similar description of goods,” and so become common to the trade in such goods, in accordance with sub-sect. 3 of sect. 74 of the Trade Marks Act 1883, that defect is cured by sect. 76, if the words registered are special and distinctive with regard to what is capable of being registered as a trade mark within the definition of sub-sect. (a) of sect. 74 of the Act of 1883. That is the case here. [CHITTY, J.—It appears to me that sect. 90 is paramount to sect. 76, having regard to the concluding words of that section, “subject to the provisions of this Act.”] As our right to this trade mark had indefeasibly accrued before the commencement of the Act of 1883, we are within the protection of the Act of 1875 by virtue of the saving clause in the latter Act, sect. 113.

*Romer* in reply.—If these words were not the proper subject of a trade mark when registered, and ought not to have been ever allowed to be registered, registration for five years cannot cure the preliminary defect:

*Re J. B. Palmer's Application (ubi sup.)*.

CHITTY, J.—The facts in this case, are that Lloyd and Sons have been on the register for more than five years in respect of the mark “La Minerva,” and they claim to be entitled accordingly. But evidence is adduced to show that this so-called trade mark is not a trade mark at all, having been a term in common use at the time of registration, and the present motion is to rectify the register under sect. 90 on the ground that the mark was entered “without sufficient cause.” Without going through other parts of the Act it is sufficient to say that sect. 76, which enacts that registration shall after the expiration of five years from the date of the registration be conclusive evidence of the right to the exclusive use of the mark, by the concluding words, “subject to the provisions of this Act,” lets in and is controlled by sect. 90, which is paramount to

sect. 76, and contains no limitation of time. Any person, therefore, who is aggrieved, and can show that the entry was made on the register without sufficient cause, may apply. The language of sect. 76 is not the same as that of the corresponding sect. 3 in the former Act. [His Lordship referred to these sections.] Apart therefore from *Re J. B. Palmer's Application (ubi sup.)*, the result of this Act is, that any person aggrieved may apply to get rid of the entry, and succeed, notwithstanding more than five years have elapsed since registration. On the evidence it is plain that this so-called mark was common in the trade, inasmuch as it was in use by more than three persons before the application to register, and, if so, it was not a distinctive mark or device, but was common in the trade, inasmuch as it had been publicly used by more than three persons on the same or a similar description of goods before the application to register. If so, goods having this mark on them had no distinctive mark such as was required by sect. 74. In *Re Hyde and Co.'s Trade Mark (ubi sup.)* Jessel, M.R., on motion, ordered the registration which had been made to be struck out. Reliance, however, has been placed in the argument on behalf of the respondents on an observation of the Master of the Rolls, which was to be found in the shorthand notes of the argument in that case. But the Master of the Rolls reconsidered the matter afterwards in *Re J. B. Palmer's Application*, and at best it was a mere dictum. I hold, therefore, that it is competent to the applicants, notwithstanding the expiration of five years from the date of registration, to show that the thing called a trade mark is not a trade mark at all, and ought not to have been registered. The evidence was practically all one way, and there has been an absolute refusal on the part of the respondent to accept the challenge of the applicant. He nowhere pledges his belief that at the date of registration it was a mark to which he had the exclusive right. No evidence was given of how he came to invent it; in fact, upon the evidence as it stands, it appears that he found the term “La Minerva” current in the market, laid hold of it, and got it registered. On the evidence more than four persons had been in the habit of publicly using this mark, and the motion must therefore succeed. I am told, however, that the case depends not on the Act of 1883, but on that of 1875, and that, as the respondent had acquired an absolute title under the Act of 1875, all his rights are preserved to him by sect. 113 of the Act of 1883. It appears to me, however, after the decision in *Re J. B. Palmer's Application*, that I must have come to just the same conclusion if I had to decide the case on the Act of 1875. Under sect. 10 of the Act of 1875, which was much more cumbersome, this was not any special or distinctive word or words, or combination of figures or letters used as a trade mark before the passing of the Act within the meaning of that section, so as to be capable of registration, as such, under the Act of 1875. I therefore come to the same conclusion on both Acts, and the motion to expunge this mark from the register must succeed.

Solicitors for the applicant, *Burn and Berridge*, for *Godfrey Rhodes*, Halifax.

Solicitor for the respondent, *W. G. Brighten*.

CHAN. DIV.]

Re THE NACUPAI GOLD MINING COMPANY.

[CHAN. DIV.]

Saturday, Nov. 1, 1884.

(Before CHITTY, J.)

Re THE NACUPAI GOLD MINING COMPANY. (a)

*Company—Winding-up—Withdrawal of petition by petitioner—Right of creditors appearing to support petition to costs—Companies Act 1862 (25 & 26 Vict. c. 89), s. 82—General Order, Nov. 1862, Schedule 3, Form 1.*

*A petition presented by a creditor for the winding-up of a company was withdrawn on the application of the petitioner by arrangement, the company paying the debt, and the petition was dismissed with costs. Some other creditors and shareholders appeared to support it, in consequence of service on them. It was submitted that they were not entitled to their costs, as they had not appeared to oppose.*

*Held, that they were entitled to their costs because, though they had appeared in support of the petition, they opposed its withdrawal, and had appeared rightly.*

*Re The Jablochkoff Electric Light and Power Company (49 L. T. Rep. N. S. 566; W. N. 1883, p. 189) distinguished.*

A CREDITOR of the above-named company had presented a petition that it might be wound-up. The petition came on for hearing in due course, when the petitioner's counsel stated that, owing to an arrangement which had been made, he wished to have the petition dismissed, as the company had paid his debt. Accordingly an order dismissing the petition with costs was made, but the counsel for the shareholders appearing to support the petition claimed to have their costs paid by the petitioner.

*Whitehorne, Q.C. and Ribton for the petitioner.*—This petition was served by advertisement, and addressed only to creditors or contributories who intended to oppose the winding-up order, in accordance with General Order Nov. 1862, sched. 3, form 1. Consequently those who have appeared to support it cannot be allowed their costs; they can only have them if they appear to oppose. As the petition is withdrawn the court cannot even look at it, and cannot tell whether the opposing or the supporting parties would have been on the winning side, and therefore entitled to costs:

*Re Patent Cocoa Fibre Company Limited, 1 Ch. Div. 617;*

*Re Jablochkoff Electric Light and Power Company Limited, 49 L. T. Rep. N. S. 566; W. N. 1883, p. 189;*

*Buskley's Companies Acts 4th edit. p. 201.*

*G. Henderson* for shareholders supporting the petition.—I not only appear to support the petition, but also to object to its withdrawal, and consequently am entitled to my costs for appearing in consequence of the advertisement.

*Quin* appeared for the company.

CHITTY, J.—I have no doubt about this point. The statutory advertisement is equivalent to actual service, and any persons served with a petition are entitled to appear, and, if they appear rightly, to have their costs. It would be most unfair to shareholders, who come here in consequence of the advertisement to support the petition, to tell them that they are not to have their costs. In one sense, however, they do oppose, for they oppose the withdrawal of it unless their

costs are provided for. To my mind they are clearly entitled to their costs. The case before *Pearson, J.*, of *Re The Jablochkoff Electric Light and Power Company Limited* (*ubi sup.*) is different from the present one, for there the shareholders who had intended to support the petition consented to its withdrawal or dismissal. That is clearly not the case here.

Solicitor for the petitioner, *E. Lee.*

Solicitors for other parties appearing, *Ashurst, Morris, Crisp, and Co.; Foss and Ledsam.*

Friday, Nov. 21, 1884.

(Before CHITTY, J.)

Re MITCHELL AND CO.'S AND HOUGHTON AND HALLMARK'S TRADE MARK. (a)

*Trade mark—Two marks on register—Common element—Rectification—Patents, Designs, and Trade Marks Act 1883 (46 & 47 Vict. c. 57), s. 90.*

*Two whisky manufacturers had each applied for registration of a similar trade mark. They entered into an agreement that they should respectively be at liberty to register their trade marks, but that the user of such trade marks should be subject to certain restrictions, and that a note to that effect should be entered on the register, with liberty in the case of the omission of such note for either party to apply, as a person aggrieved, for rectification of the register. The note as to the restriction of the user had been omitted when the trade marks were registered. The applicants now moved for an order varying the entry on the register by adding a note that the user thereof was restricted by the above-mentioned agreement.*

*Held, that the court would make the order to vary and rectify in accordance with the terms of the agreement, and that notice of the rectification must be given to the comptroller.*

*Re Rabone (Seb. Dig. 643) followed.*

MESSRS. MITCHELL AND CO., who were whisky manufacturers carrying on business in Belfast, applied to register, in class 43, a trade mark, comprising amongst other things the words "Cruiskeen Lawn," and to which the number 34,163 was given.

Messrs. Houghton and Hallmark, who were also whisky manufacturers, and who carried on business in Liverpool, applied to register a trade mark in the same class, which also comprised the words "Cruiskeen Lawn," and to which the number 29,419 was given.

Proceedings were threatened on both sides in consequence, but to avoid litigation both parties entered into an agreement in writing, dated the 22nd April 1884, whereby it was agreed that they should respectively be at liberty to register their respective trade marks, but that the user of such trade marks, after registration, should be restricted as set forth in clauses 3, 4, 5, and 6 of the agreement. The 6th clause of the agreement provided that on the registration of the said marks (Nos. 34,163 and 29,419) the said company and the said Houghton and Hallmark should cause a note of the restriction on the user thereof, imposed by clauses 2, 3, 4, and 5 of the said agreement, to be entered on the register of trade marks, and in

default of their so doing either party might apply, as persons aggrieved, to rectify the register of trade marks by the insertion of such a note, and that the defaulting party should pay the costs of the application.

Both the marks had been registered without a note of the restriction of the user; and a motion was now made on behalf of both the firms of whisky manufacturers under sect. 90 of the Patents, Designs, and Trade Marks Act 1883, to rectify the register of trade marks by adding to the registration of each of the two marks a note to the effect that the user thereof was restricted by the aforesaid agreement.

*J. Cutler* for the applicants.—The object of this application is to prevent any assignment of the trade marks without notice of the agreement. In support of the motion he cited

*Re Leonardi*, Seb. Dig. 610;

*Re Babone*, Seb. Dig. 643;

*Re Kuhn and Co.*, 53 L. J. 238, Ch.

*CHITTY, J.*—In this case I will make the order to vary and rectify the register in accordance with the terms of the agreement, and notice of this rectification must be given to the comptroller by the applicants.

Solicitors for the parties, *Hutchinson and McKenna*.

Thursday, Jan. 23.

(Before PEARSON, J.)

*Re HALL; HALL v. HALL.* (a)

*Practice*—Order for certain inquiries—Order LV., r. 3, s. 10—Rule 12—Effect upon powers of trustees.

*A. by will appointed three trustees, one of whom was B., the tenant for life, and directed that any vacancy in the number of trustees should be filled up within one year after it occurred. One trustee disclaimed, the other died after some years, leaving B. surviving. An action was commenced, asking for the general execution of the trusts of the will. The Court, under Order LV., r. 3, sub-sect. 10, ordered only certain special inquiries, among which was an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for their appointment. Pending this inquiry B. appointed a new trustee. The plaintiffs now moved to restrain the funds being handed to him and his acting as trustee.*

*Held, that the special inquiry made it the duty of B. not to fill up the appointment without the approval of the court, but that the power was not destroyed; all that was necessary was for B. to appoint a person whom the court would approve, and it not being alleged that the new trustee was an improper person, the court would not interfere with his appointment, and it was not necessary formally to sanction it.*

*CHARLES RADCLIFFE HALL*, by his will, dated the 31st Dec. 1872, gave all his residuary personal estate to the defendant *Radclyffe Hall* and *John Fielder Hall* and *Henry Reade*, upon trust, subject to certain charges, and to the accumulation of one-third of the income, so long as the law would permit, for the defendant for life, and after his death for his children, as he should appoint, and in default for them equally at

twenty-one or marriage. And the testator directed that any vacancy which might occur in the office of trustee of that his will should be filled up within one year from the happening thereof, and he appointed the said three trustees executors of that his will.

The will contained no power to appoint new trustees.

The testator died on the 21st March 1879. *Henry Reade* disclaimed the trusts of the will, and *John Fielder Hall* died in April 1883. No trustee was appointed in either of their places before the commencement of this action.

On the 16th May 1883 this action was brought by the children of *R. Hall* against their father for the execution of the trusts of the will.

On the 20th May 1883 judgment was given in the said action under Order LV., r. 3 (10) R. S. C., not directing a general execution of the trusts of the will, but directing certain inquiries, among which was an inquiry whether any and what persons had been appointed new trustees, and whether any and what proceedings should be taken for the appointment of new trustees of the said will.

By deed dated the 21st Dec. 1884 the defendant, in exercise of the power given him by the Conveyancing Act 1881, appointed *William Joseph Warren* a trustee of the said will jointly with himself.

This was a motion on the part of the plaintiffs to restrain the defendant from transferring the funds, subject to the trusts of the will, to the said *W. J. Warren*, and to restrain *Warren* from acting as trustee of the will.

*Montague Cookson, Q.C.* and *H. Warkles Horne* for the motion.—The power of appointing new trustees is suspended, just as every other power in the will is, by the order for executing the trusts in this court. The power is not indeed absolutely gone; any exercise of it, except under the sanction of the court, is improper, and the court will restrain its being acted upon—at least till the court has approved it:

*Re Gadd; Eastwood v. Clarke*, 48 L. T. Rep. N. S. 395; 23 Ch. Div. 134.

Evidence had been adduced that *Warren* was not a fit person to be trustee, but had been contradicted, and this contention was abandoned.

*Cozens-Hardy, Q.C.* and *Underhill* for the defendant.—There is not here a general order for administration or execution of the trusts. Only certain inquiries were ordered, and the case is the same as if a summons had been taken out for those inquiries only under R. S. C., Order LV., r. 3. Rule 12 of that order expressly provides that the issue of a summons under rule 3 shall not interfere with or control any power or discretion vested in any executor, administrator, or trustee except so far as such interference or control may necessarily be involved in the particular relief sought. Even a general administration order does not destroy a power to appoint new trustees. It only obliges the person exercising the power to satisfy the court that he has appointed a proper person, and that *Mr. Warren* is a proper person is not now disputed.

*M. Cookson, Q.C.* in reply.—Here there is a special inquiry about the appointment of new trustees. The exception in Order LV., r. 12, therefore applies.

(a) Reported by J. B. BROOKS, Esq., Barrister-at-Law.

CHAN. DIV.]

DRAGE v. HARTOPP.

[CHAN. DIV.]

PEARSON, J.—This action was commenced by writ, not by originating summons. The statement of claim asks for general administration of the testator's personal estate. The first paragraph of the prayer is, "that the personal estate of the testator Charles Radclyffe Hall, deceased, may be administered, and the trusts of his will relating to the same carried into execution by the order and under the direction of the court." But the court did not think fit to make an order for general administration, but under the circumstances deliberately made an order directing certain inquiries only. I have no hesitation in saying that by such an order the exercise by the trustees of the powers given by the will is in no way interfered with, except so far as such exercise must necessarily clash with the particular inquiries ordered. What has happened in this case is this: The will contained a direction that any vacancy in the trusteeship should be filled up within a year. At the time this order was made there was only one trustee. The court directed this inquiry: [His Lordship read the inquiry set out above.] Then the defendant appointed Mr. Warren trustee. That inquiry being directed, I think it was the duty of the defendant not to fill up the vacancies in the trusteeship without an application for the approval of the court. But it has been decided that all the person possessing the power has to do in such a case is to take care that he appoints such a person as the court will approve. The power of nomination is left in him, but the court has a power of control to see that a fit and proper person is appointed. The proper course for the defendant would have been to make an application in chambers stating that he intended to appoint Warren, and if it was found that there was no objection to his appointment, it would have been approved. There is no objection made to Warren in this case. But it is said that, because the appointment was made while this inquiry was pending, I ought to interfere with it and refer the whole matter back to chambers, and if I do not do that I ought to formally sanction the appointment. I see no necessity for doing either. In the course of the argument in *Re Gould* (23 Ch. Div. 136) Baggallay, L.J. says, after referring to the observations of the Master of the Rolls in *Tempest v. Lord Camoys* (48 L. T. Rep. N. S. 13; 21 Ch. Div. 571, 578): "This may be illustrated by the case of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trusts has been made they may still exercise the power, but the court will see that they do not appoint improper persons." I think that is the sole duty of the court in the matter, and therefore the defendant undertaking to appoint a third trustee and to submit his name to the chief clerk before appointment, I shall make no further order on the motion.

The motion also asked for payment into court of a sum appearing to be due from the defendant on account of income. His Lordship held that this application was premature till the accounts between capital and income were completed, and specially reserved the costs of the motion.

Solicitors: Waddilove and Johnson; A. IV. Mills.

Thursday, Jan. 23.

(Before PEARSON, J.)

DRAGE v. HARTOPP. (a)

*Practice—Executor—Action by one executor alone—Order XVI., r. 11.*

*H. deposited deeds with P. (one of the executors of A.), as security for moneys advanced by him, out of moneys in his hands as such executor. P. became bankrupt, and went abroad to escape prosecution for fraud. This action was brought by D., the other executor alone, for foreclosure.*

*Held, on a summons that P. should be added as a party, and to stay proceedings till he was so added, that, if the facts alleged stated above were proved, there would be no object in adding P. as a party, and that, if they were not made out, the court could add P. so soon as it appeared he might have any interest.*

## ADJOURNED SUMMONS.

This was an action for an account of moneys due upon an equitable mortgage, payment, and in default sale or foreclosure, and possession.

On the 31st Dec. 1878 the firm of Messrs. Parker, solicitors, advanced to the defendant Sir John William Cradock Hartopp the sum of £6968l.; on the 5th Jan. 1879 they advanced him a further sum of 9000l. Both sums were advanced by Messrs. Parker, acting as solicitors for the estate of George Ashwell, deceased, and out of moneys belonging to Frederick Searle Parker, one of the partners in the firm, and the plaintiff Charles Drage, as executors of George Ashwell. The statement of claim alleged that they were so lent "with notice to and knowledge by the defendant that they were the moneys belonging to George Ashwell's estate." The defendant gave charges in writing to Messrs. Parker, upon certain property for the said sums, and directed them to hold the deeds which were in their possession as security for the loans. It did not appear that there was any reference in the written charge to the money belonging to Ashwell's estate.

On the 20th March 1884 the two Messrs. Parker were jointly and separately adjudicated bankrupt, and both went out of the jurisdiction. The plaintiff commenced this action on the 10th Dec. 1884, as executor of the said George Ashwell, without joining F. S. Parker as co-plaintiff or defendant.

The defendant took out a summons that F. S. Parker should be added as a party, and that all proceedings should be stayed until he was so added. This summons was adjourned into court, and now came on for hearing.

*Whitworth* for the defendant.—An action for foreclosure by one of two executors alone cannot be maintained. In *Daniel's Chancery Practice* (6th edit. p. 239) it is stated that the rule which requires them all to be parties "may be dispensed with if any of them are not answerable to the process of the court;" but the case quoted for this proposition (*Cowstod v. Cely*, Prec. in Ch. 83) does not bear it out at all. It was an action by a residuary legatee to make one executor account for moneys which he had himself received. Here the security was given to Parker alone. The plaintiff is suing on the ground that it was given for the benefit of the estate of which he and

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

Q.B. Div.]

SAUNDERS v. PAWLEY.

[Q.B. Div.]

Parker are co-trustees, but in *Lake v. South Kensington Hotel Company* (40 L. T. Rep. N. S. 638; 11 Ch. Div. 121) the Court of Appeal held that trustees who were not co-plaintiffs must be made defendants.

*Langley* for the plaintiff.—This is in the first place an action to recover money. Under the old rule a defendant who wished to have another plaintiff joined had to swear that he was within the jurisdiction. That cannot be done here. *Webster v. Spencer* (3 B. & Ald. 360) shows that executors can maintain an action for money lent by one of them alone. Even if the plaintiff could not sue alone under the old law, the case comes within Order XVI., rr. 1, 11.

*Whitworth* in reply.

PEARSON, J.—This is an action brought by the plaintiff Drage as one of the executors of the will of George Ashwell. His co-executor F. S. Parker is bankrupt and out of the jurisdiction, and it is objected that he ought to be made a party. The statement of claim contains allegations that certain moneys were advanced upon the securities belonging to the defendant, and that notice was given to the defendant, and he acknowledged that these moneys belonged to the estate of George Ashwell. Upon those allegations it appears that the defendant knew that the money came from Ashwell's estate, and gave these charges to Messrs. Parker in their character of solicitors to the executors of Ashwell. If those allegations are made out, I cannot see that it will be any advantage to anyone to have Parker before the court. If they are not made out, a question may arise whether Parker had any interest in these moneys. But if any such question should arise the court will be able to deal with it and can make Parker a party at any time if it should be necessary. I do not think it necessary to complicate the action at this stage by adding him as a defendant. I am not aware that the court has any power to add him as a plaintiff. There is no evidence before me that anyone knows where he is, or that the court would be able to make any order for substituted service, and I therefore decline to make any order upon the summons.

Solicitors for the plaintiff, *Fairfoot, Webb, and Rooke*.

Solicitors for the defendant, *Prior, Bigg, Church, and Adams*.

#### QUEEN'S BENCH DIVISION.

Thursday, Jan. 15.

(Before GROVE and LOPES, JJ.)

SAUNDERS v. PAWLEY. (a)

*Practice*—Notice of trial—Power to abridge the time—Rules of Supreme Court 1883—Order XXXVI., r. 12—Order LXIV., r. 7.

Order XXXVI., r. 12, provides that if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may before notice of trial given by the plaintiff give notice of trial. And Order LXIV., r. 7, provides that the court or a judge shall have power to enlarge or abridge the time

appointed by these rules for doing any act or taking any proceeding.

Held, that the period of six weeks mentioned in Order XXXVI., r. 12, is not a "time appointed for doing any act or taking any proceeding" within the meaning of Order LXIV., r. 7, and that therefore the court has no power to abridge that time, so as to enable the defendant to give notice of trial before the expiration of the six weeks.

This was an appeal from the decision of the judge at chambers, affirming the decision of the master, refusing an application by the defendant for an order that, if the plaintiff did not give notice of trial for the next ensuing Surrey Assizes, the defendant should be at liberty to give short notice of trial for the said assizes.

The plaintiff's claim was for damages for false and fraudulent representations as to the drains in a certain dwelling-house belonging to the defendant, whereby he was induced to take a lease thereof.

The pleadings in the action closed on the 14th Dec. 1884, the venue being laid in Surrey, and the Surrey Assizes were fixed to commence on the 20th Jan. 1885. The plaintiff had not given notice of trial.

The defendant was anxious to have the case tried at those assizes, and consequently took out a summons in the above form to be allowed to give short notice of trial before the expiration of the six weeks mentioned in Order XXXVI., r. 12. The affidavits filed by the defendant showed that the case ought to be tried in Surrey, as the jury could view the premises, and that the defendant would suffer serious injury if the case were not tried at those assizes, inasmuch as the plaintiff had left the house, and the defendant could not safely repair the drains until the case was tried, and so could not allow the house to be occupied.

Order XXXVI., r. 12:

If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the court or judge to dismiss the action for want of prosecution; and on the hearing of such application the court or a judge may order the action to be dismissed accordingly, or may make such other order and on such terms as to the court or a judge may seem just.

Order LXIV., r. 7:

The court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

*E. Clarke, Q.C.* and *Morton Smith* for the defendant.—Unless this application is granted, the case will be postponed till the Surrey Summer Assizes. The affidavits show that such delay will inflict very serious injury on the plaintiff. The court has power, under Order LXIV., r. 7, to abridge the time allowed to the plaintiff for giving notice of trial.

*McCall* for the plaintiff.—The court will not abridge the time allowed by the rules to a party

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.



Q.B. Div.]

THE REGALIA.

[ADM.]

for doing any act or taking any proceeding, unless that party is applying for some indulgence to himself; or he must have raised some equity against himself, as, for instance, by having been guilty of delay:

*Eaton v. Storer*, 48 L. T. Rep. N. S. 204; 22 Ch. Div. 91;

*Curtis v. Sheffield*, 46 L. T. Rep. N. S. at p. 179; 21 Ch. Div. at p. 5;

*Pilcher v. Hinder*, 40 L. T. Rep. N. S. 832; 11 Ch. Div. 905.

The plaintiff here has been guilty of no delay whatever, and the only ground the defendant assigns for this application is that it would be convenient for him to have it granted. Secondly, Order LXIV., r. 7, only gives power to abridge the time "appointed by the rules for doing any act or taking any proceeding." It applies to cases such as pleading, interrogatories, &c., where a certain act must be done within a certain time. Order XXXVI., r. 12, does not "appoint" any time within which the plaintiff is to give notice of trial; he may give such notice at any time. The rule only says that if he does not do so within six weeks the defendant may give notice of trial. This rule gives the defendant a certain right upon the happening of a certain event, namely, the lapse of six weeks after the close of the pleadings; but here he asks the court to accelerate that right. The rules give no such power. Order XXXVI., r. 12, expressly gives the court power to enlarge the time, but says nothing about any power to abridge it. Order LXIV., r. 9, gives the Admiralty Court power to abridge the time for giving notice of trial, but if the defendant's contention is correct this express power is superfluous, as the time can be abridged by rule 7 of this order. He also cited Rules of Court Oct. 1884, rule 4 (Order XXXVI., rule 22 b.)

*Clarke in reply*.—The period of six weeks allowed by Order XXXVI., r. 12, is a "time appointed" within the meaning of Order LXIV., r. 7. The sentence is only put in the negative, but the time is none the less appointed. The court can say that the defendant may give notice of trial at the end of six weeks or at the end of any other shorter time that it may fix. The cases cited have really no bearing on the matter.

GROVE, J.—In this case I was up to a certain point against the plaintiff's contention, but on the whole I do not think that the defendant's application can succeed. The cases cited by Mr. McCall do not seem to me to touch the point. The court, no doubt, have been strict in enforcing compliance with the rules; but it has never been laid down that if it had the power it would not enlarge or abridge the time where the refusal to do so would entail irreparable injury. In the cases cited no irremediable harm was done, and in *Eaton v. Storer* the time was enlarged upon payment of costs, which was considered a sufficient penalty. Here it was strongly urged that very serious injury would be inflicted on the defendant if the court did not abridge the time under Order LXIV., r. 7. But the last argument used by Mr. McCall I cannot get over. I say it very reluctantly, as it is an immense hardship on Mr. Clarke's client; nevertheless I have come to the conclusion that this is not "time appointed" by that rule

for taking a proceeding or doing an act in anything like the same sense in which those words are applied to other rules. The defendant has no power *prima facie* to give notice of trial; he can only do so upon a certain condition. Now what we are asked to do is to give him that power without the condition annexed to it by rule 12 of Order XXXVI. The sole power the defendant has of giving notice of trial is conditional upon the expiration of six weeks from the close of the pleadings. How can we by abridging that time give him a power which the rules do not give him? Very reluctantly I have come to the conclusion that the words of Order LXIV., r. 7, do not give us that power. We should, if we granted this application, sanction this, that the defendant should be allowed to give notice of trial just as if the six weeks had elapsed, though in reality the six weeks had not elapsed. This is the sole argument that has affected my mind, but I do not entertain it without great doubt. The appeal must, therefore, be dismissed.

LOPES, J.—I am very sorry that I am unable to decide in favour of the defendant, because it is clear to me that all the merits are on his side. It is important to consider what we are asked to do. We are asked to act under Order XXXVI., r. 12, and Order LXIV., r. 7. It is admitted that the six weeks have not expired. No time is specified in Order XXXVI. within which the plaintiff is to give notice of trial. It is left entirely open, but if he does not give notice of trial within six weeks certain consequences follow. Now, we are asked to allow the defendant to give notice of trial as if the six weeks had elapsed, and we are asked to do this under Order LXIV., r. 7. I am of opinion that the case does not come within that rule. By the rules certain steps in an action are to be taken within a certain number of days, as in the case of pleadings, interrogatories, &c., and it is to those cases that Order LXIV., r. 7, applies, and that is what is meant by the words "time appointed" in that rule. If we granted this application we should be accelerating the vesting of a privilege which by the rules the defendant is only to have upon a default on the part of the plaintiff. No default has taken place here, and so the application must be refused.

*Appeal dismissed.*

Solicitor for the plaintiff, G. R. Dodd.

Solicitor for the defendant, P. K. Langdale.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

### ADMIRALTY BUSINESS.

Tuesday, Nov. 25, 1884.

(Before BUTT, J.)

THE REGALIA. (a)

*Action of restraint—Pari owners—Bond for safe return—Practice.*

*Where minority owners have instituted an action of restraint claiming security for the safe return of the ship to a named port within the jurisdiction,*

(a) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

ADM.]

THE ROBINSONS and THE SATELLITE.

[ADM.]

and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted it will be dismissed with costs.

This was a motion by the defendants in an action of restraint "to dismiss the action and to condemn the plaintiffs in all costs and damages through the arrest of the steamship *Regalia* and also in the costs of this application."

The plaintiff, John Robson, was the owner of two sixty-fourth shares in the steamship *Regalia*. In Oct. 1884 the managing owners, the registered owners of sixty-two sixty-fourth shares, having chartered the *Regalia* were about to send her on a voyage from the Tyne to Aarhus. On Oct. 13 the plaintiff commenced an action (1884, R. No. 2002, Fo. 365) in the Admiralty Division of the High Court, against the owners of the *Regalia*, and indorsed his writ as follows:

The plaintiff as owner of two sixty-fourth shares in the vessel *Regalia*, of the port of Newcastle-upon-Tyne, claims the sum of 500*l.* in respect of his said shares for the safe return of the vessel to the port of Newcastle.

The plaintiff caused the *Regalia*, then lying in the Tyne, to be arrested. In order to obtain her release the defendants' solicitors, on Oct. 14, undertook to put in bail, and in pursuance of such undertaking a bail bond was executed by two sureties for the sum of 500*l.*, the bond being conditioned that if the defendants should not pay what was "adjudged against them in the said action with costs, execution may issue forth against us (the sureties), our heirs, executors, and administrators, on goods and chattels for a sum not exceeding 500*l.*" No further proceedings were taken in such action.

The *Regalia* having been released proceeded on her intended voyage, and on Nov. 11 arrived at the port of West Hartlepool, from whence her managing owners proposed despatching her on another foreign voyage. On Nov. 14 the plaintiff commenced the present action of restraint (1884, R. No. 2241, Fo. 427) in the Admiralty Division against the owners of the *Regalia*, in which action the indorsement on the writ was exactly similar to the indorsement in the first action. On Nov. 14 the plaintiff caused the *Regalia* to be arrested in the second action. In order to obtain her release the defendants' solicitors undertook to put in bail to the action and in pursuance of such undertaking a bail bond was executed by two sureties for the sum of 500*l.*

The defendants now moved the court to dismiss the present action.

*J. P. Aspinall*, for the defendants, in support of the motion.—The second action is unnecessary. The bond given in the first action holds good until the vessel returns to the port named, i.e. to Newcastle.

*Bucknill*, for the plaintiff, *contra*.—In the case of *The Margaret* (2 Hagg. 275) it was decided that, while the vessel was within the jurisdiction, the minority owners were premature in instituting a second action. It is, however, to be noticed that in that case Sir Christopher Robinson says as follows: "In the case before me the vessel is safe for the present; if she should prepare to go to sea the part owners may resort to the same remedy

as before." [BUTT, J.—But if the vessel is lost prior to her return, the sureties are liable for 500*l.* under the first bond.] The present circumstances are those referred to in *The Margaret* (*ubi sup.*) and entitle the plaintiff to commence a second action.

BUTT, J.—I am of opinion that this second action is unnecessary and should be dismissed with costs, including the costs of this application.

Solicitors for the plaintiff, *Stokes, Saunders, and Stokes*.

Solicitors for the defendants, *Thomas Cooper and Co.*

Tuesday, Dec. 2, 1884.

(Before BUTT, J.)

THE ROBINSONS and THE SATELLITE. (a)

*Co-ownership action—Sale of ship—Register—Guernsey—Admiralty Court Act 1861 (24 Vict. c. 10), s. 8.*

*The Admiralty Division has no jurisdiction over an action in rem, instituted under sect. 8 of the Admiralty Court Act 1861, claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales.*

THIS was a motion by the defendant in an action *in rem*, instituted under sect. 8 of the Admiralty Court Act 1861, for the release of the vessels the *Robinsons* and the *Satellite*, and for an order dismissing the action with costs against the plaintiff.

The action was instituted on the 13th Nov. 1884, and the indorsement on the writ was as follows:

The plaintiff, as owner of thirty-two sixty-fourth shares of the brig *Robinsons*, and thirty-two sixty-fourth shares of the brig *Satellite*, claims to have a sale of the said vessels, and that the accounts outstanding and relating to the earnings and management of the said vessels be referred to the registrar.

The following affidavit was filed on the 27th Nov. 1884 on behalf of the defendant:

I, George Allix, of Caesars House, Bridge-road, Southampton, in the county of Hants, shipowner and master mariner, make oath and say:

1. I am the above-named defendant, and owner of thirty-two sixty-fourths of the brig *Robinsons*, and thirty-two sixty-fourths of the brig *Satellite*.

2. This action is brought by the above-named plaintiff, the owner of the other thirty-two sixty-fourths of the said vessels, against me, the said defendant, for leave to sell the said vessels *Robinsons* and *Satellite*.

3. The said brigs or vessels *Robinsons* and *Satellite* are registered at and belong to the port of Guernsey, and not in any port of England or Wales.

4. An action was commenced by me in the Royal Courts of Jersey previous to the issuing of the writ in this action, against the plaintiff, for the purpose of having the accounts taken and adjusted between us in respect of the earnings of the said two vessels. Such action is now pending, and will shortly be heard.

In reply to this affidavit an affidavit was filed on behalf of the plaintiff, which alleged that the plaintiff was resident in Southampton, but did not traverse the allegation that the brigs were registered at the port of Guernsey, and not in any port of England or Wales.

SECT. 8 of the Admiralty Court Act 1861 is as follows:

The High Court of Admiralty shall have jurisdiction

(a) Reported by J. P. ASPINALL and BUTLER ASPINALL Esqrs., Barristers-at-Law.

ADM.]

THE MARION—THE EARL OF DUMFRIES.

[ADM.]

to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.

*J. P. Aspinall* in support of the motion.—The court has no jurisdiction to entertain this action. Sect. 8 of the Admiralty Court Act 1861 only gives jurisdiction in the case of ships registered at any port in England or Wales. The *Robinsons* and the *Satellite* are registered at Guernsey, and not in any port in England or Wales. The action should therefore be dismissed with costs.

*Bucknill*, for the plaintiffs, *contra*.—The parties live within the jurisdiction, and the contract was made in this country.

*Burr, J.*—It seems that there is no part of this action which comes outside sect. 8 of the Admiralty Court Act 1861. If so, the court has no jurisdiction. I shall accordingly make the order in the terms of the motion.

Solicitors for the plaintiff, *Lowless and Co.*

Solicitors for the defendant, *Clarkson, Greenwell, and Wyles*.

Tuesday, Dec. 2, 1884.

(Before *Burr, J.*)

THE MARION. (a)

*Co-ownership—Sale of ship—Admiralty Court Act 1861 (24 Vict. c. 10), s. 8.*

*The High Court of Justice (Admiralty Division) will not, in a co-ownership action, order the sale of a ship on the application of either minority or majority owners, unless the applicants prove strong necessity for so doing.*

THESE were applications by way of motion and cross-motion for the sale of the steamship *Marion*, under sect. 8 of 24 Vict. c. 10.

The plaintiff *W. C. Lang*, the owner of twenty-two sixty-fourth shares, had instituted an action of restraint against the majority owners *C. B. Forwood* and one *Nash*. *Forwood* was the managing owner, and owned thirty-eight sixty-fourth shares. *Nash* owned the remaining four sixty-fourth shares.

By order of the Liverpool District Registrar, the value of the shares in the *Marion* had been appraised.

From affidavits filed on both sides it appeared that the parties were unable to agree as to the employment or management of the vessel, that there was no probability of their coming to terms, and that the only means of putting an end to the difficulty was the sale of the ship.

*Bucknill*, for *W. C. Lang*, the plaintiff, in support of the motion.—It being impossible that the ship can be managed between her present owners, the court is asked to order a sale of the ship. [*Burr, J.*—A part owner must make out an extremely strong case before he will induce the court to order the sale of the whole ship.] Sir Robert *Phillimore* did so on the application of minority owners in the case of *The Nelly Schneider* (4 Asp. Mar. Law Cas. 54; 3 P. Div. 152; 39 L. T. Rep. N. S. 360). Sir Robert

*Phillimore's* reason for so doing is, that it would be greatly to the interests of the parties that their connection should be severed. [*Burr, J.*—It is a strong thing for the court to say that it is for a man's interest to sell his ship when he himself says it is not.] The ship has been appraised by the marshal, and my clients are ready to buy Mr. *Forwood's* shares at the marshal's valuation. We are willing that your Lordship should so order.

*Myburgh, Q.C.*, for the majority owners, in support of the cross-motion.—We as majority owners ask for a sale of the ship. We will undertake to buy Mr. *Lang's* shares at the marshal's valuation.

*Burr, J.*—I think a very strong case should be made out before the court will order the sale of a ship on the application of part owners. It is asking the court to sell the ship whether the co-owners like it or not. If a man is unable to agree with his co-owners, his remedy is to sell his own particular shares. I will therefore not order a sale of the ship except by consent. I will not do it for either party without consent. I shall therefore dismiss both motions.

Solicitors for the plaintiff, *W. W. Wynne and Son*.

Solicitors for the defendants, *Pritchard and Sons*.

Thursday, Jan. 15.

(Before *Burr, J.*)

THE EARL OF DUMFRIES. (a)

*Collision—Practice—Evidence—Engineer's log—Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 285.*

*In a damage action the log kept by the engineer is admissible as evidence against his owners.*

THIS was a damage action *in rem*, arising out of a collision between the steamships the *Boskenna Bay* and the *Earl of Dumfries*.

During the defendants' case, counsel for the plaintiffs while cross-examining the second engineer of the defendants' ship, proposed to put in evidence the log kept by the first engineer of the defendants' ship for the purpose of contradicting the evidence of the witness. Counsel for the defendants objected to the admission of such evidence.

*Dr. Phillimore* (with him *Bucknill*), for the plaintiffs, in support of the admission of the evidence.—The declarations of an agent are admissible evidence against his principal:

*The Acton*, 1 Spinks Ec. & Ad. 176.

The engineer is the agent of the defendants for the purpose of making entries in his log. A protest is admissible evidence. [*Burr, J.*—I am not so sure of that, although I know that by the practice of this court it is very often put in.] The log kept by the mate of the defendants' ship is admissible evidence against them. By parity of reasoning the engineer's log is also admissible.

*Hall, Q.C.* (with him *Kennedy*), for the defendants, *contra*.—The engineer's log is very different to the official log, which was specifically directed to be received in evidence by sect. 285 of the Merchant Shipping Act 1854. There is no legal duty upon the engineer to keep a log, and

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the entries should not be admitted as evidence against his owners.

BUTT, J.—This is a point upon which I have considerable doubt. It is clear that this engineer's log is not evidence in favour of the owners of the vessel. It, however, is not clear whether by the law of England it is admissible as evidence against them. Yet, as I have so strong an opinion in favour of admitting this and similar documents, I shall, in the absence of any authority against it, allow this log to be put in evidence. Upon the same principle by which the mate's log is admissible I think it may be said that the engineer's log is also admissible. Therefore, though not without doubt, I think this log may be put in.

*The log was accordingly put in and read by plaintiff's counsel.*

Solicitors for the plaintiffs, T. Cooper and Co.  
Solicitors for the defendants, Stokes, Saunders, and Stokes.

Tuesday, Dec. 9, 1884.

(Before BUTT, J.)

THE CITY OF LUCKNOW. (a)

*Practice—Collision—Counsel's fee—Witnesses—Registrar.*

*In an action for damage by collision, where the damage to one vessel amounted to 20,000*l.*, and to the other vessel to 2000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively, seventy-five guineas, fifty guineas, and thirty guineas, and the registrar, on taxation, reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas; the Court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. Semble, the cost of detaining witnesses on shore may be allowed, although such witnesses are not called. This is a matter in the discretion of the registrar.*

This was a motion by the plaintiffs, in a damage action, arising out of a collision between the steamships *Simla* and *City of Lucknow*, "to review the assistant registrar's taxation of the plaintiffs' costs, so far as relates to the reduction of the fees paid to counsel on the hearing of the action and the disallowance of the amounts paid in respect of the detention of the witnesses Egsberg, Coyle, and Scott."

The items in dispute were:

Fee to Mr. B. E. Webster, Q.C. and clerk with brief and papers	£ s. d.
Fee to Dr. Phillimore and clerk with brief and papers	82 10 0
Fee to Mr. A. E. Nelson and clerk with brief and papers	55 0 0
Three seamen, Egsberg, Coyle, and Scott, A.Bs. on board <i>Simla</i> , for detention on shore	32 10 0
	35 0 0

These items were at first allowed by the registrar, whereupon the defendants filed the following objections:

As to item 1 (viz., fee to plaintiffs' leading counsel) it is submitted that the employment of a third counsel was unnecessary, having regard to the nature of the action, and that in any case the fee ought not to be allowed as against the defendants, inasmuch as the

learned counsel did not appear in court in support of the plaintiffs' case or take any part at the trial of the action.

If, notwithstanding the above objection the court should consider the learned counsel to be entitled to a fee, then it is submitted that the amount allowed is excessive, except as including a special fee, it being the invariable practice of the learned counsel to charge a special fee of fifty guineas for undertaking a case in the Admiralty Division of the High Court of Justice, and which special fee it is not the practice to allow on taxation of party and party costs.

As regards items 2 and 3 (viz., fees to plaintiffs' second and third counsel), in case of any fee being allowed to the leading counsel under the above circumstances it is submitted that the fee of 55*l.* allowed to second counsel and clerk with brief and papers and of 32*l.* 10*s.* allowed to third counsel and clerk with brief and paper should be reduced to the usual amount of two-thirds of the fee of the immediately senior counsel. It should be remembered that the trial did not last six hours.

As to items 4 to 12 (viz., allowances for nine witnesses), it is submitted that the allowance of so large a number of witnesses for attending the trial, eighteen in all, out of whom nine only were called to give evidence, is out of all proportion to the questions of fact at issue in the action, and that all or some of the expenses of witnesses named in the above items (none of whom gave evidence on the trial) should be disallowed.

Thereupon the registrar reviewed his taxation and reduced the items as shown in his notes:

Notes of objection to taxation:

1. This was in my opinion a proper case for three counsel. The amount at stake was unusually large. The plaintiffs' ship *Simla*, of 2172 tons, laden with a general cargo, having been totally lost, the plaintiffs claimed 20,000*l.*, the defendants 2000*l.* The papers also were very lengthy, the plaintiffs' brief and proofs extending to 340 folios, and the other documents laid before counsel to more than 300 folios more. That one of the three counsel for the plaintiffs did not appear at the trial seems rather to justify the employment of a third counsel in a case where so much was at stake. The defendants also had three counsel.

2. On the other hand I think that I ought to make some reduction in the amount of the plaintiffs' counsel's fees, which were: to the leading counsel seventy-five guineas; to the second counsel fifty guineas; to the third counsel thirty guineas. I am informed that the defendants' counsel's fees were: to the leading counsel (the Solicitor-General in addition to a special fee of fifty guineas which it was admitted could not have been recovered as between party and party on taxation) fifty guineas; to the second counsel forty guineas; to the third counsel twenty-seven guineas.

I cannot say that these items were inadequate for a case which though, the amount at issue was very large, did not involve any questions of peculiar difficulty, and for which, although the trial lasted barely more than one day, refreshers were paid on each side and have been allowed on taxation to the plaintiffs at the usual amounts. I have, therefore, on reconsideration, reduced the fees as follows: To the plaintiffs' leading counsel (who seems to have had no special fee) from seventy-five to sixty guineas; to the second counsel from fifty to forty guineas; to the third counsel from thirty to twenty-seven guineas, with refreshers of ten and five guineas respectively to the second and third counsel, who alone appeared on the second day of the trial.

3. Of the eighteen witnesses previously allowed I have, on revision, disallowed three. In explanation of the allowance of so many as fifteen witnesses, of whom fourteen belonged to the *Simla*, I should observe that the ship's crew numbered fifty, that the collision took place about 7.45 p.m., and that the fourteen witnesses allowed were selected from a much larger number of persons on board the *Simla* who had witnessed the collision, also that no less than five distinct charges of negligence were made by the defendants against those in charge of the *Simla*, viz., of want of look-out, of improper navigation, of not exhibiting a proper side light, of having improperly burnt a blue light, and of having improperly deserted their ship after the collision, and that different witnesses were detained in order to speak to different points.

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Thereupon the plaintiffs on appeal filed the following objections to the registrar's taxation:

It is submitted that the fees paid to counsel herein having regard to the large sum involved, the voluminous documents and the number of witnesses engaged in the action and the several charges made against the plaintiffs by the defendants in their counter-claim, were fair and proper and ought to be allowed.

The three witnesses were on deck from the time the *City of Lucknow* was first seen until the collision, and they were material and necessary witnesses for the plaintiffs, and by counsel's advice on evidence were certified as such and were delivered accordingly.

Dr. *Phillimore*, for the plaintiffs, in support of the motion.—The findings of the assistant registrar speak to the importance of the case. Acting on counsel's advice the plaintiffs had eighteen witnesses in attendance. Only nine of these were called, in consequence of an intimation from your Lordship that more were unnecessary. It seems to be the practice in the registry only to allow such witnesses as are actually called. [BUTT, J.—My interposing does not show that it was improper on the part of the plaintiffs to have eighteen witnesses. I interpose when the evidence sufficiently satisfies me as to the points in dispute. Though nine witnesses may have proved sufficient,

the plaintiffs could not tell so until the hearing.] The registrar has allowed three counsel, but reduced their fees. [BUTT, J.—For what reason? I can only say that my experience of common law cases was that in a case of this magnitude counsel got very much larger fees.]

*Bucknill*, for the defendants, *contra*, read the registrar's reasons and submitted that they were right.

BUTT, J.—If any mercantile firm of high standing had been called in to deal with an amount in which 20,000*l.* is claimed, their commission would have amounted to more than the three counsel's fees put together. I think these fees were reasonable and should be allowed. With regard to the witnesses, I am not so clear. There must be a discretion vested in the registrar, and unless there is some strong reason to suppose that he has acted wrongly, I do not think that I ought to interfere. I therefore do not propose to interfere with the discretion of the registrar on this point. The costs of this application are to be costs in the cause.

Solicitors for the plaintiffs, *Lowless and Co.*

Solicitors for the defendants, *Gellatly, Son, and Warton.*

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